NORTH CAROLINA COURT OF APPEALS REPORTS

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1. Elected and sworn in 9 February 2001 (correcting fn. 5, p. v, Volume 142).
2. Appointed and sworn in 10 January 2001 (correcting fn. 4, p. v, Volume 142).

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. KEITH BUTLER

No. COA00-999

(Filed 6 November 2001)

1. Search and Seizure— cocaine—suspicious behavior in bus terminal

There was no plain error in a prosecution for possessing and trafficking in cocaine in the court's failure to suppress the cocaine on its own motion where there was sufficient evidence from which a trained narcotics officer could form a reasonable, articulable suspicion that defendant may have been involved in criminal activity on the basis of identifiable behaviors that are usually associated with drug couriers as opposed to law abiding citizens. Officers were observing passengers arriving at a bus terminal from New York City, a source city; defendant, carrying a single bag, paused, stopped, and turned around to look directly at the officers on more than one occasion; defendant walked very briskly through the terminal, continually looking over his shoulder at the officers, although no one was in the terminal to meet him; defendant appeared very nervous; and an officer observed defendant hurriedly instructing a cab driver to "go, go, go," even though defendant observed the officers following him.

2. Indictment and Information— fatal variance with verdict—amount of cocaine

There was no fatal variance between the indictment and the verdict where the indictments were for cocaine trafficking by

transporting 28 to 300 grams and cocaine trafficking by possessing 28 to 300 grams, while the verdicts did not specify the amounts. Defendant had stipulated at trial that the amount was 83.1 grams and the trial court had instructed the jury that the amount was 83.1 grams.

3. Drugs— constructive possession—taxi

The trial court did not err by refusing to dismiss cocaine trafficking charges for insufficient evidence where an officer testified at length regarding defendant's suspicious behavior as he departed a bus from New York City, a "source city" for cocaine; defendant was nervous and excited as he entered a cab and attempted to leave as officers approached; defendant exited the cab in a suspicious manner, "struggling" behind the driver's seat with his arms and hands not visible to officers; defendant was the first fare of the day and the driver had cleaned the cab right before defendant entered it; there was a passenger between defendant's exit from the cab and the search, but that passenger sat on the other side of the back seat and made no movement toward or behind the driver's seat; and only about ten minutes passed between defendant exiting the cab and the discovery of the drugs.

4. Sentencing— statement by court—explanation of consecutive sentence

The trial court did not abuse its discretion when sentencing defendant for trafficking in cocaine by possession and transportation by stating its reason for not consolidating the sentences. Nothing in N.C.G.S. § 15A-1334(b), which concerns statements at sentencing, precludes a trial court from explaining to a defendant why a consecutive or concurrent sentence would be imposed. Moreover, consecutive sentences are well within the court's discretion.

Judge TYSON dissenting.

Appeal by defendant from judgments entered 29 October 1998 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 15 August 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Claud R. Whitener, III, for the State.

John T. Hall for defendant-appellant.

HUNTER, Judge.

Keith Butler ("defendant") appeals from convictions of trafficking cocaine by transportation and trafficking cocaine by possession in violation of N.C. Gen. Stat. § 90-95 (1999). We find no error.

The evidence presented at trial tended to establish that on 20 January 1998, Raleigh police officers assigned to the Drug Interdiction Unit of the Drug Task Force, as well as officers of the State Bureau of Investigation, were monitoring the city's bus terminals. Officer D.C. Murphy of the Interdiction Unit testified that the officers were watching for buses arriving from or traveling to "source cities" where drugs are prevalent. Officer Murphy testified that the officers generally observe disembarking passengers, including whether the passengers have little or no luggage; their demeanor and how they react upon seeing the officers; whether they appear nervous; and whether they look around or behind themselves often even though no one is at the terminal to meet them.

At approximately 9:30 a.m., the officers were observing a bus arriving from New York City and traveling to Miami, both of which are considered "source cities." Officer Murphy testified that he saw defendant exit the bus carrying a single bag and walk towards the first set of double doors in the terminal. As defendant reached the doors, he "stopped, turned around, paused for a minute and then walked in quickly." Officer Murphy testified that defendant looked directly at the officers, making eye contact right before he walked through the terminal. As defendant walked through the terminal, the officers observed him "turn[ing] around several times looking behind him" and making eye contact with the officers. Defendant was walking "very briskly," and as he approached the doors to exit the terminal, he "paused and looked back again," making eye contact with the officers.

Defendant then left the terminal and got into a taxicab parked approximately two feet from the terminal doors, just as the officers were exiting the terminal behind him. The cab was being driven by Christopher Thomas ("Thomas"). Defendant sat directly behind Thomas' driver's seat. Thomas' window was down, and Officer Murphy told Thomas to "hold on just a second." As he approached the cab, Officer Murphy observed defendant "making motions with his hands to go on" and telling Thomas to "go, go, go several times." Thomas testified that defendant slammed the cab door when he

entered the cab and continued to say "let's go, let's go, let's go" in a "frightened" voice.

The officers approached the cab and identified themselves as police officers. Officer Murphy stated that defendant was "very nervous, fidgety." The officers asked defendant if they could speak with him for a few minutes, and defendant agreed. As defendant began to exit the vehicle, Officer Murphy noticed that he was "very slow getting out and bent over to where you could see just barely the top of his head and part of his shoulder," but not his hands. Thomas testified that he felt defendant "struggling" behind his seat right before defendant opened the cab door. Thomas stated that he did not "know what [defendant] was doing," but he could feel defendant "pushing the back of [his] seat" and "could feel the force on the back of [the] seat." Defendant then exited the cab and immediately walked away from the cab, going towards the front doors of the terminal. The officers had to follow defendant away from the cab in order to speak with him.

The officers asked defendant some questions, during which time he appeared "very nervous" and "his hands were shaking." Defendant consented to a search of his person and the bag he was carrying. The search did not uncover any illegal substances, and the officers allowed defendant to leave the terminal.

In the meantime, another man entered Thomas' cab, looking for a ride a few blocks away. Thomas knew the man, and had given him several cab rides previously. Thomas testified that the passenger was seated behind the front passenger seat, the opposite side from which defendant sat. Thomas testified that the passenger stayed behind the front passenger seat, and at no time did the passenger move over to where defendant had sat, or make any leaning motions behind Thomas' seat or to the floor of the cab. After dropping off the passenger, Thomas immediately returned to the bus terminal, approximately ten minutes after he left. The officers approached Thomas' cab and asked if they could search the vehicle. Thomas consented to a search which lead to the discovery of cocaine in a package underneath the driver's side seat, in front of where defendant had been seated.

Thomas testified that defendant was the first person in his cab that morning, and that he cleaned the cab right before picking up defendant. Thomas testified that he did not observe anything under his driver's seat other than the usual cigarette butts and lint. Officer

Murphy testified that the cab was "extremely clean" and that he observed "vacuum marks" indicating that the cab had been vacuumed recently. Defendant was apprehended near the bus terminal.

Defendant was tried at the 26 October 1998 Criminal Session of Wake County Superior Court on charges of trafficking cocaine by transportation and trafficking cocaine by possession in violation of N.C. Gen. Stat. § 90-95. On 29 October 1998, defendant was found guilty on both counts and was sentenced to two consecutive terms of thirty-five to forty-two months' imprisonment. Defendant appeals.

Defendant makes four arguments on appeal: (1) the trial court committed plain error in failing to suppress the cocaine evidence recovered from the taxicab; (2) the trial court erred in denying defendant's motion to set aside the verdicts based on a variance between the indictments and the verdicts; (3) the trial court erred in denying defendant's motion to dismiss the charges for insufficient evidence; and (4) the trial court erred in sentencing defendant "in a manner not authorized by law." After careful review, we hold that defendant received a fair trial.

A. Motion to Suppress

[1] Defendant first argues that the trial court committed plain error in failing to suppress, on its own motion, the cocaine evidence recovered from the taxicab. Specifically, defendant argues that the evidence should have been suppressed because the officers did not have probable cause to detain defendant both inside and outside the cab.

Defendant failed to move to suppress the evidence at trial, or otherwise object; therefore, the issue is under plain error review. *See State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000). Our standard of review under plain error is whether

> "it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial.' " "

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)).

We first note that the officers' questioning and subsequent search of defendant were pursuant to defendant's consent, and the search of the taxicab was executed pursuant to Thomas' consent. Thus, the only question here is whether the officers violated defendant's constitutional rights when they initially approached defendant for questioning. We further note that this issue is determined based upon the evidence known to the officers leading up to and at the time that they approached defendant for questioning. The issue of whether there exists sufficient evidence from which a jury could conclude that defendant possessed the drugs is appropriately considered in connection with defendant's motion to dismiss, addressed in part C of this opinion.

The United States Supreme Court has not concluded that all contact between citizens and police in the course of an investigation is subject to the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1, 34, 20 L. Ed. 2d 889, 913 (1968) (White, J., concurring) ("[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets"). Indeed, the Court has repeatedly held that the Fourth Amendment does not inhibit voluntary interaction between police and citizens. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 488, 29 L. Ed. 2d 564, 595, *reh'g denied*, 404 U.S. 874, 30 L. Ed. 2d 120 (1971) ("it is no part of the policy underlying the Fourth . . . Amendment[] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals"). The Court stated in *Terry* that, "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred," thus invoking the Fourth Amendment. *Terry*, 392 U.S. at 19 n.16, 20 L. Ed. 2d at 905 n.16.

In this case, there is no evidence that defendant expressed to the officers that he did not wish to answer their questions. Even assuming, *arguendo*, that the officers detained or "seized" defendant by instructing Thomas to "hold on just a second," we find no violation of defendant's constitutional rights. "It has long been the law that '[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.' " *State v. McDaniels*, 103 N.C. App. 175, 181-82, 405 S.E.2d 358, 362 (1991) (quoting *Adams v. Williams*, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 617 (1972)) (holding as factors justifying investi-

gatory stop prolonged eye contact with officers, nervousness, and walking at a rapid pace), *affirmed*, 331 N.C. 112, 413 S.E.2d 799 (1992).

" 'While the court has recognized that in some circumstances a person may be detained briefly without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity.' " *State v. Hendrickson*, 124 N.C. App. 150, 154-55, 476 S.E.2d 389, 392 (1996) (quoting *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893-94 (1980)), *appeal dismissed and disc. review denied*, 346 N.C. 273, 485 S.E.2d 45 (1997). The reasonable and articulable suspicion standard " 'requires that the court examine both the articulable facts known to the officers at the time they determined to approach and investigate the activities of [defendant], and the rational inferences which the officers were entitled to draw from those facts.' " *Id.* at 155, 476 S.E.2d at 392 (quoting *State v. Casey*, 59 N.C. App. 99, 107, 296 S.E.2d 473, 478 (1982)).

"The circumstances leading to the 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. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779), *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). "A trained narcotics agent forms a reasonable, articulable suspicion that an individual is a drug courier on the basis of identifiable behaviors that are usually associated with drug couriers as opposed to law abiding citizens." *Id.*

Here, Officer Murphy, a seven-year veteran of the Drug Task Force, testified about his extensive experience and training in the apprehension of drug criminals. Officer Murphy testified that in this case, the officers were observing passengers coming from New York City, a "source city," for suspicious behavior. Officer Murphy testified in detail regarding the factors the officers are trained to observe, including a person's overall demeanor, how a person reacts to seeing the officers in the terminal, indications of nervousness, and whether a person repeatedly looks behind themselves or at the officers.

The evidence presented here is similar to that of *State v. Sugg*, 61 N.C. App. 106, 300 S.E.2d 248, *disc. review denied*, 308 N.C. 390, 302 S.E.2d 257 (1983). In *Sugg*, the police officer saw the defendant disembark from a commercial airline flight ". . . 'connect[ing] to Florida source cities' " considered points of entry for narcotics smuggling. *Id.*

at 110, 300 S.E.2d at 251. The officer observed the defendant exit the plane and " 'scan[]' " the area, making eye contact with the officer. *Id.* The officer noticed that the defendant carried only a briefcase and appeared to be nervous. *Id.* The defendant met with another man and then left the terminal hurriedly, "frequently glancing back at [the officer]" following him. *Id.*

This Court held that such evidence was sufficient to support a reasonable suspicion that the defendant was engaged in or connected to criminal activity, supporting the officer's initial approach and questioning of the defendant. *Id.* at 111, 300 S.E.2d at 251. We stated that given the defendant's "conduct and appearance, which by his experience and familiarity with the drug courier profile [the officer] had come to associate with the typical drug courier, further investigation was warranted." *Id.* at 110, 300 S.E.2d at 251.

Similarly, the evidence presented in this case established that defendant exhibited several of the suspicious behaviors which the officers were trained to observe. Defendant, carrying a single bag, paused, stopped, and turned around to look directly at the officers on more than one occasion; defendant walked very briskly through the terminal, continually looking over his shoulder at the officers, though no one was at the terminal to meet him; defendant appeared very nervous; and Officer Murphy observed defendant hurriedly instructing Thomas to drive the cab, even though defendant observed the officers following him. We must view the evidence along with all rational inferences which the officers were entitled to draw from these facts. *See Hendrickson*, 124 N.C. App. at 155, 476 S.E.2d at 392.

We hold that there was sufficient evidence from which Officer Murphy, a trained narcotics officer, could form a reasonable, articulable suspicion that defendant may have been involved in criminal activity "on the basis of identifiable behaviors that are usually associated with drug couriers as opposed to law abiding citizens." *Id.* In light of such evidence, the trial court's failure to suppress the cocaine recovered from the cab *ex mero motu* was not error, much less plain error. This assignment of error is overruled.

B. Motion to Set Aside the Verdicts

[2] Defendant next argues that the trial court erred in denying his motion to set aside the verdicts due to a "fatal variance" between the indictments and the verdicts. The record reveals that defendant's objection at trial was not on this ground; rather, it was a motion to set

aside the verdicts "for insufficiency of the facts." In any event, defendant's argument is without merit.

"[T]he State's proof must conform to the specific allegations contained in the indictment, or it is insufficient to convict defendant of the crime charged, thus warranting a motion to dismiss." *State v. Redd*, 144 N.C. App. 248, 256, 549 S.E.2d 875, 881 (2001). Defendant concedes that the indictments were valid. One indictment alleged defendant was guilty of trafficking by transporting 28 grams or more but less than 200 grams of cocaine; the other alleged defendant was guilty of trafficking by possessing 28 grams or more but less than 200 grams of cocaine. Defendant argues that he was prejudiced in that the verdict sheets simply indicated that he was guilty of trafficking cocaine by transportation, and guilty of trafficking cocaine by possession without specifying the amounts of cocaine listed in the indictments.

However, defendant stipulated at trial to the fact that the cocaine recovered from the taxicab was 83.1 grams of cocaine, an amount sufficient to convict defendant of both charges under N.C. Gen. Stat. § 90-95(h)(3) (the selling, manufacturing, delivery, transportation, or possession of twenty-eight grams or more of cocaine constitutes the felony of "trafficking"). The trial court instructed the jury that in order to find defendant guilty of both charges they must find that he knowingly possessed and transported the cocaine, and that the amount of the cocaine was 83.1 grams. Therefore, the jury's return of guilty verdicts on both charges establishes that the jury determined beyond a reasonable doubt that defendant possessed and transported 28 grams or more but less than 200 grams of cocaine, consistent with both indictments. The absence of the specific amount of cocaine listed on the verdict sheets was not error, much less plain error. The judgments entered thereon clearly establish that defendant was convicted of two violations of N.C. Gen. Stat. § 90-95, and therefore are also consistent with the indictments.

C. Motion to Dismiss

[3] Defendant assigns error to the trial court's denial of his motion to dismiss the charges due to insufficiency of the evidence. Specifically, defendant argues there was no evidence that defendant placed the drugs inside the taxicab.

On a motion to dismiss for insufficient evidence, " '[t]he question for the court is whether substantial evidence—direct, circumstantial,

or both—supports each element of the offense charged and defendant's perpetration of that offense.' " *State v. McCullers*, 341 N.C. 19, 29, 460 S.E.2d 163, 168 (1995) (quoting *State v. Abraham*, 338 N.C. 315, 328, 451 S.E.2d 131, 137 (1994)). "When 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 therefrom." *State v. Fleming*, 350 N.C. 109, 142, 512 S.E.2d 720, 742, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). Moreover, "if the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Clark*, 138 N.C. App. 392, 402-03, 531 S.E.2d 482, 489 (2000), *cert. denied*, 353 N.C. 730, 551 S.E.2d 108 (2001).

Here, Officer Murphy testified that as he approached the cab, defendant was motioning for Thomas to drive away. Thomas testified that defendant jumped in the cab quickly and said "let's go, let's go," and that defendant appeared frightened. Officer Murphy observed that defendant appeared very nervous and fidgety. Officer Murphy testified that defendant was "very slow getting out [of the cab] and bent over to where you could see just barely the top of his head and part of his shoulder," but not his hands. Thomas testified that when defendant moved to get out of the cab, Thomas felt defendant "struggling" behind his seat and "pushing the back of [his] seat." As soon as defendant exited the cab, he walked very quickly away from the cab to the front doors of the terminal, requiring the officers to follow him away from the cab.

Thomas further testified that his subsequent passenger sat on the opposite side of the cab from where defendant had been seated. At no time did the passenger move to the other side of the cab, lean over towards Thomas' seat, or make any other kind of movement towards the driver's seat or the floor of the cab. Thomas had cleaned his cab first thing that morning, and had not noticed anything unusual under the driver's seat. Defendant was Thomas' first passenger of the day.

Although the State lacks direct evidence of defendant's possession of the drugs, "[p]ossession of controlled substances may be either actual or constructive." *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996) (citing *State v. Davis*, 325 N.C. 693, 386 S.E.2d 187 (1989)). "Evidence of constructive possession is sufficient

to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the drugs." *Id.* (citing *State v. Peek*, 89 N.C. App. 123, 365 S.E.2d 320 (1988)). Where a defendant does not have exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred. *State v. Chavis*, 134 N.C. App. 546, 557, 518 S.E.2d 241, 249 (1999) (citing *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984)), *appeal dismissed and cert. denied*, 351 N.C. 362, 542 S.E.2d 220 (2000).

We emphasize that "constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily *the questions will be for the jury.*" *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991) (citations omitted) (emphasis added), *affirmed*, 331 N.C. 113, 413 S.E.2d 798 (1992).

In *State v. Matias*, 143 N.C. App. 445, 550 S.E.2d 1 (2001), this Court recently upheld the trial court's denial of the defendant's motion to dismiss for insufficient evidence that he possessed cocaine recovered from a vehicle in which he was a passenger. In that case, the arresting officers detected the odor of marijuana emanating from the vehicle as it passed the officers' patrol car. *Id.* at 446, 550 S.E.2d at 2. Upon stopping the vehicle, the officers observed four occupants, including the defendant who was seated in the right rear passenger seat. *Id.* One of the officers observed marijuana seeds scattered throughout the vehicle. *Id.* A plastic bag containing both marijuana and cocaine was recovered from a crack in the seat where defendant had been seated. *Id.* On this evidence, the defendant was convicted of possession of cocaine. *Id.*

This Court upheld the denial of the defendant's motion to dismiss, concluding that "[t]his evidence is sufficient to support an inference that defendant placed the plastic bag in the crack of the right rear passenger seat where it was found, and, therefore, had the power and intent to control its disposition or use." *Id.* at 449, 550 S.E.2d at 4. Although this Court's decision in *Matias* was split, the dissent focused on the fact that the defendant was one of four occupants in the vehicle, and the State had not presented evidence to show that the drugs were not placed in the seat by another occupant or by a previous passenger in the vehicle.

In contrast, the State presented evidence in this case that defendant was the first passenger in the cab that day, that the drugs were not

present in the cab before defendant entered it, that only approximately ten minutes passed between defendant's presence in the cab and the discovery of the drugs, and that the only other passenger to ride in the cab other than defendant never touched or made any type of motion in the direction of the driver's seat or the floor of the cab behind the driver's seat.

In *Carr*, the arresting officer observed a parked vehicle with three occupants who were conversing with a pedestrian whom the officer knew to be a prior drug offender. *Carr*, 122 N.C. App. at 371, 470 S.E.2d at 72. When the vehicle drove away, the officer followed it and ran a license plate check. *Id.* Upon discovering that the vehicle was posted for salvage, the officer pulled the vehicle over. *Id.* The officer watched all three occupants of the vehicle and observed that the defendant, who had been seated in the front passenger seat, was the only occupant to exit through the front passenger-side door. *Id.* Upon exiting the vehicle, the defendant provided the officer with a fictitious name. *Id.* Pill bottles containing cocaine were recovered from under the front passenger seat and between the front passenger seat and the center armrest. *Id.* Defendant was convicted of possession with intent to sell and deliver cocaine. *Id.*

This Court noted that the defendant's presence in a vehicle from which drugs were recovered was not alone sufficient to prove the defendant's possession of the drugs. *Id.* at 372, 470 S.E.2d at 73. We noted, however, that the additional incriminating circumstances were sufficient to establish the defendant's constructive possession of the drugs. *Id.* at 373, 470 S.E.2d at 73. The only additional incriminating pieces of evidence were that the drugs were found in the area of the car occupied solely by the defendant; the defendant had been seen speaking to a known drug user earlier in the evening; the defendant was the only passenger who left the vehicle by the passenger-side door; and the defendant attempted to give the arresting officer a fictitious name when questioned. *Id.* This court determined "that these facts provide sufficient incriminating circumstances to allow the reasonable inference that defendant had the intent and capability to exercise control and dominion over the drugs." *Id.*

Likewise, in the present case, there are sufficient additional incriminating circumstances which, taken in the light most favorable to the State, allow a reasonable inference of defendant's constructive possession of the drugs. Officer Murphy testified at length regarding defendant's suspicious behavior as he departed from the "source city" bus, behavior which fit the description of what the officers were

trained to observe. Thomas also testified to defendant's nervous and excited behavior, his slamming of the cab door and his rush to leave the terminal immediately. Both Officer Murphy and Thomas testified to the suspicious manner in which defendant exited the cab, including that defendant was "struggling" behind Thomas' seat, that defendant bent down so that his arms and hands were not visible to the officers, and that he immediately walked far away from the cab. The State also presented extensive testimony from Thomas that defendant was his first passenger of the day; that Thomas had cleaned the cab right before defendant entered it; that Thomas did not observe anything unusual on the cab floors; that the subsequent and only other passenger in the cab sat behind the front passenger seat and at no time made any movement whatsoever toward or behind Thomas' seat; and that only approximately ten minutes lapsed between defendant's exiting the cab and the discovery of the drugs.

Viewed in the light most favorable to the State, the evidence, albeit circumstantial, was sufficient to withstand a motion to dismiss and allow the issue to be submitted to the jury. *See Clark*, 138 N.C. App. at 403, 531 S.E.2d at 489 ("[a]lthough the State's case centered around circumstantial evidence, taken in the light most favorable to the State, it was sufficient to withstand the defendant's motions to dismiss"); *Jackson* (issues of constructive possession are properly determined by the jury).

We acknowledge that the facts of this case, particularly the approximate ten-minute time gap between defendant's presence in the cab and the discovery of the drugs, as well as the cab leaving the bus station and returning, make this decision difficult. The outcome of this appeal may have been different had the State not introduced Thomas' testimony that he had cleaned the cab before defendant entered it and did not see anything unusual, and that the only other passenger in the cab prior to the discovery of the drugs made no movement towards Thomas' driver's seat. Such testimony, however, when taken in the light most favorable to the State, provides a sufficient link between defendant and the drugs to allow for the jury's consideration.

D. Sentencing

[4] Defendant argues that the trial court erred in sentencing defendant "in a manner not authorized by law." Defendant seeks a new sentencing hearing on grounds that the trial court, before imposing consecutive as opposed to concurrent sentences, stated:

> It's a sad day for you being convicted of these very serious felonies. It is really not my practice to consolidate drug charges. There's a lot of reasons for it. The primary one is that drugs in the community impact a lot of people, not just individuals who take the drugs . . . . It impacts everybody around you because they're trying to get money to get the drugs. I know people who live in communities who older people who [sic] get their houses broken into because of drugs, get hit in the head and get hurt and that's why the legislature is so tough on it.

Defendant argues that the trial court's statement violates N.C. Gen. Stat. § 15A-1334(b), which provides:

> (b)Proceeding at Hearing.—The defendant at the hearing may make a statement in his own behalf. The defendant and prosecutor may present witnesses and arguments on facts relevant to the sentencing decision and may cross-examine the other party's witnesses. No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court. Formal rules of evidence do not apply at the hearing.

N.C. Gen. Stat. § 15A-1334(b) (1999). We do not agree. Nothing in this statute precludes a trial court from explaining to a defendant why the court will impose a consecutive or concurrent sentence. We see no error in the trial court's explaining to defendant the reasoning behind the court's general approach of not consolidating drug charges.

Moreover, we do not agree with defendant that the trial court's statement reveals that it based its decision to impose consecutive sentences upon "improper . . . considerations" that do not apply to defendant. The imposition of consecutive sentences was well within the trial court's discretion under the Structured Sentencing Act. *See State v. Parker*, 350 N.C. 411, 441, 516 S.E.2d 106, 126 (1999) (citing N.C. Gen. Stat. § 15A-1354(a) (1997)) ("[t]he trial court has discretion to determine whether to impose concurrent or consecutive sentences"), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). Defendant has failed to show an abuse of the trial court's discretion.

No error.

Judge WYNN concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

No substantial evidence exists to prove that defendant is guilty of trafficking cocaine by actual or constructive possession. The evidence, at best, raises only a suspicion or conjecture that defendant possessed or placed the cocaine in the taxi. The evidence tending to show defendant possessed illegal drugs is insufficient to withstand defendant's motion to dismiss. I would reverse the trial court's denial of defendant's motion.

I. Motion to Dismiss

Defendant argues that the evidence was insufficient as a matter of law to convict him because the State presented no evidence that defendant knew about, placed, or had possession of the cocaine later found in the taxicab. " 'An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use.' " *State v. Weems*, 31 N.C. App. 569, 570, 230 S.E.2d 193, 194 (1976) (quoting *State v. Harvey* 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)).

"This Court has held that the mere presence of the defendant in an automobile containing drugs does not, without additional incriminating circumstances, constitute sufficient proof of drug possession." *State v. Matias*, 143 N.C. 445, 448, 550 S.E.2d 1, 3 (2001) (citing *Weems*, 31 N.C. App. at 571, 230 S.E.2d at 194 (1976)).

"Where such materials are found on the premises *under the control of an accused*, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714 (emphasis supplied). Here, no inference that the defendant had knowledge and possession should arise. The taxi, where the cocaine was later found, was not under the control of defendant. Thomas, the taxi driver, maintained control of the vehicle where drugs were found, and consented to the search of his vehicle.

"Proving constructive possession where defendant had nonexclusive possession of the place in which the drugs were found requires a showing by the State of other incriminating circumstances which would permit an inference of constructive possession." *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996). Evidence that a defendant places drugs in the crack of a passenger seat of a car is

sufficient to find the power and intent to control its disposition or use. *Matias*, 143 N.C. App. at 449, 550 S.E.2d at 4. Because the State cannot prove actual possession, the State must show "other incriminating circumstances" which raise an inference that defendant placed the cocaine under the driver's seat.

" 'It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue.' " *State v. Brooks*, 136 N.C. App. 124, 129, 523 S.E.2d 704, 708 (1999), *disc. review denied*, 351 N.C. 475, 543 S.E.2d 496 (2000) (quoting *State v. Johnson*, 199 N.C. 429, 154 S.E. 730 (1930)). "If the evidence 'is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed . . . . This is true even though the suspicion so aroused by the evidence is strong.' " *State v. LeDuc*, 306 N.C. 62, 75, 291 S.E.2d 607, 615 (1982) (quoting *In re Vinson*, 298 N.C. 640, 656-57, 260 S.E.2d 591, 602 (1979)).

II. Issues

The dispositive issue in this case is: (1) what "other incriminating circumstances" are required by the State to prove to permit an accused's close proximity to drugs to raise a reasonable inference that defendant controlled, used, or possessed the drugs, when there is no evidence of actual possession, and (2) what is the impact of the taxi, wherein cocaine was later discovered, leaving the location for at least 10 minutes carrying an intervening passenger after defendant exited the taxi.

III. Other Incriminating Circumstances

The majority finds sufficient "other incriminating circumstances" from testimony that defendant: (1) exited a bus coming from or going to a "source city" of drug activity, (2) acted "nervous," (3) hurriedly entered a recently cleaned taxi as the first fare of the morning, (4) telling the taxi driver to "go," (5) bent down while inside the taxi, (6) pushed on the taxi driver's seat from behind, and (7) "struggled" to exit the taxi.

None of these seven factors considered individually or taken together show "other incriminating circumstances" to prove that defendant placed the cocaine under the taxi driver's seat. These factors do show that defendant was nervous, paused, acted fidgety, and had difficulty getting out of a taxi. To translate these bodily actions

into sufficient "other incriminating circumstances" to prove that defendant placed cocaine under the seat requires adding a premise that the circumstantial evidence does not contain. The majority's logic presumes that all people who act nervous exiting buses, who are aware of others around them, who pause to gather their bearings at a bus terminal, and who struggle to exit taxis with baggage are guilty of possessing illegal drugs. Remove that presumption and these circumstances fail to raise a reasonable inference that defendant placed the drugs under the taxi driver's seat.

Based on the taxi driver's own testimony, at least two other people could have placed the cocaine in the taxi, the taxi driver himself and/or the later passenger. "The fact that defendant exited the vehicle from the right rear passenger seat—the same side of the car in which the cocaine was found—raises no more of an inference defendant knew of the presence of the cocaine than it raised as to the other occupant of the rear passenger seat who could also have hidden the drugs there without defendant's knowledge." *Matias*, 143 N.C. App. at 454-55, 550 S.E.2d at 5 (Hunter, J., dissenting).

Here, not only were two other people in the taxi after defendant exited the vehicle, the taxi drove away from the station, beyond the view of police detectives, for at least ten minutes. This gap in time and the departure of the taxi from the defendant's location further weakens any inference that defendant placed the drugs under the driver's seat.

Defendant cooperated with the detective's request and voluntarily exited the taxi, walked back into the bus station, and consented to a search of his person and baggage. These searches disclosed no connection whatsoever between defendant and the drugs or any unlawful activity. The drugs provided no link to defendant, except for his brief presence in the taxi while under the detectives' surveillance and scrutiny. There was no evidence of defendant's fingerprints on the cocaine package, there was no evidence of cocaine residue on defendant or in or about his searched bag, no drug paraphernalia, and no evidence of any other illegal drugs or weapons. Defendant was not observed engaged in any criminal activity.

IV. Other Exculpatory Circumstances

The record is replete with "other exculpatory circumstances" that the majority's opinion ignores. The majority's opinion fails to mention that defendant recently had been robbed and shot and that he had

reported this incident to the police. According to Detective Murphy, "it was [a] pretty fresh wound, I mean, not within a day or two, but it was still tender." This fact may explain defendant's timidness and nervousness while walking through the bus station, being followed by three or four plain clothes detectives. This fact may also explain defendant's "struggling" to get out of the taxi and bumping the rear of the driver's seat as he retrieved his bag and tried to rotate his wounded body out of the taxi.

Taxi driver Thomas and Detective Halsaber both testified that defendant carried a small bag, which he placed on the backseat after he entered the taxi. The detectives stood less than two feet from the cab door moments before they asked defendant to exit the taxi for questioning. Detective Murphy testified that, at that moment, defendant bent down so that he could not see defendant's hands. The implication from Detective Murphy's testimony is that at that precise moment defendant hid or stashed the drugs under the front seat. With detectives standing so close to the taxi and peering straight at defendant, it is difficult to imagine that defendant, in broad daylight, was able to remove drugs from his bag on the seat or from his body, and conceal 83.1 grams of cocaine wrapped in a paper towel without being seen. Detective Murphy testified that as he backed away from the vehicle so that defendant could exit, he observed defendant "make a straight motion down and then leaned out to get out of the vehicle. More or less a one motion thing where he bent over a little bit and opened the door to get out." There was no testimony that defendant hesitated getting out of the taxi.

The majority's opinion also omits that after defendant exited the taxi, Thomas picked up a known passenger and transported him to the Wake County jail, after he left the bus station.

Defendant was not in exclusive control or possession of the taxi, and no one observed him conceal the drugs under the seat. The "other incriminating circumstances" must be sufficient to raise an inference that defendant placed the drugs under the seat. Without more evidence than the State presented, the case should have been dismissed.

The transcript reveals that the trial judge expressed grave concerns before ruling on defendant's motion to dismiss. The court asked the prosecutor, "why in the world didn't they search the car [before it left the bus station]? . . . it's [sic] just makes it messy. . . . it just makes it difficult." The trial court also recognized the importance of the

lapse in time and location: "[m]eaning that there was a time period in which the vehicle—in which the contraband was found was elsewhere and other people were in the vicinity of the—and had an opportunity to place the drugs there possibly."

V. Non-Exclusive Constructive Possession

In *State v. McLaurin*, our Supreme Court reversed this Court concluding that "because defendant's control over the premises [a residence] in which the paraphernalia were found was nonexclusive, and because there was no evidence of other incriminating circumstances linking her to those items, her control was insufficiently substantial to support a conclusion of her possession . . . ." 320 N.C. 143, 147, 357 S.E.2d 636, 638 (1987).

In *State v. Ledford* evidence that: (1) a defendant was seen picking up objects from the ground in a public place where drugs were later found, (2) other persons had been in that area, and (3) defendant ran from that area when requested by police officers to empty his pockets, was insufficient to support an inference of constructive possession. 23 N.C. App. 314, 208 S.E.2d 870 (1974). Our Court examined the evidence in *Ledford* and found "it sufficient to raise a strong suspicion of defendant's guilt but not sufficient to take that issue beyond the realm of suspicion and conjecture." *Id.* at 316, 208 S.E.2d at 872.

The facts at bar are analogous to *Ledford*: (1) both defendants were observed bending down in an area where drugs were later found, (2) there was no evidence concerning what they bent down for, other than drugs were later found in the area nearby, (3) defendant in *Ledford* ran; the defendant here was nervous, (4) both defendants did not have exclusive control of the areas, and (5) other persons were also located in close proximity to where the drugs were found. Defendant's fleeing the scene in *Ledford* merely added to this suspicion of his guilt, but was insufficient for the evidence to go to the jury. Here, defendant's nervousness and timidity, considering that defendant had been robbed and had a "tender" and "fresh" wound to his "rear," does no more than merely add to the suspicion of his guilt.

In *Weems*, the police observed three men enter a car and drive off. Weems was siting in the front passenger seat, along with the driver. Another passenger was seated in the back. The police searched the car and found three packets of heroin, two of which

were in close proximity to the defendant in the front seat. "There was no evidence [defendant] had been in the car at any time other than during the short period . . . . There was no evidence of any circumstances indicating that defendant knew of the presence of the drugs hidden in the car." *Weems*, 31 N.C. App. at 571, 230 S.E.2d at 194-95. This Court found "no evidence of any circumstance connecting the defendant to the drugs in any manner whatsoever other than the showing of his mere presence for a brief period in the car as a passenger." *Id.* at 571, 230 S.E.2d at 195.

In *Matias*, this Court recently found sufficient "other incriminating circumstances" to show constructive possession. We distinguished *Matias* from *Weems* because "sufficient incriminating circumstances exist to give rise to a reasonable inference that defendant knew of the presence of the cocaine in the car and had the power and intent to control its disposition or use." 143 N.C. App. at 449, 550 S.E.2d at 3. The defendant in *Matias* was found guilty of constructively possessing cocaine that was discovered in a vehicle in which he was a passenger. Part of the "other incriminating circumstances" consisted of marijuana odor which emanated from the vehicle after it passed the police and again after the police stopped it. These facts were evidence of criminal activity. The cocaine was discovered in the same container that contained the marijuana. Here, there is no evidence that defendant was engaged in any criminal activity. Also, in *Matias* the vehicle in which the cocaine was found never left the police's sight or custody from the time criminal activity was suspected until the drugs were discovered.

VI. Conclusion

After carefully examining the entire record, the seven "other incriminating circumstances" relied on by the majority are not incriminating. All the circumstantial evidence fails to raise, as a matter of law, a reasonable inference of constructive possession. Because there is no evidence of actual possession of cocaine, and only a "suspicion or conjecture" of constructive possession, the trial court erred in denying defendant's motion to dismiss. "To hold otherwise places innocent persons, riding in a vehicle where cocaine has been hidden, at risk of being charged and convicted of possession of cocaine when there is no evidence of their having knowledge of the cocaine." *Matias*, 143 N.C. App. at 453, 550 S.E.2d at 5 (Hunter, J., dissenting).

I respectfully dissent.

CYRIL Z. CACHA, AND WIFE, RENATA CACHA, PLAINTIFFS V. MONTACO, INC., AMERICAN DRYWALL COMPANY, AND DRYVIT SYSTEMS, INC., DEFENDANTS

No. COA00-374

(Filed 6 November 2001)

1. **Products Liability— statute of repose—synthetic stucco—first purchase for use or consumption**

Plaintiffs' claims against a synthetic stucco (EIFS) manufacturer were barred by the 6 year products liability statute of repose, N.C.G.S. § 1-50(a)(6), where the subcontractor purchased the EIFS in April of 1991, plaintiffs purchased their house on 2 October 1992; and plaintiffs filed their action on 19 August 1998. The EIFS was first "purchased for use or consumption" by the subcontractor because it was "consumed" when it was applied; that is, when its use resulted in its transformation and the destruction of its original form so that it could not be returned to its original consistency and used on another house. Moreover, the ultimate use of the EIFS was to provide a weather-resistant barrier, which it began to do the moment it was applied.

2. **Products Liability— statute of repose—synthetic stucco—not tolled by class action**

The N.C.G.S. § 1-50(a)(6) statute of repose was not tolled by the filing of a class action in a synthetic stucco action. Under *Monson v. Paramount Homes, Inc.*, 133 N.C. 235, statutes of repose may not be tolled by considerations of equity. Other cases cited involved statutes of limitation rather than of repose or the defeat of a statute of repose rather than tolling.

3. **Real Property— improvements—statute of repose—synthetic stucco—willful and wanton negligence exception**

The trial court did not err by granting summary judgment for a builder and subcontractor in a synthetic stucco action where plaintiffs' claims were barred unless falling within the willful and wanton negligence exception to the N.C.G.S. § 1-50(a)(5) real property improvements statute of repose. The essentially uncontradicted evidence was to the effect that neither defendant had any knowledge that their conduct would cause damage to the residence; even if the evidence arguably reflected negligence, it fell short of showing a wicked purpose or the intentional disregard of and indifference to the rights and safety of others.

Judge HUDSON concurring in part and dissenting in part.

Appeal by plaintiffs from order entered 2 December 1999 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 22 January 2001.

Lewis & Roberts, P.L.L.C., by Daniel K. Bryson and F. Murphy Averitt, III, for plaintiff-appellants.

Pinto Coates Kyre & Brown, PLLC, by Kenneth Kyre, Jr. and Brady A. Yntema, for defendant-appellee Montaco, Inc.

Hill, Evans, Duncan, Jordan & Davis, by Joseph P. Gram, for defendant-appellee American Drywall Company.

Womble Carlyle Sandridge & Rice, PLLC, by Jerry S. Alvis, Mary S. Pollard, Charles L. Becker, Robert E. Fields, III, and Scott P. Mebane, for defendant-appellee Dryvit Systems, Inc.

JOHN, Judge.

Plaintiffs appeal the trial court's 2 December 1999 entry of summary judgment in favor of defendants. We affirm.

The instant action arises out of defendant Montaco, Inc.'s ("Montaco"), construction and sale of a house clad with an exterior insulation and finish system ("EIFS") known as synthetic stucco. Montaco began work on the residence in 1990 and retained defendant American Drywall Company ("American Drywall") as a subcontractor to install the EIFS. American Drywall purchased the EIFS from defendant Dryvit Systems, Inc. ("Dryvit"), a manufacturer and distributor of the EIFS product, and the system was installed in 1991. Construction of the home was completed and a certificate of occupancy was issued 21 September 1991 by the Town of Cary.

On 2 October 1992, plaintiffs Cyril Z. and Renata Cacha purchased the house from Montaco (the closing). In April 1996, plaintiffs became concerned that the residence was experiencing "severe and serious moisture intrusion problems" due to "inadequate and improper installation and application" of the EIFS.

In January 1996, a purported class action, *Ruff v. Parex*, 96-CVS-0059, was filed in New Hanover County Superior Court against various EIFS manufacturers, including Dryvit, asserting claims essentially identical to those alleged by plaintiffs against Dryvit herein. *Ruff v. Parex* was later certified as a class action and plaintiffs were designated class members. On 29 June 1999, plaintiffs opted out of the *Ruff v. Parex* class action, *see Crow v. Citicorp*

Acceptance Co., 319 N.C. 274, 284, 354 S.E.2d 459, 466 (1987) (class members may be "given an opportunity to request exclusion from the class within a specified time"), and filed the present action 19 August 1998 to pursue their claims on an individual basis.

American Drywall, Montaco and Dryvit moved for summary judgment herein on 28 May, 27 September and 29 September 1999, respectively. Plaintiffs subsequently filed an amended complaint. On 2 December 1999, the trial court entered an order granting each defendant's summary judgment motion. Plaintiffs appeal.

In the case *sub judice*, plaintiffs advance three separate contentions in maintaining the trial court erred by granting defendants' summary judgment motions. First, plaintiffs argue their claims against Dryvit were filed within six years of the "first purchase for use for consumption" of the residence, and thus complied with the products liability statute of repose, *see* N.C.G.S. § 1-50(a)(6) (1999). Alternatively, plaintiffs maintain the statute of repose was tolled with respect to their claims against Dryvit by the filing of *Ruff v. Parex* in 1996. Finally, relying upon G.S. § 1-50(a)(5)(e), an exception to the real property statute of repose, *see* G.S. § 1-50(a)(5)(a), plaintiffs contend a jury question existed as to whether the alleged actions of Montaco and American Drywall constituted willful and wanton negligence. We consider plaintiffs' arguments *ad seriatim*.

[1] Regarding plaintiffs' claims against Dryvit, we note initially the undisputed circumstances that Dryvit was a remote manufacturer and that the EIFS made its way to plaintiffs' home through the commerce stream, thus implicating the products liability statute of repose, G.S. § 1-50(a)(6). *See Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 445, 444 S.E.2d 423, 427 (1994) (products liability statute of repose, as opposed to real property statute of repose, G.S. § 1-50(5)(b)(9), applies to remote manufacturer whose materials find their way to job site indirectly through the commerce stream; such manufacturer would not be a materialman who furnished materials to the job site under G.S. § 1-50(a)(5)(b)(9)).

We therefore apply the products liability statute of repose, G.S. § 1-50(a)(6), which provides as follows:

> No action for the recovery of damages . . . based upon or arising out of any alleged defect or any failure in relation to a product

> shall be brought more than six years after the date of *initial purchase for use or consumption.*

"Initial purchase for use or consumption" is not defined by statute.

> Our Supreme Court has explained that:
>
> [i]n construing this language, the normal rules of statutory construction apply: the intent of the legislature controls; words in a statute are normally given their natural and recognized meanings; and the statute will be interpreted so as to avoid absurd consequences.

Tetterton v. Long Manufacturing Co., 314 N.C. 44, 55, 332 S.E.2d 67, 73 (1985) (citing *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981)). Further,

> the obvious intent of the legislature . . . was to limit . . . the manufacturer's [] liability after a certain period of years had elapsed from the date of initial purchase for use or consumption. "Initial" is defined . . . to mean "of or relating to the beginning: marking the commencement: incipient, first."

Id. at 56, 332 S.E.2d at 74 (citations omitted). "Use" is defined as the act of using; the application or employment of something for some purpose." American Heritage Dictionary, 2nd College Edition. 1331 (1985). "Consumption" is defined as "the utilization of economic goods in the satisfaction of wants or in the process of production resulting chiefly in their destruction, deterioration, or transformation." *Id.* at 179.

In maintaining the instant claims against manufacturer Dryvit were brought within the limitation period proscribed by G.S. § 1-50(a)(6), plaintiffs note their complaint including the claims against Dryvit was filed 19 August 1998, less than six years after 2 October 1992. According to plaintiffs, 2 October 1992 qualifies as the "date of initial purchase for use or consumption" of the EIFS under G.S. § 1-50(a)(6). In support of this assertion, plaintiffs rely upon *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211 (1990), and *Tetterton*.

In *Chicopee*, the plaintiff textile manufacturer contracted with defendant American Tool and Machine Company (American Tool) to manufacture and install two drying ranges which incorporated allegedly defective pressure vessels. *Id.* at 424, 391 S.E.2d at 212. The ranges were used in the plaintiff's manufacture of fiber products.

Id. American Tool had subcontracted with defendant Sims Metal Works, Inc. to manufacture the pressure vessels. *Id.* at 425, 391 S.E.2d at 212.

This Court held American Tool's "use" of the pressure vessels was limited to installing them with other component parts into the drying ranges delivered to Chicopee's plant. *Id.* at 428, 391 S.E.2d at 214. We explained that:

> American Tool's purchase of the component parts for the purpose of assembly into a drying range . . . [wa]s not the "initial purchase for use" with the meaning of N.C. Gen. Stat. § 1-50(a)(6). [Rather,] Chicopee's purchase of the drying ranges for the purpose of manufacturing textiles was the "initial purchase for use" because manufacturing textiles was the ultimate or intended use of this product.

Id.

Based on the foregoing, plaintiffs reason that the closing "represents the first time the [EIFS] was purchased for its ultimate intended use as a cladding on the residence." Until that time, plaintiffs maintain, the EIFS was merely a component part of the structure having no independent value. Plaintiffs also emphasize that this Court cited with approval in *Chicopee* a Nebraska decision holding that

> [u]nder Nebraska statute of repose, plumbing pipe was first sold for use when homeowner took possession of house of which pipe was a part, not when plumbing subcontractor purchased pipe from pipe manufacturer.

Id. (citing *Witherspoon v. Sides Construction Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985).

Tetterton involved a products liability action arising out of the 1981 death of plaintiff's intestate while operating a tobacco harvester. *Tetterton*, 314 N.C. at 46, 332 S.E.2d at 68. The harvester had been sold by defendant Long Manufacturing Co. to a dealer in 1974; in 1975, the dealer sold it to a farmer who thereafter sold it to defendant Revels Tractor Company, Inc. ("Revels"), in 1981; finally, Revels sold the tractor to plaintiff's intestate that same year. *Id.* Our Supreme Court ruled that "[t]he first purchase in this case 'for use or consumption' was by [the] farmer []" in 1975. *Id.* at 56, 332 S.E.2d at 74,

Based upon *Tetterton*, plaintiffs argue the statute of repose does not begin to run until a product is purchased by its ultimate con-

sumer. As applied to the case *sub judice*, plaintiffs contend the 2 October 1992 closing constituted the date upon which the EIFS was purchased for its ultimate intended use as a cladding on the residence. Therefore, plaintiffs continue, the intermediary purchase of the EIFS by American Drywall was not a "purchase for use or consumption" under G.S. § 1-50(a)(6) and plaintiffs are the "ultimate" consumer of the EIFS. *Chicopee*, 98 N.C. App. at 428, 391 S.E.2d at 214.

Dryvit likewise considers G.S. § 1-50(a)(6) the applicable statute of repose. However, Dryvit contends the statute began to run when the EIFS was purchased for its intended use or function, *i.e.*, installation on a residence for the purpose of providing a weather-resistant barrier protecting the interior of the structure from the elements. According to Dryvit, that event occurred in April 1991 when American Drywall first purchased the EIFS for installation in plaintiffs' residence and not at the closing. According to Dryvit, therefore, plaintiffs' claims against it, filed more than seven years later in 1998, were barred by the six year limitation set out in G.S. § 1-50(a)(6).

Applying the rules of statutory interpretation and the definitions cited above, we conclude that both *Chicopee* and *Tetterton* are distinguishable from the circumstances *sub judice* and that Dryvit's argument has merit. In *Chicopee*, the pressure vessel was not "purchased for use or consumption," G.S. § 1-50(a)(6), until the drying ranges were placed into service by the plaintiff, the ultimate consumer. *Chicopee*, 98 N.C. App. at 428, 391 S.E.2d at 214. In *Tetterton*, "[t]he first purchase [of the tobacco harvester] 'for use or consumption' was by [the] farmer," *id.* at 56, 332 S.E.2d at 74, also the ultimate consumer.

In the instant case, however, the EIFS was first "purchased for use or consumption," G.S. § 1-50a)(6), by American Drywall to be applied to plaintiffs' residence. Once American Drywall applied the EIFS, it was "consumed," *see id.*, that is, utilized in the construction process, which use resulted in its transformation, *see Websters* at 179, and the destruction of its original form, *see id.* At that point, the EIFS could not be returned to its original consistency and could not be deployed in the construction of another house.

In addition, as Dryvit maintains, the "ultimate and intended use" of the EIFS was to provide a weather-resistant barrier to protect the house interior from exposure to the weather. The EIFS at issue began to perform this function from the moment of application, becoming

immediately exposed to rain, wind and other elements, and thus subject to wear and tear and "deterioration," *see id.*

In short, the statute of repose was triggered in April 1991 upon the purchase by American Drywall of the EIFS for installation in plaintiffs' house, and plaintiffs' claims against Dryvit, the EIFS manufacturer, filed more than seven years later, were barred. *See* G.S. § 1-50(a)(6).

[2] Notwithstanding, plaintiffs maintain in the alternative that the statute of repose regarding their claims against Dryvit was in any event equitably tolled by the filing of *Ruff v. Parex* in 1996. Plaintiffs argue that their "rights [against Dryvit] were bound up in the class action until they opted out" on 16 July 1999, that the claims asserted against Dryvit in *Ruff* by the class were essentially the same as those asserted by plaintiffs against Dryvit herein, and that "the statute of repose should be tolled" for the period during which plaintiffs remained in *Ruff*. We are compelled to hold that the statute of repose may not be tolled by considerations of equity.

Plaintiffs rely upon *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 38 L. Ed. 2d 713 (1974). In that case, the United States Supreme Court held that commencement of a class action suspended the applicable statute of limitations for all putative class members. *Id.* at 561, 38 L. Ed. 2d at 731. Although the federal district court had denied class certification, therefore,

> the commencement of the original class suit toll[ed] the running of the statute [of limitations] for all purported members of the class who ma[d]e timely motions to intervene after the court ha[d] found the suit inappropriate for class action status.

Id. at 552-53, 38 L. Ed. 2d at 726. The statute of repose did not figure in the *American Pipe* decision.

According to plaintiffs, however, *American Pipe* should be extended to apply to statutes of repose as well as statutes of limitation. Otherwise, plaintiffs insist,

> every putative member of the *Ruff* class would, at some point, have their claims barred by statute of repose, even though their class action claims were timely filed . . . . The plaintiffs would have [had] to file two lawsuits in order to toll the statute [of repose].

Finally, plaintiffs continue, had the *Ruff* class later been decertified, those plaintiffs "who had been relying on the class action [w]ould suddenly find their claims against Dryvit [time] barred by the statute of repose."

While plaintiffs' objections engender concern, Dryvit properly points us to *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 515 S.E.2d 445 (1999). In *Monson*, this Court reiterated the rule that "[w]hile equitable doctrines may toll statutes of limitation, *they do not toll substantive rights created by statutes of repose.*" *Id.* at 240, 515 S.E.2d at 449 (citation omitted) (emphasis added); *see State Ex. Rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998) ("equitable doctrines do not toll statutes of repose"), and *Stallings v. Gunter*, 99 N.C. App. 710, 716, 394 S.E.2d 212, 216 (fraudulent concealment cannot operate to toll running of the statute of repose because "[s]ubstantive rights, such as those created by the statute of repose, are not subject to tolling"), *disc. review denied*, 327 N.C. 638, 399 S.E.2d 125 (1990); *see also Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985) (statute of repose "serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue"). We are bound by *Monson* and *Long*. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court").

In addition to *American Pipe* and *Burnett v. New York Central R. Co.*, 380 U.S. 424, 13 L. Ed. 2d 941 (1965), which speak only to tolling of statutes of *limitation*, not statutes of *repose*, the dissent cites *Bryant v. Adams*, 116 N.C. App. 448, 448 S.E.2d 832 (1994), and *One North McDowell Assn. v. McDowell Development Co.*, 98 N.C. App. 125, 389 S.E.2d 834 (1990), to sustain the conclusion that equitable doctrines prevent running of applicable statutes of repose. Like *American Pipe* and *Burnett*, *Bryant* and *McDowell* are inapposite.

Neither *Bryant* and *McDowell* addressed the issue of equitable tolling, but rather simply stand for the proposition that equitable estoppel may "*defeat* a statute of repose defense." *Bryant*, 116 N.C. App. at 460, 448 S.E.2d at 838 (emphasis added). *Bryant* held that where "a complaint on its face sufficiently states a claim" of equitable estoppel, the statue of repose may not be asserted as a defense. *Id.* In *McDowell*, the defendants similarly were held estopped from raising

the statute of repose as a defense because filing of plaintiffs' action had been delayed based upon representations by the defendants. *McDowell* at 128, 389 S.E.2d at 836. Significantly, no claim of equitable estoppel, involving, *inter alia*, elements of "conduct . . . amount[ing] to a false representation or concealment of material facts," *Bryant* at 469, 448 S.E.2d at 460 (quoting *Hensell v. Winslow*, 106 N.C. App. 285, 290-91, 416 S.E.2d 426, 430, *disc. review denied*, 332 N.C. 344, 421 S.E.2d 148 (1992)), and detrimental reliance, *id.*, was raised by plaintiffs in the case *sub judice*. Accordingly, the statute of repose as to plaintiffs' claims against Dryvit was not tolled by the filing of *Ruff* as a class action.

[3] Lastly, we consider plaintiffs' assignments of error directed at the trial court's grant of summary judgment in favor of Montaco and American Drywall. The parties appear to agree our disposition thereof is governed by the statute of repose applicable to improvements to real property, G.S. § 1-50(a)(5)(a), and an exception thereto provided in G.S. § 1-50(a)(5)(e).

The former section provides as follows:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

G.S. § 1-50(a)(5)(a).

This Court has reasoned that:

> The logical interpretation of our statute includes classifying the later of the last act or omission or date of substantial completion as the date at which time the party (contractor, builder, etc.) has completed performance of the improvement contract.

Monson, 133 N.C. App. at 241, 515 S.E.2d at 450. A failure to perform or to complete performance may thus constitute a "last omission." *Id.* In the instant case, the essentially uncontroverted evidence was that the last act or omission of American Drywall occurred no later than 15 July 1991.

Montaco cites *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 518 S.E.2d 789 (1999), *disc. review denied*, 3510 N.C. 359, 542 S.E.2d 214 (2000). In *Nolan*, this Court held the house at issue therein had become " 'substantially completed' for purposes of

[]G.S. § 1-50(a)(5)," *id.* at 76, 518 S.E.2d at 791, on the date the Durham City-County Inspections Department issued a "certificate of compliance" for the structure, confirming it had been constructed "in compliance with all applicable building and zoning ordinances." *Id.* We explained that

> N.C.G.S. § 1-50(a)(5)(c) defines "substantial completion" as being "that degree of completion of a project [or] improvement . . . upon attainment of which the owner can use the same for the purpose for which it was intended." An owner of a residential dwelling may use it as a residence when the appropriate government agency issues a final certificate of compliance. The owner may then utilize the residence for the purpose for which it was intended and the home is substantially completed under N.C.G.S. § 1-50(a)(5).

Id. at 76, 518 S.E.2d at 791. In the case *sub judice*, the Town of Cary issued its Certificate of Occupancy regarding plaintiffs' residence on 20 September 1991.

However, it is unnecessary to specify the date or dates herein upon which the statute of repose on plaintiffs' claims against American Drywall and Montaco began to run. By failing to argue otherwise, *see* N.C.R. App. P. 28(a) (appellate "review is limited to questions . . . presented in the several briefs"), plaintiffs *sub silentio* concede such claims were barred unless falling within the following statutory exception to the real property statute of repose:

> The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of fraud, or *willful or wanton negligence* in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.

G.S. § 1-50(a)(5)(e) (emphasis added).

"[W]ilful and wanton negligence encompasses conduct which lies somewhere between ordinary negligence and intentional conduct." *Siders v. Gibbs*, 39 N.C. App. 183, 186, 249 S.E.2d 858, 860 (1978).

> "Negligence . . . connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others."

Duncan v. Ammons Construction Co., 87 N.C. App. 597, 601, 361 S.E.2d 906, 909 (1987) (quoting *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 396-97 (1956)). Stated otherwise, " '[a]n act is wanton when it is done of wicked purpose . . . ,' " *Yancey v. Lea*, 139 N.C. App. 76, 79, 532 S.E.2d 560, 562 (2000) (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929)), *aff'd*, 354 N.C. 48, 550 S.E.2d 155 (2001), and wilful negligence is the "deliberate purpose not to discharge some duty necessary to the safety of the person or property of another," *Siders*, 39 N.C. App. at 187, 249 S.E.2d at 186.

Regarding Montaco, the "Eleventh Claim" of plaintiffs' amended complaint set out the following allegations of "gross negligence," *see Cole v. Duke Power Co.*, 81 N.C. App. 213, 219, 344 S.E.2d 130, 133-4 (1984), *disc. review denied*, 318 N.C. 281, 347 S.E.2d 462 (1986) ("[g]ross negligence is negligence of an aggravated character and a gross failure to exercise reasonable care"; "*[t]he term implies a thoughtless disregard of consequences without exerting any effort to avoid it*") (emphasis in original), which plaintiffs now point to as indicative of wilful and wanton negligence:

> (a) [f]ailing to adequately research [the feasibility of using EIFS on plaintiffs' home];
>
> (b) [f]ailing to adequately follow the manufacturer's applicable specifications, details, and application requirements for the EIFS utilized on plaintiffs' house;
>
> (c) [f]ailing to effectively familiarize its supervisory personnel with proper EIFS application methods and techniques . . .;
>
> (d) [f]ailing to properly coordinate and integrate the EIFS with other building components . . .;
>
> (e) [a]ltering aspects of construction intended to protect homes from harmful water intrusion . . .; and
>
> (f) [f]ailing to assist and instruct plaintiffs in the proper maintenance, repairs, or replacement of the EIFS . . . .

In the same section of the amended complaint, plaintiffs' "gross negligence" allegations against American Drywall included:

(a) . . . attempt[ing] to remove from its contract, aspects of the application specifications which were known to routinely fail;

(b) . . . knowingly install[ing] a barrier system which American Drywall knew could not adequately drain water intrusion through the windows, and into the wall assembly;

(c) . . . fail[ing] to warn or instruct [Montaco] that [roof and window flashings] required proper integration with the EIFS in order for EIFS to form an effective barrier; [and]

(d) violat[ing] the North Carolina Building Code by . . . cutting away the black plastic flashing around windows which allowed water to drain into the wall assembly.

In his deposition introduced at the summary judgment hearing, Harvey Lynwood Montague, Jr. ("Montague"), President of Montaco, related that plaintiffs' home was the first built by Montaco using the EIFS. Montague stated he had decided to use synthetic stucco because he thought it was a good product and he liked its appearance after inspecting several homes constructed with the product. Montague indicated the EIFS manufactured by Dryvit was chosen because it was "the best product for the best price on the market." He further testified he had discussed application of the EIFS with Steve Matthews ("Matthews"), President of American Drywall, and was told American Drywall had their best crew installing it. According to Montague, he was "confident" during construction that Matthews was doing the work correctly and according to Dryvit's specifications, and that plaintiffs' house was caulked well. In conclusion, Montague stated that EIFS "wasn't supposed to get water in it" and that, had he had known the system would not tolerate moisture intrusion, he "would not have built that house."

Matthews testified in his deposition that it was "our belief and intent that the [EIFS] system was installed properly." Concerning the subcontracting issue, Matthews reported he had subcontracted an installer recommended by a Dryvit distributor who "supposedly [was] a responsible applicator and knew how to install the system properly." In addition, American Drywall had checked the subcontractor's references and had worked with it on a previous EIFS project without incident. Matthews further noted that, at the time the EIFS was installed, it was not known that caulking and sealants in the EIFS "routinely failed." Finally, Matthews stated that, at the time plaintiffs' home was constructed, he had no knowledge that any conduct

on the part of American Drywall or its subcontractor, including removal of black plastic flashing, would cause any moisture intrusion problem.

Significantly, moreover, even assuming *arguendo* plaintiffs had introduced evidence tending to show American Drywall knew caulking and sealants in the EIFS often failed, nothing in the record indicates such items were specifically excluded by American Drywall from its contract with Montaco based upon such knowledge. *See Yancey*, 139 N.C. App. at 79, 532 S.E.2d at 562, and *Siders*, 39 N.C. App. at 187, 249 S.E.2d at 186. Further, no evidence was introduced of any violations of the North Carolina Building Code ("the Code"). The witnesses relied upon by plaintiffs testified as to the 1993 version of the Code, *i.e.*, the Code in effect approximately two years following installation of the EIFS in plaintiffs' residence. We also note violation of the Code, standing alone, has been held by this Court to be insufficient "to reach the somewhat elevated level of gross negligence," *Bashford v. N.C. Licensing Bd. for General Contractors*, 107 N.C. App. 462, 467, 420 S.E.2d 466, 469 (1992), much less wilful and wanton negligence, *see Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 326, 363 S.E.2d 367, 373-74 ("failure to check Code compliance" prior to applying roof system "does not indicate a reckless indifference which rises to the level of wilful or wanton negligence"), *disc. review denied*, 321 N.C. 744, 366 S.E.2d 86 and 321 N.C. 744, 366 S.E.2d 863 (1988); *see also Collins v. CSX Transportation, Inc.*, 114 N.C. App. 14, 24, 441 S.E.2d 150, 155-56 (noting distinction between "gross negligence" and "wilful and wanton negligence"), *disc. review denied*, 336 N.C. 603, 447 S.E.2d 388 (1994).

In short, the essentially uncontradicted evidence before the trial court was to the effect that neither Montaco nor American Drywall had any indication that their conduct in utilizing the EIFS in plaintiffs' home would cause damage to the residence. To the contrary, it appears from the record that Montaco and American Drywall believed the EIFS was properly applied consistent with each defendant's knowledge of home construction, and that neither became aware of problems inherent in the product until after rotting began to be discovered. Both Matthews and Montague testified that had they known the EIFS would fail, it would not have been used in the construction of plaintiffs' home.

To conclude, even if arguably tending to reflect negligence, the record falls woefully short of evidence of any "wicked purpose," *Yancey*, 139 N.C. App. at 79, 532 S.E.2d at 562, or "intentional disre-

gard of and indifference to the rights and safety of others," *Duncan*, 87 N.C. App. at 601, 361 S.E.2d at 909, on the part of Montaco or American Drywall sufficient to withstand defendants' summary judgment motion. *See Starkey v. Cimarron Apartments*; *Evans v. Cimarron Apartments* 70 N.C. App. 772, 774-75, 321 S.E.2d 229, 231 (1984) (evidence defendant landlord knew apartment building had no attic fire walls and failed to correct condition prior to fire did not constitute wilful and wanton negligence), *disc. review denied*, 312 N.C. 798, 325 S.E.2d 633 (1985). Accordingly, plaintiffs' argument, relying upon the wilful and wanton negligence exception contained in G.S. § 1-50(a)(5)(e), fails.

Prior to concluding, we acknowledge *Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. at 438, 444 S.E.2d at 423, wherein our Supreme Court stated that "under section 1-50(5), no statute of repose *may be asserted as a defense* to a claim of willful and wanton misconduct," *id.* at 446, —— S.E.2d at —— (emphasis added). As noted above, the parties characterized the issue before us in terms of the sufficiency of the evidence as opposed to the propriety of the "assert[ion] as a defense," *id.*, by Montaco and American Drywall of the statute of repose in G.S. § 1-50(5). In view of the similarity herein between the questions of sufficiency of allegation and sufficiency of proof, we have elected to address the issue as argued by the parties, *see* N.C.R. App. P. 28(a), and *State v. Cohen*, 301 N.C. 220, 222, 270 S.E.2d 416, 417 (1980) (appellate review limited "to questions that are supported by the arguments made and authorities cited in the [appellate] brief"), and in any event have found the record evidence inadequate to support an issue of fact regarding "wilful and wanton misconduct" on the part of Montaco and American Drywall.

Based upon the foregoing, we hold the trial court did not err in allowing the summary judgment motions of Dryvit, American Drywall and Montaco.

Affirmed.

Chief Judge EAGLES concurs.

Judge HUDSON concurs in part and dissents in part.

Judge HUDSON, concurring in part and dissenting in part.

As to the first issue presented—whether the statute of repose began to run with the closing by plaintiffs or with the purchase of the

EIFS by American Drywall—I concur with the majority. I also concur on the disposition regarding defendant Montaco. However, for reasons that will be explained here, I do not agree that we are bound by *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 515 S.E.2d 445 (1999), on the question of the tolling of the statute of repose by the filing of the class action in *Ruff v. Parex*. I also believe that the plaintiffs' forecast of evidence is sufficient to raise a genuine issue of material fact as to willful and wanton negligence on the part of American Drywall. Therefore, I respectfully dissent with regard to these two issues.

The pertinent procedural history on the statute of repose issue is as follows. The *Ruff* suit was filed on 5 January 1996, well inside the statute of repose period (under the majority holding here, the statute of repose did not run until April of 1997, six years after American Drywall purchased the EIFS). Plaintiffs filed their complaint in this case on or about 19 August 1998, while they were still part of the putative class in the pending *Ruff* case. On 17 June 1999, Judge Tennille entered an order allowing plaintiffs to opt out of the class action in order to pursue their cause of action individually in state court.

Defendants argue that plaintiffs' individual state law claim against Dryvit is barred by the six-year statute of repose found in N.C. Gen. Stat. § 1-50(a)(6) (1999). Plaintiffs argue that the statute of repose was tolled by the filing of the class action against Dryvit in the *Ruff* case. The majority, citing *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), holds that we are bound to follow *Monson v. Paramount Homes*, which states that, although statutes of limitations may be tolled by equity, statutes of repose in North Carolina may not be tolled by doctrines of equity. *See Monson*, 133 N.C. App. at 240, 515 S.E.2d at 449.

I disagree with the majority for two reasons. First, I do not believe that we are bound to follow *Monson*. Second, and as a result, I believe that the statute of repose was tolled when the plaintiffs in *Ruff* (including these plaintiffs) filed the class action in that suit.

As to the first point, I do not believe we are bound by *Monson*, primarily because the language quoted by the majority is not the holding in the case, but is merely dictum. The actual holding in *Monson* is that the statute of repose found in N.C. Gen. Stat. § 1-50(a)(5) (1999) (statute of repose applicable to improvements to real property) does not begin to run anew each time a repair is made to the property at issue. *See Monson*, 133 N.C. App. at 241-42, 515 S.E.2d at 450 (explain-

ing that N.C.G.S. § 1-50(a)(5) itself specifies that the statute of repose begins to run from "substantial completion," and that a " 'repair' does not qualify as a 'last act' "). Indeed, the Court stated that "[t]he dispositive issue in the present case is whether a repair qualifies as the 'last act or omission' under N.C. Gen. Stat. § 1-50[a](5)." *Id.* at 238, 515 S.E.2d at 448. Thus, the statement that "equitable doctrines . . . do not toll substantive rights created by statutes of repose," *id.* at 240, 515 S.E.2d at 449, is mere dictum, which we are not bound to follow. *See Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby."). Further, the factual context here is so dissimilar to *Monson* as to be distinguishable, even if the above statement were the holding of the case.

Moreover, previous panels of this Court have specifically held that equitable doctrines *are* applicable to statutes of repose. *See Bryant v. Adams*, 116 N.C. App. 448, 460, 448 S.E.2d 832, 838 (1994) ("Equitable estoppel may . . . defeat a defendant's statute of repose defense."), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995); *One North McDowell Assn. v. McDowell Development Co.*, 98 N.C. App. 125, 127-28, 389 S.E.2d 834, 836 (stating that "[i]t is well established that the doctrine of equitable estoppel will deny the right to assert a defense based on lapse of time" and concluding that "Defendants are therefore estopped from raising [the statute of repose] in bar of plaintiffs' action"), *disc. review denied*, 327 N.C. 432, 395 S.E.2d 686 (1990). In these two cases, this Court specifically applied equitable doctrines to prevent the application of statutes of repose pursuant to N.C.G.S. § 1-50. *See Douglas v. Sandoz Pharm. Corp.*, No. 1:98CV00911, 2000 WL 33342286, at *6 (M.D.N.C. July 18, 2000) ("North Carolina courts are split on the question of whether equitable estoppel can toll the statute of repose.").

The Court in *Monson* makes no reference to either *Bryant* or *McDowell*. Therefore, I do not believe that we are bound to follow the dicta in *Monson* regarding considerations of equity, when previous decisions of this Court have specifically held otherwise. I believe that, to the extent considerations of equity control the running of the statute of repose here, we are bound by the holdings in *Bryant* and *McDowell* rather than the quoted dictum in *Monson*, and that the statute of repose was tolled as to defendant Dryvit by the filing of the class action in *Ruff*.

This result is consistent with the U.S. Supreme Court decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 38 L. Ed. 2d 713 (1974). In *American Pipe*, the U.S. Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." 414 U.S. at 554, 38 L. Ed. 2d at 727. Although I recognize that the case before us does not involve a statute of limitations, the equitable principles involved are the same. Here, had plaintiffs remained parties to the class action, their claims against Dryvit clearly would not have been barred by the statute of repose because the class action was filed against defendant Dryvit inside of the six-year limitations period. In light of the fact that the class suit was actually pending and the plaintiffs still part of the putative class when their suit was filed in state court, I can see no reason to treat these plaintiffs more harshly than those in *American Pipe*.

These facts are similar to those in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 13 L. Ed. 2d 941 (1965), relied upon by the U.S. Supreme Court in *American Pipe*. In *Burnett*, the plaintiff timely filed his Federal Employer's Liability Act ("FELA") suit in Ohio state court, but the case was dismissed for improper venue under state procedural rules. *See* 380 U.S. at 424-25, 13 L. Ed. 2d at 943. In federal courts and in some states, such cases may be transferred to a court where venue is proper; in Ohio, however, the rules required plaintiff to file a new suit within a specified time period. *See id.* at 430-32, 13 L. Ed. 2d at 946-48. Eight days after the dismissal of his suit by the state court, but outside the FELA statute of limitations period, the plaintiff filed an identical suit in federal court. *See id.* at 425, 13 L. Ed. 2d at 943.

The Court held that the original filing had tolled the statute of limitations during the pendency of the state suit, and thus, the federal suit was timely filed. *See id.* at 435, 13 L. Ed. 2d at 949. In its discussion, the Court noted that in other circumstances the FELA limitations period had been extended, *see id.* at 427, 13 L. Ed. 2d at 944-45, and that "Congress would not wish a plaintiff deprived of his rights when no policy underlying [the] statute of limitations is served in doing so," *id.* at 434, 13 L. Ed. 2d at 949. The Court identified the policies underlying statutes of limitations as follows:

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and

> witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation . . . .

Id. at 428, 13 L. Ed. 2d at 945 (internal quotation marks omitted). These policy reasons are virtually indistinguishable from those articulated as the basis for the statutes of repose in our State. As our Supreme Court has observed, the statute of repose was intended to shield defendants from " 'open-ended' liability," and its advantages are certainty and the "eliminat[ion of] tenuous claims involving older products for which evidence . . . may be difficult to produce." *Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 54, 332 S.E.2d 67, 73 (1985) (internal quotation marks omitted).

The purposes of the statute of repose are not offended by allowing the plaintiffs here to proceed, since they have already sued Dryvit, and the class suit is ongoing. Dryvit has been defending the suit and will doubtless continue to do so, whether or not these plaintiffs proceed individually. In fact, the only parties adversely affected by the operation of the statute of repose are these plaintiffs, who did not "sit on their rights," or file a "stale" claim, but would nonetheless have their claims defeated. Accordingly, since I believe that we may apply considerations of equity, I would follow *American Pipe* and *Burnett* and hold that in these circumstances the plaintiffs are not barred.

As to the defendant American Drywall, I believe that the evidence was sufficient on the issue of willful or wanton negligence to raise a genuine issue of material fact on the question of the application of the statute of repose to them. *See* N.C. Gen. Stat. § 1-50(a)(5)(e) (1999); *Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 446, 444 S.E.2d 423, 428 (1994). Steven W. Matthews was project manager on the plaintiff's house for American Drywall, who subcontracted the application of the EIFS to David Davis. In his deposition, Matthews acknowledged that he knew that the EIFS was a "barrier system" that is dependent upon sealing to keep out moisture, that the system had to be installed properly to prevent water intrusion, and that it was important to follow the specifications of Dryvit for the system to operate properly. He further acknowledged that he did not check to see if the applicator's work complied with the Dryvit specifications, that based on verbal instructions, he allowed work on sealants and caulk joints to be done in a manner which could have been a "fairly significant deviation" from the Dryvit specifications,

and that he was not familiar with the requirements of the building code. I believe that all of these statements and other evidence forecast in the record raise a genuine issue of material fact regarding whether Matthews acted with "a deliberate purpose not to discharge a legal duty . . . to . . . the person or property of another." *Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E.2d 858, 860 (1978). Accordingly, I would remand for trial as to American Drywall.

In sum, I concur in part in that I would affirm the granting of summary judgment against Montaco, and I agree with the majority analysis as to when the statute of repose began to run against Dryvit. Believing that the filing of the class suit in *Ruff v. Parex* tolled the running of that statute, however, I would remand for trial against Dryvit. Because I believe that there are genuine issues of material fact pertaining to defendant American Drywall, I would remand for trial against that defendant as well. Thus, I respectfully concur in part and dissent in part.

HENRY G. LEWIS, PLAINTIFF v. CHARLES K. EDWARDS, DEFENDANT

No. COA00-1190

(Filed 6 November 2001)

1. Partnerships— modification of agreement—acceptance of other employment

The trial court did not err in an action arising from the dissolution of a partnership tried without a jury by concluding that defendant was not entitled to damages for plaintiff's breach of the partnership agreement in accepting other employment while still a partner where the evidence showed both consent and consideration, so that a new agreement was produced by the parties.

2. Partnerships— dissolution—rent

The trial court erred in an action arising from the dissolution of a partnership tried without a jury by awarding plaintiff rent through the entire month of July where the record shows that defendant obtained ownership of the building on 9 July.

3. Partnerships— dissolution—collection of debts

The trial court erred in an action arising from the dissolution of an accounting partnership tried without a jury by finding that

defendant had collected $18,000 from JFJ where the record shows that defendant only received about $13,317.65.

4. Partnerships— dissolution—interest

The trial court in an action arising from the dissolution of an accounting partnership tried without a jury did not err by awarding plaintiff interest on a judicial award from the date the partnership dissolved. The business of the partnership was continued by defendant without liquidation of partnership affairs and plaintiff was thus entitled by N.C.G.S. § 59-72 to receive interest on the value of his share of the partnership from the date of dissolution. While N.C.G.S. § 24-5(b) generally provides interest from the date of entry of judgment, the more specific statute controls.

5. Partnerships— dissolution—payment of debts from individual funds

The trial court erred in an action arising from the dissolution of a partnership tried without a jury by not considering the parties' adjustments to the final valuation for the payment of partnership liabilities from individual funds.

6. Appeal and Error— cross-assignment of error—improper

A plaintiff's argument on appeal was waived where plaintiff cross-assigned error to a trial court's order but the proper method of raising the arguments would have been by a cross-appeal. Plaintiff argued reasons the trial court erred in its findings of fact and conclusions of law, but those reasons do not provide an alternative basis in law for supporting the judgment.

Appeal by defendant from order filed 11 May 1999 by Judge Robert F. Floyd, Jr. and from order and judgment filed 17 March 2000 by Judge William C. Gore, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 11 September 2001.

Parker, Poe, Adams & Bernstein L.L.P., by R. Bruce Thompson, II, for plaintiff-appellee.

McCoy, Weaver, Wiggins, Cleveland & Raper, PLLC, by Jim Wade Goodman, for defendant-appellant.

GREENE, Judge.

Charles K. Edwards (Defendant) appeals an order filed 11 May 1999 determining the value of a partnership and an order filed 17

March 2000 directing Defendant to pay Henry G. Lewis (Plaintiff) a total of $157,414.99 for Plaintiff's one-half interest in a partnership between Plaintiff and Defendant.

Defendant and Plaintiff were the sole partners of Edwards & Lewis, CPAs (the Partnership), a professional certified public accounting practice in Lumberton, North Carolina. Plaintiff and Defendant entered into a partnership agreement (the agreement) on 1 June 1978 that included a provision for the duties of the partners (the Partnership duties):

> Each partner shall devote full working time to [the P]artnership affairs and shall not accept full, or regular parttime, employment from any other source nor engage in any other business other than investment and management of his own funds without first obtaining the agreement of the other party, and notwithstanding such agreement, if the other partner so demands, any and all salaries received thereafter from such employment shall be charged against the pro-rata share of net income to which such employed partner is entitled to receive.

The Partnership was primarily located at 304 East 5th Street in Lumberton (the 5th Street building). The 5th Street building was owned by E&L Rentals, a separate general partnership between Defendant and Plaintiff, from 1985 until 9 July 1999. Tax returns filed by the Partnership indicate the Partnership paid E&L Rentals $2,500.00 per month for rent.

In December 1995, Plaintiff decided he no longer wanted to be actively involved in the Partnership and obtained employment at Ted Parker Home Sales, Inc. (Ted Parker) as its Chief Executive Officer. The parties agreed Defendant would be the managing partner of the Partnership and would be compensated an additional $2,000.00 per week for his increased responsibilities of managing the Partnership. Plaintiff began his employment with Ted Parker on 1 January 1996.

In a letter dated 8 April 1996, Plaintiff informed Defendant of Plaintiff's "intent to dissolve the [P]artnership effective May 1, 1996." Plaintiff also requested Defendant inform him as to whether Defendant intended to continue operating as a sole practitioner and whether Defendant intended to continue utilizing the 5th Street building and the equipment and other assets of the Partnership. In his

response letter dated 26 April 1996, Defendant indicated he would "continue in public accountancy as a sole practitioner" at the 5th Street building.

A year after the date of dissolution of the Partnership Defendant had not formally accounted to Plaintiff for Plaintiff's share in the assets of the Partnership. On 9 May 1997, Plaintiff filed a complaint against Defendant requesting: Defendant be required to account for the Partnership's property and earnings retained by Defendant, as required by the agreement or N.C. Gen. Stat. §§ 59-52 and 59-68(a);[1] Plaintiff recover from Defendant Plaintiff's share of the Partnership's property and earnings; and Plaintiff recover interest, including pre-judgment interest. In Defendant's answer and counterclaim, he denied the allegations of Plaintiff's complaint and counterclaimed for Plaintiff's alleged breach of the Partnership duties, alleged breach of fiduciary duty, violation of the Trade Secrets Protection Act, and unfair and deceptive trade practices. In an amended complaint filed 1 June 1998, Plaintiff sought damages for Defendant's alleged: negligence and breach of the Partnership duties; breach of fiduciary duty; and unfair and deceptive trade practices. Defendant filed an amended counterclaim and answer specifically pleading unclean hands as a defense to Plaintiff's allegations concerning Defendant's breach of fiduciary duty. Defendant also counterclaimed for: a declaratory judgment on Plaintiff's claim for a judicial accounting; unjust enrichment; and interference with prospective economic advantage.

On 21 May 1998, Plaintiff moved for partial summary judgment on Plaintiff's entitlement to an accounting of the Partnership and Defendant's causes of action for an alleged violation of the Trade Secrets Protection Act and alleged unfair and deceptive trade practices. Plaintiff also requested that all other issues be stayed until completion of the accounting. On 7 July 1998, Judge Dexter Brooks (Judge Brooks) granted Plaintiff's motion for summary judgment on Defendant's claim under the Trade Secrets Protection Act and on Defendant's claim for unfair and deceptive trade practices. Judge Brooks further held Plaintiff was entitled to summary judgment on his claim seeking an accounting for the Partnership assets, and all

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1. Although Plaintiff alleged the accounting of the Partnership's assets should occur pursuant to the agreement, the agreement only provides a formula for the accounting of the Partnership upon the withdrawal of one partner and the remaining partner deciding not to dissolve the Partnership. That formula, however, is not applicable in this case because both parties decided to dissolve the Partnership.

other issues should be stayed pending the completion of the accounting of the Partnership.[2]

On 20 July 1998, a hearing began on Plaintiff's claim for an accounting of the Partnership. During the presentation of Defendant's evidence, Judge Stafford G. Bullock (Judge Bullock) found the accounting of the Partnership required "the examination of a long, complicated account" and concluded "that a reference is necessary" to complete the accounting. In an order filed 21 September 1998, Judge Bullock ordered a reference for an accounting of the value of the Partnership as of 1 May 1996.

On 9 and 10 November 1998, the reference hearing was conducted by Robert N. Pulliam (Pulliam), a Certified Public Accountant and Accredited in Business Valuations. Pulliam found as fact:

> 1 The accounting records maintained by the Partnership subsequent to May 1, 1996 are not credible as to accuracy. Billings and collections were commingled by . . . Defendant with his subsequent proprietorship thereby making it impossible to identify separate distinguishable values for accounts receivable and work in process.
>
> . . . .
>
> 4. Intangible assets (goodwill) is agreed to by the parties to have a value of zero.
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> . . . .
>
> 6. . . . The value of the assets, less liabilities of [the Partnership] as of May 1, 1996 is $176,070.52.

Pulliam also found that the methodology for dissolution of the Partnership contained in the agreement was based on a "rule of thumb," more appropriate to "measure the CPA practice operating as a **going concern with measurable goodwill**," which was not applicable in this case. Both parties objected to Pulliam's report and his valuation of the Partnership.[3] In an order filed 11 May 1999, Judge

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2. Defendant did not appeal the order of Judge Brooks granting Plaintiff's motion for summary judgment on: Defendant's Trade Secrets Protection Act claim; Defendant's unfair and deceptive trade practices claim; or Plaintiff's claim seeking an accounting for the Partnership assets.

3. Defendant conceded in oral argument before this Court that he does not quarrel with the value of the Partnership as determined by Pulliam.

Robert F. Floyd, Jr. (Judge Floyd) concluded the value of the Partnership was $176,070.52 as of 1 May 1996 and adopted Pulliam's report, including the methodology used for the valuation of the Partnership.[4] Judge Floyd further concluded:

> Nothing else appearing, Plaintiff would be entitled to receive $88,035.26, plus appropriate interest, on his first claim for relief. However, each party reserves its rights in further proceedings in this matter to prove that he has paid from his individual funds partnership liabilities existing at May 1, 1996, or that the [P]artnership has, since May 1, 1996, paid for the benefit of either party any amount that was not a liability of the Partnership at May 1, 1996, or that any other adjustments are appropriate.

A bench trial was held on the remaining claims of Plaintiff and Defendant on 1-3 November 1999 before Judge William C. Gore, Jr. (Judge Gore). At the trial, Plaintiff presented exhibit 66 which showed Defendant had collected approximately $13,317.65 in payments from JFJ, a client of the Partnership. Plaintiff also presented exhibit 71-A (exhibit 71-A), a computation of the adjusted value of the Partnership and the amounts owed to Plaintiff. Exhibit 71-A adjusted the value of the Partnership, as determined by Pulliam, to include debts paid by the parties after 1 May 1996. Exhibit 71-A included amounts Plaintiff paid for storage of the Partnership's files, amounts paid to Kinlaw Chiropractor, and amounts due to Plaintiff for rental of the 5th Street building. Exhibit 71-A also made adjustments to Plaintiff's interest in the Partnership for disbursements made for the benefit of Plaintiff including amounts paid to: Jean Lamb; E&L Rentals from the Partnership's BB&T account (BB&T); Robesonian from BB&T; E&L Rentals from the Partnership's UCB account; Plaintiff's country club dues; taxes paid for Plaintiff; and insurance paid for Plaintiff. In Plaintiff's exhibit 71-B (exhibit 71-B), Plaintiff made adjustments to exhibit 71-A showing the subtraction of monies paid for rent from E&L Rentals as well as payment on BB&T's line of credit. Exhibit 71-A also adds payments from E&L Rentals.

Defendant's exhibit 109 (exhibit 109) adjusted the value of the Partnership as determined by Pulliam to include distributions for the parties' joint benefit. Defendant added to Plaintiff's one-half interest sums including: E&L Rentals' contribution to "FUNB Bank Principal"; E&L Rentals' contribution to BB&T Note; personal contributions to

4. Plaintiff did not appeal Judge Floyd's order accepting the methodology used by Pulliam for valuation of the Partnership.

BB&T Note; and half the value of the Partnership's furniture, equipment, and supplies. Defendant, however, subtracted from Plaintiff's interest sums including: payments for country club dues; payments for tax filings; payments for insurance; interest on BB&T note; and bank charges.

At the conclusion of trial, Judge Gore entered an order and found as fact, in pertinent part:

> 10. The Court finds that [the Partnership duties] w[ere] modified by the conduct of the parties and that, through that conduct, [Defendant] waived his right to enforce the provisions of the [agreement] relating to outside employment by [Plaintiff]. Specifically, [Plaintiff] and [Defendant] agreed that, beginning January 1, 1996, when [Plaintiff] began his work with Ted Parker, [Defendant] would receive an additional $2,000.00 per week in guaranteed compensation from the . . . Partnership.
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> 11. [Defendant] was in fact paid $2,000 per week for the time period January 1, 1996 through April 30, 1996 from [the] Partnership assets. [Plaintiff's] acceptance of a salary from Ted Parker and his failure to disclose the same to [Defendant] was not a breach of fiduciary duty because of this modification of the . . . [a]greement and the extra compensation paid from the [P]artnership assets to [Defendant].
>
> . . . .
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> 14. [Plaintiff's] leaving to work for Ted Parker, the . . . Partnership's largest client, did adversely affect the . . . Partnership. However, in agreeing to accept $2,000 per week, [Defendant] agreed to this, there is no cause of action based on that conduct and [Defendant] is not entitled to any damages as a result of [Plaintiff's] conduct in leaving to take another job.
>
> . . . .
>
> 20. The Court likewise finds that [Defendant's] mailing statements to the . . . Partnership's clients on his personal letterhead after the date of dissolution was not in good faith, was not in keeping with accepted business practices, and that such conduct also adversely affected the collectability of the . . . Partnership's accounts receivable.
>
> 21. The Court further finds that [Defendant], after the date of dissolution did in fact commingle his private proprietorship

accounting business funds with the funds of the . . . Partnership, which, according to [Pulliam], made a valuation of the . . . Partnership very difficult. The Court further finds that [Defendant's] actions in commingling funds and sending confusing bills to the . . . Partnership's clients did adversely affect the collectability of accounts receivable. The Court cannot assign a number figure to that.

. . . .

24. The Court further finds that [Defendant's] representations to [Pulliam] that the . . . Partnership, as of the date of dissolution, had a negative value of $118,000 to be false, disingenuous, and a violation of his fiduciary duty to the . . . Partnership.

. . . .

26. From 1985 until July 9, 1999, the 5th Street [b]uilding continued to be owned by E&L Rentals. On July 9, 1999, [Defendant] and his wife and Jeff Collins and his wife purchased the 5th Street [b]uilding. During the period from May 1, 1996, through July 9, 1999, [Defendant] . . . continued to use the 5th Street [b]uilding for his own accounting practice. Although the . . . Partnership, according to filed tax returns, paid rent of $2,500 per month on the 5th Street [b]uilding, [Defendant] paid rent of only $1,275 per month. The Court finds that [Defendant's] contention that he should not be required to pay rent based on the same rental value as had been claimed by the . . . Partnership for tax purposes is not equitable, and that [Defendant] is estopped from denying that the amount of rent shown by the . . . Partnership in its tax returns ($2,500[] per month) is not the fair rental value of the 5th Street [b]uilding.

27. The difference between the $2,500 per month rental value paid by the . . . Partnership for the 5th Street [b]uilding and the $1,275.00 per month paid by [Defendant] after May 1, 199[6], is $1,225. [Defendant] paid the lesser amount for 33 months, from May 1, 1996 through January 1999. Thus, the total deficiency for this 3[3] month period is $40,425. [Defendant] did not pay any rent on the 5th Street [b]uilding from February 1999 until July 1999. The total deficiency for this period is $15,000.

. . . .

29. [Defendant] collected $18,000.00 from [the] Partnership client JFJ when approximately that same amount was still owing to the Partnership. [Defendant's] actions were in bad faith and the $18,000.00 should be added to the post-dissolution value of the Partnership, with [Plaintiff] being entitled to one-half (1/2) of that amount.

. . . .

31. The Court finds that [Defendant] continued to use all of the . . . Partnership's assets in the 5th Street [b]uilding. However, [Defendant] did not convert all the assets because [Defendant] did offer [Plaintiff] and indeed requested [Plaintiff] to come to the [P]artnership and help with the winding down of the [P]artnership's affairs.

. . . .

34. [Plaintiff's] contention that he should be reimbursed by the . . . Partnership for storage charges for files and records . . . is a transparent attempt by [Plaintiff] to require [Defendant] to reimburse [Plaintiff] when the money [Plaintiff] actually paid was paid to a corporation of which [Plaintiff] was an officer. . . .

35. The Court finds that the only May 1, 1996 adjustments to be made to [Pulliam's] valuation are the rental amount and the amount collected from JFJ.

Judge Gore concluded: Defendant breached his fiduciary duty and the Partnership duties, but Plaintiff was not entitled to the recovery of damages on these claims; Plaintiff breached the Partnership duties, but Defendant was not entitled to any damages on this claim; Plaintiff breached his fiduciary duty, but Defendant failed to show any compensable damages; and Defendant failed to present any evidence establishing Defendant's entitlement of relief for interference with prospective economic advantage or unjust enrichment.[5] Judge Gore further concluded with respect to Plaintiff's first claim for relief for a judicial accounting pursuant to statute:

A. The value of the . . . Partnership at May 1, 1996 . . . was $176,070.52.

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5. Defendant did not assign error to Judge Gore's conclusions of law concerning Defendant's failure to present evidence establishing entitlement of relief for interference with prospective economic advantage or unjust enrichment.

B. The value of the . . . Partnership as of the dissolution date should be adjusted upward by $18,000.00, representing the amount of money that [Defendant] collected from JFJ and deposited into his sole proprietorship after May 1, 1996. Thus, the value of the Partnership is $194,070.52 and [Plaintiff] is entitled to one-half (1/2) of that amount from [Defendant], which is $97,035.26. Interest at the rate of eight percent (8%) per annum should be added to that amount from May 1, 1996, the date that [Defendant] took control of the Partnership assets and liabilities, until the date of entry of judgment.

C. [Defendant] is also liable to E&L Rentals in the principal sum of $55,425.00 in rent on the 5th Street [b]uilding, in accordance with the rent of $2,500.00 per month previously paid by the . . . Partnership for rent of the 5th Street [b]uilding according to the . . . Partnership's tax returns.

D. [Defendant] is required to pay [Plaintiff] $27,712.50 for the principal amount of his one-half interest in the principal sum that [Defendant] owes in rent for the 5th Street [b]uilding, plus appropriate interest.

The issues are whether: (I) Defendant is entitled to recover damages for Plaintiff's breach of the Partnership duties; (II) the trial court properly calculated the amount of rent Defendant owed to Plaintiff; (III) the trial court properly calculated the amount of payments Defendant received from JFJ; (IV) the trial court erred in awarding pre-judgment interest on the judicial accounting award; and (V) the trial court erred in not considering the parties' adjustments to the value of the Partnership.

"The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings." *In re Foreclosure of C and M Inv.*, 123 N.C. App. 52, 54, 472 S.E.2d 341, 342 (1996), *aff'd in part, rev'd in part*, 346 N.C. 127, 484 S.E.2d 546 (1997).

I

[1] Defendant argues Plaintiff breached the Partnership duties by accepting employment with Ted Parker while still a partner with the Partnership and Defendant therefore is entitled to damages. We disagree.

A modification to a contract occurs if there is mutual assent to the terms of the modification and consideration for the contract. *Altman v. Munns*, 82 N.C. App. 102, 105, 345 S.E.2d 419, 422 (1986). The effect of a modification to a contract is the production of a new agreement. *Yamaha Int'l Corp. v. Parks*, 72 N.C. App. 625, 628, 325 S.E.2d 55, 58 (1985).

In this case, the trial court found the Partnership duties were modified by the parties' conduct and concluded Defendant was not entitled to damages for Plaintiff's breach of the Partnership duties. The evidence in the record shows that in December 1995, after the agreement had been entered into, the parties agreed Defendant would be the managing partner of the Partnership and would receive additional compensation as a result of his increased responsibilities. As there was both assent and consideration (the additional compensation to Defendant), the agreement was modified and a new agreement was produced between the parties. At no time did Defendant object to Plaintiff leaving the Partnership to work for Ted Parker nor did Defendant demand Plaintiff's income from Ted Parker "be charged against the pro-rata share of net income," as required by the agreement. In fact, Defendant accepted the additional $2,000.00 per week as contemplated by the parties. Accordingly, as there is competent evidence to support the finding of fact that the Partnership duties were modified and this finding of fact supports the conclusion of law, there is no error in the trial court's conclusion that Defendant was not entitled to damages for Plaintiff's breach of the Partnership duties.

II

[2] Defendant next argues the trial court erred in awarding Plaintiff rent through the entire month of July 1999 because Defendant obtained ownership of the 5th Street building on 9 July 1999. We agree.

In this case, the trial court found Defendant was liable for rent from 1 February 1999 through July 1999, a six month period, for the sum of $15,000.00 and after adding in additional amounts owed, concluded Defendant "is required to pay [Plaintiff] $27,712.50." The evidence, however, does not support the trial court's finding of fact that Defendant was obligated to pay rent for the entire month of July 1999 because the record shows Defendant obtained ownership of the 5th Street building on 9 July 1999. Accordingly, on remand, the trial court's finding of fact and conclusion of law concerning rent on the

5th Street building must be modified to reflect the rent Defendant owes through 9 July 1999.

III

[3] Defendant further argues the trial court erred in finding Defendant collected $18,000.00 from JFJ. We agree.

In this case, the trial court found Defendant collected $18,000.00 from the Partnership client JFJ and concluded the value of the Partnership should be adjusted to include payments from JFJ. The evidence, however, does not support the trial court's finding of fact that Defendant received $18,000.00 from JFJ; indeed, Plaintiff's exhibit 66 shows Defendant only received approximately $13,317.65 from JFJ. Accordingly, the trial court's finding of fact and conclusion of law concerning money collected from JFJ should be adjusted on remand to conform to the evidence.

IV

[4] Defendant next argues the trial court erred in awarding Plaintiff interest on the judicial accounting award from 1 May 1996, the date the Partnership dissolved and Defendant took control of the assets and liabilities of the Partnership. We disagree.

Generally, all portions of a money judgment, other than in an action for contract and those designated by the fact finder as compensatory damages, "bear[] interest from the date of entry of judgment until the judgment is satisfied." N.C.G.S. § 24-5(b) (Supp. 2000). North Carolina General Statutes § 59-72, however, provides that a retiring partner has the right to receive the value of his interest in the partnership, with interest from the date of dissolution, if the partnership business is continued as set forth in N.C. Gen. Stat. § 59-71, subsections (a), (b), (c), (e), or (f). N.C.G.S. § 59-72 (1999). The partnership business is continued under section 59-71(c) if the partnership is dissolved and the business is continued without liquidation of the partnership affairs. N.C.G.S. § 59-71(c) (1999).

The applicable rule of statutory construction here is that "where one statute deals with a particular subject or situation in specific detail, while another statute deals with the subject in broad, general terms, the particular, specific statute will be construed as controlling, absent a clear legislative intent to the contrary." *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154-55, 423 S.E.2d 747, 751 (1992). Therefore, section 59-72, which specifically deals with inter-

est on an award for judicial accounting, controls over the general statute dealing with interest on judgments. In this case, the business of the Partnership was continued by Defendant without liquidation of the Partnership affairs; thus, Plaintiff was entitled to receive interest on the value of his interest in the Partnership from the date of dissolution. Accordingly, the trial court did not err in awarding Plaintiff interest on the judicial accounting award from 1 May 1996.

V

[5] Defendant's final argument is that the trial court erred in not considering the parties' adjustments to the final valuation. We agree.

In this case, we are unable to determine from Judge Gore's order whether he considered the parties' recommended adjustments to each partner's share of the value of the Partnership. Although Judge Gore found "that the only May 1, 1996 adjustments to be made to [Pulliam's] valuation are the rental amount and the amount collected from JFJ," these adjustments went to the overall value of the Partnership and not to the partner's individual interest in the Partnership. Accordingly, this case must be remanded for consideration of each party's proposed adjustments so as to conform to Judge Floyd's order that each party have the right to "prove that he has paid from his individual funds partnership liabilities existing at May 1, 1996, or that the [P]artnership has, since May 1, 1996, paid for the benefit of either party any amount that was not a liability of the Partnership . . . or that any other adjustments are appropriate." *See Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982) (proper findings of fact require a specific statement of the facts on which the parties' rights are to be determined "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").

[6] In his brief to this Court, Plaintiff cross-assigns error to the trial court's failure to award Plaintiff damages for Defendant's breach of the Partnership duties and breach of fiduciary duty. Plaintiff's arguments concerning its cross-assignments of error are reasons the trial court erred in its findings of fact and conclusions of law and those reasons do not provide "an alternative basis in law for supporting" the judgment as Plaintiff contends. The proper method to raise these arguments would have been by a cross-appeal. *See Williams v. N.C. Dept. of Economic and Community Development*, 119 N.C. App. 535, 539, 458 S.E.2d 750, 753 (1995); *see also* N.C.R. App. P. 10(d).

Accordingly, Plaintiff's failure to appeal the trial court's order waives this Court's consideration of the matter on appeal. *Id.*

Affirmed in part, reversed in part, and remanded.[6]

Judges CAMPBELL and SMITH concur.

OBERLIN CAPITAL, L.P., PLAINTIFF v. EDWARD W. SLAVIN, INDIVIDUALLY, BETTINA K. SLAVIN, INDIVIDUALLY, JOSEPH J. FINN-EGAN, INDIVIDUALLY, JEFFREY A. LIPKIN, INDIVIDUALLY, DEFENDANTS

No. COA00-1111

(Filed 6 November 2001)

1. Corporations— directors—liability to third parties

The trial court properly dismissed claims against defendants Bettina Slavin, Finn-Egan, and Lipkin arising from the failure to disclose information prior to entering a loan agreement where all of the allegations against these defendants were made collectively and solely in their capacity as directors but did not allege sufficient facts of individual participation.

2. Fraud— fraudulent concealment and negligent misrepresentation—loan—opportunity to discover facts

The trial court did not err by granting a Rule 12(b)(6) dismissal of a negligent misrepresentation claim and should have dismissed a fraudulent concealment claim against a corporate director arising from a loan transaction where the complaint failed to allege that plaintiff was denied the opportunity to investigate or that plaintiff could not have learned the true facts by the exercise of reasonable diligence, even though the allegations of this director's personal participation in the alleged wrong were sufficient to allow him to be held directly liable to third parties and to establish a duty to act sufficient for negligence and negligent misrepresentation.

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6. Defendant also assigns error to the trial court's failure to award damages for Plaintiff's breach of fiduciary duty. Defendant's brief to this Court, however, cites no authority in support of his position. Accordingly, we do not address this assignment of error. *See* N.C.R. App. P. 28(b)(5).

3. Civil Procedure— Rule 12(b)(6) motion—consideration of loan agreement—referred to in complaint

The trial court did not err by reviewing a loan agreement when ruling on Rule 12(b)(6) motions where the loan agreement was the subject of the complaint and was specifically referred to in the complaint. A trial court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party.

4. Negligence— loan transaction—opportunity to investigate

The trial court did not err by granting a Rule 12(b)(6) dismissal of a negligence claim arising from a loan transaction where plaintiff failed to allege that it was denied the opportunity to investigate or that it could not have learned the true facts by the exercise of reasonable diligence and the loan agreement referred to plaintiff's experience and investigation of the company receiving the loan.

5. Fiduciary Relationship— loan transaction—corporate director—fiduciary relationship not alleged

The trial court did not err by granting a Rule 12(b)(6) dismissal of a claim for breach of fiduciary duty against a corporate president and director arising from a loan agreement where the complaint did not sufficiently allege a special confidence reposed in the director by plaintiff or the existence of a fiduciary relationship between the parties. Plaintiff did not allege that the loan agreement occurred during a winding up or dissolution of the company and, while the loan agreement gave plaintiff the contractual right to purchase stock in the company at some future date, plaintiff was not a shareholder in the absence of the exercise of that right.

6. Unfair Trade Practices— corporate loan—not in or affecting commerce

The trial court did not err by granting a Rule 12(b)(6) dismissal of an unfair and deceptive trade practices claim arising from a corporate loan agreement where the complaint stated that the purpose of the agreement was to acquire "working capital." Capital raising devices are not in or affecting commerce and are not subject to N.C.G.S. § 75-1.1.

Appeal by plaintiff from order and opinion entered 28 April 2000 by Judge Ben F. Tennille in Wake County Superior Court. Heard in the Court of Appeals 20 August 2001.

Franch Jarashow, Burgmeier & Smith, P.A., by Frank T. Laznovsky, and Smith Debnam Narron Wyche Story & Myers, L.L.P., by Kevin L. Sink, for the plaintiff-appellant.

Bode, Call & Stroupe, L.L.P., by Odes L. Stroupe, Jr. and Christie M. Foppiano, and Roseman & Colin, L.L.P., by Richard L. Farley, for the defendant-appellees.

EAGLES, Chief Judge.

Oberlin Capital, L.P. ("Oberlin") appeals from the trial court's order granting the motions to dismiss of defendants Bettina Slavin, Joseph Finn-Egan, and Jeffrey Lipkin in their entirety and the motion to dismiss of defendant Edward Slavin in part. After a careful review of the record, briefs, and arguments of counsel, we affirm the trial court's dismissal of all claims against defendants Bettina Slavin, Joseph Finn-Egan, and Jeffrey Lipkin; however, as to claims against defendant Edward Slavin, we affirm the trial court in part and reverse in part with the result that all claims against Edward Slavin must be dismissed.

Oberlin's complaint alleges the following facts: Oberlin (creditor) was licensed by the Small Business Administration as a Small Business Investment Company engaged in the business of making subordinated loans to small businesses. Express Parts Warehouse, Inc. ("Express Parts") (debtor) was a North Carolina corporation engaged in the business of selling automotive parts. Defendants Edward Slavin, Bettina Slavin, Finn-Egan, and Lipkin comprised the entire board of directors of Express Parts (defendant Edward Slavin also served as President). In July 1997, Oberlin and Express Parts began negotiations for a loan to provide "working capital" to meet Express Parts' "short term cash flow problem." Negotiations on behalf of Express Parts were conducted exclusively by Edward Slavin, who had the full authorization of the board of directors. On 27 August 1997, Oberlin and Express Parts entered into a loan and security agreement ("loan agreement"), whereby Oberlin agreed to loan Express Parts $1,500,000.00 and Express Parts agreed to give Oberlin the right to purchase stock in the corporation in the future. Each defendant subsequently signed a document entitled "Consent of Directors Action Without Meeting of Express

Parts" ("Consent document") acknowledging their ratification of the agreement.

Prior to entering into the loan agreement, Express Parts purchased assets from another corporation's Chapter 11 bankruptcy estate sale and increased the number of its operating locations from nine to seventy-one. Express Parts purchased these assets only after reaching an agreement with Echlin/Raybestos ("Echlin"), a supplier, in which Echlin agreed to accept parts obtained in the asset purchase and provide a like amount of new parts for sale in Express Parts' expanded locations. Approximately two months before the loan agreement between Oberlin and Express Parts was completed, Echlin breached its agreement with Express Parts. This breach had a material negative impact on Express Parts' financial condition. Oberlin was aware of the Echlin agreement, but not the breach. Conversely, Express Parts was aware of the Echlin agreement and its breach before finalizing the deal with Oberlin, but defendants failed to disclose to Oberlin the information regarding the breach. Ultimately, in January 1998, Express Parts filed a voluntary petition for Chapter 11 bankruptcy reorganization in the United States Bankruptcy Court.

On 29 March 1999, Oberlin filed suit against each defendant individually alleging that they were personally liable for Oberlin's losses incurred in connection with the loan agreement. Oberlin asserted claims against defendants in their individual capacities for fraudulent concealment, negligence, negligent misrepresentation, breach of fiduciary duty, unfair and deceptive trade practices, and punitive damages. Upon motion by defendants, Chief Justice Henry E. Frye designated this case a complex business case and assigned it to the Honorable Ben F. Tennille, Special Superior Court Judge for Complex Business Cases.

Defendants filed motions to dismiss Oberlin's claims pursuant to Rule 12(b)(6) for failure to state a claim. After a hearing on the motions, Judge Tennille entered an order and opinion (1) dismissing all six of Oberlin's claims against Bettina Slavin, Finn-Egan, and Lipkin, (2) dismissing Oberlin's claims for negligence, negligent misrepresentation, breach of fiduciary duty, and unfair and deceptive trade practices against Edward Slavin, (3) denying defendants' motion to dismiss Oberlin's claim for fraudulent concealment against Edward Slavin, and (4) striking from Oberlin's complaint its claim for punitive damages against Edward Slavin but allowing amendment within thirty days for a proper claim. In a separate order, Judge

Tennille certified this matter pursuant to Rule 54 for immediate appeal. Oberlin appeals.

The issue on appeal is whether the trial court erred in granting defendants Bettina Slavin, Finn-Egan, and Lipkin's motions to dismiss in their entirety and Edward Slavin's motion to dismiss in part. Viewing the complaint's allegations in the light most favorable to Oberlin, we affirm the trial court's dismissal of all of Oberlin's claims against Bettina Slavin, Finn-Egan, and Lipkin. However, as against Edward Slavin, we (1) affirm the dismissal of the claims for negligence, negligent misrepresentation, breach of fiduciary duty, and unfair and deceptive trade practices, (2) reverse the denial of the motion to dismiss as to fraudulent concealment, and (3) reverse the trial court's order regarding the punitive damages claim.

The essential question on a motion under Rule 12(b)(6) "is whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any* theory." *Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984), *rev'd on other grounds*, 313 N.C. 565, 330 S.E.2d 600 (1985) (emphasis in original). The trial court must treat the allegations in the complaint as true, *see Hyde v. Abbott Laboratories*, 123 N.C. App. 572, 575, 473 S.E.2d 680, 682 (1996), but the court is not required to accept as true any conclusions of law or unwarranted deductions of fact. *See Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint must be dismissed. *See Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 345-46, 511 S.E.2d 309, 312 (1999).

We note at the outset that the case before us does not include a claim for breach of contract. Five of Oberlin's claims asserted against defendants arise in tort, and one is an unfair and deceptive trade practices claim. In the absence of a claim for breach of contract, this Court is limited to a review of the trial court's disposition of these torts and unfair and deceptive trade practices claims and nothing more.

[1] Generally, the duties of a corporation's directors are provided by G.S. § 55-8-30. These duties include a duty to act in good faith, "[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances," and "[i]n a manner he reasonably believes to be in the best interests of the corporation." G.S. § 55-8-30(a). Directors "may be held personally liable for gross

neglect of their duties, mismanagement, fraud and deceit resulting in loss to a third person, but not for errors of judgment made in good faith." *Milling Co., Inc. v. Sutton*, 9 N.C. App. 181, 184, 175 S.E.2d 746, 748 (1970).

The general rule is that "a director, officer, or agent of a corporation is not, merely by virtue of his office, liable for the torts of the corporation or of other directors, officers, or agents." *Records v. Tape Corp.*, 19 N.C. App. 207, 215, 198 S.E.2d 452, 457 (1973) (quoting 19 C.J.S., Corporations, § 845, pp. 271-72). Ordinarily, "[t]he duties and liabilities of directors . . . run directly to the corporation and indirectly to its shareholders; they do not run to third parties, such as creditors." Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.08 (6th ed. 2000). One exception to this general rule is that "[a] director or other corporate agent can, of course, be held directly liable to an injured third party for a tort personally committed by the director or one in which he participated." Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.08(a); *see also Knitting Mills Co. v. Earle*, 237 N.C. 97, 104, 74 S.E.2d 351, 356 (1953); *Records*, 19 N.C. App. at 215, 198 S.E.2d at 457.

Here, Oberlin failed to allege sufficiently any wrongful action on the part of defendants Bettina Slavin, Finn-Egan, and Lipkin. Every allegation made against these three defendants is made against them collectively and solely in their capacity as directors. The complaint simply alleges in a conclusory manner that "all of the directors of Express Parts" were kept fully apprised and informed by Edward Slavin of the facts surrounding the loan agreement and the Echlin breach. Additionally, the complaint alleges in several places that "all of the directors of Express Parts actively and personally participated in the decision to conceal, fail to disclose and otherwise hide" the facts regarding the Echlin breach. However, the complaint does not clarify how and to what extent these defendants actively and personally participated in the alleged wrongdoing.

"[W]hen the complaint on its face reveals the absence of fact sufficient to make a good claim," dismissal of the claim pursuant to Rule 12(b)(6) is properly granted. *Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986). Having failed to allege sufficient facts of individual participation in any wrongdoing by defendants Bettina Slavin, Finn-Egan, and Lipkin, the facts alleged were insufficient to state a cause of action in tort against these defendants. Accordingly,

the trial court properly dismissed all of Oberlin's claims against Bettina Slavin, Finn-Egan, and Lipkin.

[2] We next address Oberlin's claims as asserted against Edward Slavin individually. Unlike the allegations regarding defendants Bettina Slavin, Finn-Egan, and Lipkin, Oberlin's complaint attributes specific individual actions to Edward Slavin. In fact, the complaint alleges that Edward Slavin was actively involved with Oberlin in the negotiations for the loan agreement; he signed the loan agreement; he was aware of the Echlin breach; he was aware of the material nature of the breach; and he failed to disclose information about the breach to Oberlin. Viewing the allegations in the light most favorable to Oberlin, we conclude that the complaint sufficiently alleges Edward Slavin's personal participation in the alleged wrong. As a result, these allegations are sufficient to fit this case into the exception which allows directors and other corporate agents to be held directly liable to injured third parties for torts that they personally committed. *See* Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.08(a); *see also Knitting Mills Co.*, 237 N.C. 97, 74 S.E.2d 351 (recognizing a cause of action against a corporation's directors brought by a creditor for the fraudulent misrepresentation of the corporation's financial condition). Again, we note that Oberlin did not assert a breach of contract claim against defendants.

Here, Oberlin's claims for fraudulent concealment, negligence, and negligent misrepresentation are all premised on a duty allegedly owed by Edward Slavin to Oberlin. "A cause of action for fraud is based on an affirmative misrepresentation of a material fact, or a failure to disclose a material fact relating to a transaction which the parties had a *duty* to disclose." *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119 (1986) (emphasis added) (citations omitted). "Negligence is the failure to exercise proper care in the performance of a legal *duty* which the defendant owed the plaintiff under the circumstances surrounding them." *Moore v. Moore*, 268 N.C. 110, 112, 150 S.E.2d 75, 77 (1966) (emphasis added). "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a *duty* of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988) (emphasis added).

The trial court concluded that the complaint's allegations established a duty to disclose owed by Edward Slavin sufficient to state a

cause of action for fraudulent concealment. Yet, the court also concluded that the same allegations did not establish a duty owed by Edward Slavin sufficient to support claims for negligence and negligent misrepresentation. "A duty is defined as an 'obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.' " *Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 112, 465 S.E.2d 2, 6 (1995) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 30, at 164 (5th ed. 1984)). A person's "obligation or duty to act may flow from explicit requirements, *i.e.*, statutory or contractual, or may be implied from attendant circumstances." *In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 793, 309 S.E.2d 183, 187 (1983) (emphasis in original).

Here, the loan agreement provided:

> [Express Parts] has fully advised [Oberlin] of all material matters involving [Express Parts'] financial condition, operations, properties or industry that management of [Express Parts] reasonably expects might have a materially adverse effect on [Express Parts]. No representation or warranty given as of the date hereof by [Express Parts] contained in this Agreement . . . or any statement in any document . . . taken as a whole, contains or will . . . contain any untrue statement of a material fact, or omits or will . . . omit to state any material fact that is necessary in order to make the statements contained therein not misleading.

Edward Slavin's duty to act flowed from the language of this agreement. Additionally, the attendant circumstances, Edward Slavin's personal participation in the loan negotiations and his signing the loan agreement, imposed a duty to act upon him. The trial court's conclusion that the complaint's allegations failed to establish a duty owed by Edward Slavin sufficient to state claims for negligence and negligent misrepresentation was error.

Nevertheless, this error was harmless because the trial court had alternative grounds for dismissal. As to Oberlin's claims for fraudulent concealment and negligent misrepresentation, in dealing with either tort, "when the party relying on the false or 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*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313.

Here, Oberlin could have discovered the facts regarding the Echlin breach upon reasonably adequate inquiry. Further, Oberlin's complaint does not allege that it was denied the opportunity to investigate or that it could not have learned the true facts by exercise of reasonable diligence. In fact, the loan agreement states the contrary:

> [Oberlin] has substantial experience in evaluating and investing in private placement transactions of securities in companies similar to [Express Parts] so that [Oberlin] is capable of evaluating the merits and risks of its investment in [Express Parts] and has the capacity to protect its own interests . . . .
>
> . . . .
>
> [Oberlin] has had an opportunity to discuss [Express Parts'] business, management and financial affairs with [Express Parts'] management and the opportunity to review [Express Parts'] facilities. [Oberlin] has also had an opportunity to ask questions of officers of [Express Parts], which were answered to its satisfaction . . . .

Because the complaint fails to allege that Oberlin was denied the opportunity to investigate or that Oberlin could not have learned the true facts by exercise of reasonable diligence, the complaint fails to state causes of action for fraudulent concealment and negligent misrepresentation. Accordingly, we affirm the trial court's dismissal of the negligent misrepresentation claim, but we reverse the denial of the motion to dismiss as to fraudulent concealment and dismiss that claim also.

[3] We acknowledge Oberlin's argument that the trial court improperly reviewed the loan agreement submitted by defendants when ruling on their Rule 12(b)(6) motions. Nevertheless, this Court has stated that a trial court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party. *See Coley v. Bank*, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979). This Court has further held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant. *See Robertson v. Boyd*, 88 N.C. App. 437, 441, 363 S.E.2d 672, 675 (1988). Here, the loan agreement is the subject of Oberlin's complaint

and is specifically referred to in the complaint. Therefore, the trial court did not err in reviewing the loan agreement when ruling on the Rule 12(b)(6) motions.

[4] Turning to Oberlin's negligence claim, we reiterate that "[a] complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Here, too, Oberlin's failure to allege that it was denied the opportunity to investigate or that it could not have learned the true facts by exercise of reasonable diligence, in addition to the language of the loan agreement referring to Oberlin's experience and investigation of Express Parts, defeat its claim. As facts were disclosed that necessarily defeat Oberlin's claim, the trial court did not err in dismissing the claim for negligence.

[5] Next, we address Oberlin's breach of fiduciary duty claim asserted against Edward Slavin. A fiduciary duty " 'exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Stone v. McClam*, 42 N.C. App. 393, 401, 257 S.E.2d 78, 83 (1979) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). "As a general rule, directors of a corporation do not owe a fiduciary duty to creditors of the corporation. *See* [G.S.] § 55-8-30, North Carolina Commentary (expressing the opinion that 'in general no such duty exists')." *Whitley v. Carolina Clinic, Inc.*, 118 N.C. App. 523, 526, 455 S.E.2d 896, 899 (1995). However, a corporate director can breach a fiduciary duty to a creditor if "the transaction at issue [] occur[s] under circumstances amounting to a 'winding-up' or dissolution of the corporation." *Id.* at 528, 455 S.E.2d at 900.

Here, because Oberlin failed to allege that the loan agreement occurred during a "winding up" or dissolution of Express Parts, Oberlin may not avail itself of this exception. Nevertheless, Oberlin contends that its right as a future shareholder, expressed in the loan agreement as the right to purchase stock in Express Parts in the future, created a fiduciary duty here. We are not persuaded. The loan agreement merely gave Oberlin the contractual right to purchase stock in Express Parts at some future date. In the absence of Oberlin actually exercising this right, Oberlin was not a shareholder of Express Parts and no fiduciary duty existed. Simply stated, the complaint does not allege sufficient facts of a special confidence reposed

in Edward Slavin by Oberlin or the existence of a fiduciary relationship between the parties. Consequently, the trial court did not err in dismissing the breach of fiduciary duty claim against Edward Slavin.

[6] We next turn to Oberlin's unfair and deceptive trade practices claim asserted against Edward Slavin. To state a *prima facie* claim for unfair and deceptive trade practices under G.S. § 75-1.1, the plaintiff must show: (1) the defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. *See Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995). "Before a practice can be declared unfair or deceptive, it must first be determined that the practice or conduct which is complained of takes place within the context of [§ 75-1.1's] language pertaining to trade or commerce." *Johnson v. Insurance Co.*, 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980), *overruled on other grounds, Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988).

Here, the complaint states that the purpose of the loan agreement was to acquire " 'working capital' from Oberlin to meet what Express Parts represented to Oberlin was a 'short term cash flow problem.' " Capital-raising devices, like corporate securities and revolving fund certificates, are not " 'in or affecting commerce' and are not subject to [§ 75-1.1]." *HAJMM Co. v. House of Raeford Farms*, 328 N.C. 578, 594-95, 403 S.E.2d 483, 493 (1991). Because the loan agreement at issue here, which also granted Oberlin the right to purchase stock in Express Parts in the future, was primarily a capital-raising device, it was not "in or affecting commerce" for purposes of Chapter 75. Accordingly, the trial court did not err in dismissing the claim for unfair and deceptive trade practices.

Finally, as to Oberlin's punitive damages claim, since there are no surviving claims against Edward Slavin, the punitive damages claim must also be dismissed.

In sum, we affirm the trial court's dismissal of Oberlin's claims against defendants Bettina Slavin, Finn-Egan, and Lipkin. As to defendant Edward Slavin, we affirm in part and reverse in part thus dismissing all claims against him also.

Affirmed as to Bettina Slavin, Joseph Finn-Egan, and Jeffrey Lipkin.

Affirmed in part and reversed in part as to Edward Slavin.

Judges TIMMONS-GOODSON and THOMAS concur.

BARRY W. SEYBOTH, PLAINTIFF-APPELLEE v. ABIGAIL B. SEYBOTH, DEFENDANT-APPELLANT

No. COA00-1160

(Filed 6 November 2001)

Child Support, Custody, and Visitation—visitation—stepparent—*Petersen* analysis required

The trial court erred by awarding visitation rights to plaintiff as to his ex-stepchild based on a best interest analysis without first determining whether defendant engaged in conduct inconsistent with her parental rights and responsibilities. Plaintiff did not adopt his stepchild and now has the status of a nonparent who has standing to sue under N.C.G.S. § 50-13.1(a); however, regardless of how compelling and significant the relationship may be, the trial court could not grant visitation based solely on the best interest analysis.

Appeal by defendant from order denying stay and new trial entered 31 July 2000 by Judge Thomas G. Foster, Jr. in Guilford County District Court. Heard in the Court of Appeals 11 September 2001.

Hatfield & Hatfield, by Kathryn K. Hatfield, for plaintiff-appellee.

Gray, Newell, Johnson & Blackmon, L.L.P., by Angela Newell Gray, for defendant-appellant.

BRYANT, Judge.

This appeal arises out of proceedings in Guilford County District Court in which plaintiff stepparent Barry W. Seyboth was awarded visitation rights as to his ex-stepchild Nicholas David Brown by order dated 5 November 1999. Defendant mother Abigail B. Seyboth moved for a new trial and moved to stay the execution of the order. Both of defendant's motions were denied by order filed 31 July 2000. Defendant appeals.

The material facts of this case are not in dispute. Defendant is the biological mother of Nicholas born 22 August 1993. Nicholas' father died before Nicholas was born. After the natural father's death, defendant and Nicholas lived with members of defendant's family until February 1995, when defendant and plaintiff were married. Following the marriage, Nicholas lived with plaintiff and defendant. Plaintiff and defendant are the biological parents of another child, Gabriel W. Seyboth, who is not the subject of this action.

During the marriage, Nicholas referred to plaintiff as his "daddy" even though Nicholas was aware that his natural father predeceased him. The trial court found:

> The Plaintiff has taken on the role of father to the child. The Defendant has allowed and encouraged the Plaintiff to assume the position of father to the child and at no time told him that it was a temporary position. On recent occasions when the child was in distress, he called for "Daddy" along with other relatives to whom he is strongly bonded.

Although plaintiff discussed the issue of adoption with defendant, plaintiff chose not to adopt Nicholas.

Plaintiff and defendant separated on 16 May 1998 and were divorced approximately one year later. Initially, plaintiff regularly visited with Nicholas during the separation. Beginning in August 1998, however, plaintiff's visits with Nicholas ceased. The parties' testimony differed as to why visitation ended. After the divorce, defendant was awarded custody of both Nicholas and Gabriel. Plaintiff was awarded visitation rights with Gabriel, but not with Nicholas.

Plaintiff filed a complaint on 23 August 1999 seeking visitation rights with Nicholas. The trial court found that both plaintiff and defendant were "fit and proper persons to have custody and visitation with [Nicholas]." The trial court also found that to deny plaintiff visitation rights would be to "interfere with the natural stability of the home which was established by the Plaintiff and Defendant together when they permitted Nicholas to bond with the Plaintiff as his father."

The trial court went on to find that it was in Nicholas' best interest for him to have ongoing visitation with plaintiff. The trial court then ordered that plaintiff have visitation rights with Nicholas on certain weekends, holidays, birthdays, and during parts of each summer.

Defendant assigns error to the trial court's granting of plaintiff's visitation with Nicholas by order filed 5 November 1999, and the trial court's denial of defendant's motion to stay and motion for a new trial by order filed 31 July 2000. The record does not reflect that defendant gave notice of appeal from the 5 November 1999 order, therefore, any assignment of error or argument pertaining to that order is not properly before this Court. *See* N.C.R. App. P. 3 (2001); N.C.R. App. P. 10 (2001). *See also 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.' " (citations omitted)).

Notwithstanding the lack of proper notice of appeal, this Court will consider defendant's assignment of error to the 5 November 1999 order as a petition for *writ of certiorari*. Having determined defendant's petition has merit, this Court will exercise its discretion and grant *certiorari* to review the first assignment of error pursuant to N.C.R. App. P. 21 (2001). *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (concluding "that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner").

The dispositive issue in this case is whether the trial court properly determined that allowing the plaintiff stepparent visitation rights would be in the best interest of his ex-stepchild. Based on the following reasons, this Court finds that the trial court improperly granted visitation. The matter is reversed and remanded to the trial court with instructions.

> In a child custody case, the trial court's findings of fact are binding on this Court if they are supported by competent evidence, and its conclusions of law must be supported by its findings of fact. . . . *And the findings and conclusions of the trial court must comport with our case law regarding child custody matters.*

Cantrell v. Wishon, 141 N.C. App. 340, 342, 540 S.E.2d 804, 805-06 (2000) (emphasis added) (citation omitted).

We initially note that plaintiff has standing to sue for visitation rights pursuant to N.C.G.S. § 50-13.1(a) (2000). N.C.G.S. § 50-13.1(a) provides: "Any parent, relative, or *other person* [nonparent] . . . claim-

ing the right to custody of a minor child may institute an action or proceeding for the custody of such child . . . . Unless a contrary intent is clear, the word 'custody' shall be deemed to include custody or visitation or both." (emphasis added). In addition, the person claiming standing must show he has a relationship with the child. *See Ellison v. Ramos*, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894, *rev. denied by* 349 N.C. 356, 517 S.E.2d 891 (1998) (stating that to assume standing in a child custody dispute, a third party must have a relationship sufficient to show that the third party is not a stranger to the child).

For the purposes of our child custody analysis in the case at bar, plaintiff stepparent assumes the status of a nonparent as he did not adopt Nicholas. *See Black's Law Dictionary* 1137 (7th ed. 1999), ("The term [parent] commonly includes (1) either the natural father or the natural mother . . . (2) *the adoptive father or adoptive mother* . . . (3) a child's putative blood parent who has expressly acknowledged paternity, and (4) an individual or agency whose status as guardian has been established by judicial decree.") (emphasis added). *See, e.g.*, cases using terms parent and natural parent interchangeably. *Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (2001); *Brewer v. Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000); *In re Gwaltney*, 68 N.C. App. 686, 315 S.E.2d 750 (1984).

The seminal case in our state regarding custody and visitation rights of parents versus nonparents is *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). In *Petersen*, the Supreme Court of North Carolina noted this state's long-standing tradition of recognizing "the paramount right of parents to [the] custody, care, and nurture of their children . . . ." *Petersen*, 337 N.C. at 402, 445 S.E.2d at 904. *Petersen* explicitly rejected the notion that a nonparent merely had to overcome a "higher evidentiary standard" in order to obtain child custody. *Id.* The Court also rejected the argument that "the welfare of the child is paramount to all common law preferential rights of the parents." *Id.* Ultimately, the *Petersen* Court formulated the following test in determining custody rights of a natural parent versus a nonparent: "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to [the] custody, care, and control of their children must prevail." *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905.

In *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), our Supreme Court refined the test enunciated in *Petersen*. The *Price* Court considered, in a child custody dispute between a parent and a

nonparent, whether application of the best interest of the child analysis was limited to situations where the parent acted inconsistently with their rights as a parent.

In *Price*, the Court expanded upon the rights and responsibilities of natural parents and stated:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. *If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause.* However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in the application of the "best interest of the child" test without offending the Due Process Clause.

Price, 346 N.C. at 79, 484 S.E.2d at 534 (emphasis added) (citations omitted). Accordingly, only after the trier of fact has found the parent has acted in a manner inconsistent with his or her protected status may application of the best interest of the child test be appropriate.

This Court has on several occasions applied the rules stated in *Petersen* and *Price* to custody cases between parents and nonparents. *See Speagle v. Seitz*, 141 N.C. App. 534, 537, 541 S.E.2d 188, 190 (2000), *stay allowed by*, 353 N.C. 381, 546 S.E.2d 609, and *rev. allowed, writ allowed, and appeal dismissed by* 353 N.C. 381, 547 S.E.2d 415 (2001) (reversing the trial court's award of custody to a third party because the trial court applied the best interest test without first determining whether the parent's conduct had any negative impact on the child or had a substantial risk of causing the child harm); *Cantrell*, 141 N.C. App. at 344, 540 S.E.2d at 807 (ruling there were insufficient facts to support the trial court's conclusion that the mother acted inconsistently with her constitutionally protected status); *Brewer*, 139 N.C. App. at 232, 533 S.E.2d at 549 (holding that "a parent who voluntarily gave custody to the other parent and has never been adjudged unfit does not lose her *Peterson*

presumption against a non-parent third party so long as the non-parent third party does not have court-ordered custody."); *Penland v. Harris*, 135 N.C. App. 359, 362, 520 S.E.2d 105, 107 (1999) ("a third party . . . who seeks custody of a minor child as against the child's natural parent, must allege facts sufficient to show that the natural parent has acted in a manner inconsistent with his or her constitutionally protected status.").

In the case *sub judice*, the trial court erred in applying the best interest of the child analysis without first determining whether defendant engaged in conduct inconsistent with her parental rights and responsibilities. Defendant, as the natural mother of the child, possesses a constitutionally protected paramount interest in the companionship, custody, care, and control of her child and is presumptively entitled to custody of her natural child. *See Price*, 346 N.C. at 79, 484 S.E.2d at 534. The trial court should have applied the best interest of the child test only if it found defendant acted inconsistently with her status as the natural mother. *See id.*

We note that other states vary as to what test should apply when deciding custody disputes between a parent and a stepparent. *See, e.g., In re Ewing*, 96 Idaho 424, 529 P.2d 1296 (1974) (stating that although there existed a presumption that a natural parent should have custody of the child, the stepfather was properly awarded custody after the natural mother's death); *Com. ex rel. Husack v. Husack*, 273 Pa. Super. Ct. 192, 417 A.2d 233 (1979) (finding that in granting custody to the stepmother instead of the natural father, the primary consideration was the best interests of the children). *See generally* Mary E. Wright-Hunt, *Equating a Stepparent's Rights and Liabilities Vis-a-Vis Custody Visitation and Support Upon Dissolution of the Marriage with Those of the Natural Parent-An Equitable Solution to a Growing Dilemma?*, 17 N.C. Cent. L.J. 1 (1988); Wendy Evans Lehmann, J.D., Annotation, *Award of Custody of Child Where Contest is Between Natural Parent and Steparent*, 10 A.L.R. 4th 767 (1981).

Our case law as enunciated in *Peterson* and refined by *Price*, however, is very clear. Regardless of the compelling and significant relationship between the stepfather and ex-stepchild in the case *sub judice*, the trial court could not grant the stepfather visitation solely based on the best interest analysis.

This matter is reversed and remanded with instructions for the trial court to allow the parties the opportunity to offer new evidence.

Thereafter, the trial court should make findings of fact regarding whether defendant acted inconsistently with her rights as a natural parent. If so, then the court should determine if it is in the best interest of the child for the plaintiff to have visitation rights. *See Price*, 346 N.C. at 84, 484 S.E.2d at 537 ("The . . . case is remanded to the Court of Appeals for further remand to District Court . . . for a determination of whether defendant's conduct was inconsistent with the constitutionally protected status of a natural parent. If so, then the court should determine custody based on the 'best interest of the child' standard . . . ."); *Cantrell*, 141 N.C. App. at 344, 540 S.E.2d at 807 ("As in *Price*, we remand this case to the district court to make findings of fact on whether the mother acted inconsistently with her constitutionally protected status, and if so, to then apply the 'best interests of the child' test to determine which party should have custody of the children.").

Having reversed and remanded this matter to the trial court, we find that it is unnecessary to address defendant's second assignment of error concerning the denial of the motion to stay and motion for a new trial.

REVERSED and REMANDED.

Judges GREENE and CAMPBELL concur.

STATE OF NORTH CAROLINA v. CINDY HAMMER STEVENSON BARBER

No. COA00-895

(Filed 6 November 2001)

1. Appeal and Error— invited error—request to publish exhibit to jury—reference to polygraph

A first-degree murder defendant waived her right to object to the failure to redact a reference to a polygraph from one of the exhibits where defendant requested that the exhibit be published to the jury even though the court warned that it was not properly redacted. If admission of this evidence was error, it was invited error.

2. Constitutional Law— due process—State's failure to disclose exculpatory evidence—prejudicial

The State violated a first-degree murders defendant's due process rights by failing to disclose cellular telephone records to defendant until after the trial where the trial court found that the records merely corroborated other evidence, but the records also lent crucial support to a witness whose credibility was questioned by the State. Given the court's finding at the motion for appropriate relief hearing that "very little additional evidence" could have changed the verdict and the jury's obvious difficulties in resolving the issues, it cannot be said that the State's failure to disclose exculpatory evidence did not create a reasonable probability of a different verdict.

Appeal by defendant from judgment entered 23 November 1999 by Judge Melzer A. Morgan, Jr., in Alexander County Superior Court. Heard in the Court of Appeals 13 August 2001.

Attorney General Roy Cooper, by Assistant Attorney General T. Brooks Skinner, Jr., for the State.

Marjorie S. Canaday for defendant appellant.

TIMMONS-GOODSON, Judge.

On 23 November 1999, a jury found Cindy Hammer Stevenson Barber ("defendant") guilty of first-degree murder in the death of her husband, Tony Charles Stevenson ("decedent"). Evidence at trial tended to show the following: On the evening of 31 January 1996, defendant telephoned 911 emergency assistance and informed the dispatcher that decedent had shot himself. Responding to the call, Alexander County Sheriff's Sergeant Arthur Duncan ("Sergeant Duncan") arrived at defendant's residence, where he discovered decedent lying in a recliner in the living room. Decedent was turned on his left side in the recliner, which was in a horizontal position. Decedent held a .380 semi-automatic pistol loosely in his left hand with the barrel pointing towards his head, which was covered in blood on the right side. As Sergeant Duncan approached him, decedent was gasping, looking at the gun, and jerking his hand. Sergeant Duncan immediately seized decedent's wrist and removed the weapon, which was loaded and in a cocked position. Sergeant Duncan observed cupcakes on the floor of the living room, and defendant explained that she had been frosting cupcakes for her daughter's birthday when decedent

shot himself. Upon further inspection of the residence, Sergeant Duncan discovered the seven-year-old son of defendant and decedent asleep in bed. No one else was in the home. While Sergeant Duncan secured the residence, defendant remained on the telephone with the emergency dispatcher. Defendant was visibly upset and "doing a lot of yelling and cussing." Emergency medical technicians soon arrived and removed decedent's body.

Dr. John M. Bauer ("Dr. Bauer"), the pathologist who performed decedent's autopsy, testified for the State. Dr. Bauer stated that he found a close contact gunshot wound to decedent's right temple, about an inch above and in front of the right ear. The track of the bullet was from right to left, straight and slightly downward at five degrees. According to Dr. Bauer, the wound was almost immediately fatal, and decedent would have had no motor control of his extremities or any bodily function after the bullet entered decedent's brain.

Linda Cox ("Cox"), a friend of decedent and defendant, testified that she hosted a party attended by defendant and decedent approximately six months before decedent's death. Cox stated that defendant and decedent arrived and departed from the party separately, and that decedent appeared to be "pretty upset" and "kind of mad." Cox also noted that defendant flirted with several men at the party, and that decedent consumed an excessive amount of alcohol.

Steve Fox ("Fox"), decedent's cousin, further testified on behalf of the State. Fox stated that he was also present at Cox's party, when defendant approached him and asked him whether he would kill decedent for her. According to Fox, who was "shocked" and declined defendant's request, defendant appeared to be "aggravated and mad" at the time. Fox did not know whether or not defendant was joking when she made her request. Fox later observed defendant leaving the party with Ricky Speaks, who testified that he and defendant engaged in sexual intercourse later that evening.

Several witnesses for the State testified as to decedent's actions and general state of mind on the days leading up to his death. Andrew Stevenson ("Stevenson"), decedent's brother, recalled a telephone conversation he had with decedent on 28 January 1996, in which decedent told Stevenson he was considering moving to Florida, where Stevenson resided. Stevenson testified that he offered "to let [decedent] move down, bring [defendant] down, bring [their children] and move in [Stevenson's] home and get a job and

start over from scratch, a whole new life." Decedent also spoke with Stevenson of his frustration with defendant and her drug addiction.

Amy Pennell ("Pennell"), a friend of defendant, testified that on the evening of decedent's death, she telephoned decedent at his residence several times and informed him that she planned to take out a warrant for his arrest for communicating threats against her. Pennell explained that she had been "drinking a lot" when she called decedent. Pennell could not remember her exact words to decedent, nor could she recall, beyond the fact that it was nighttime, the times at which she called. Pennell stated that she continued to call decedent, who responded by "hanging up on [her]."

The State presented further expert testimony by SBI Agent Peter Duane Deaver ("Agent Deaver"). Agent Deaver, an expert in blood stain pattern analysis and firearms, testified that, in order to restore a .380 semi-automatic pistol to a cocked position, one must maintain a strong grip on the weapon. Agent Deaver further stated that the type of blood spatter found on decedent's gun rarely occurs in cases of self-inflicted wounds. Finally, Agent Deaver testified that the bloodstains on decedent's recliner were inconsistent with the reported position of decedent's body in the chair.

Defendant presented evidence at trial tending to show the following: On 23 January 1996, decedent visited his physician, Dr. Alan Forshey ("Dr. Forshey"), in order to obtain a refill for Xanax, a prescribed medication decedent took in order to manage his substance abuse problems. Decedent had previously informed Dr. Forshey that "as long as [decedent] took the Xanax he could stay off of alcohol and . . . be pleasant and less angry." Dr. Forshey testified that decedent had an "addictive personality," with a history of depression, tendinitis and hypertension, and that during the consultation, decedent told Dr. Forshey "[defendant] had left him approximately in November . . . . [and decedent] had four children to raise and that he was working two different jobs." Decedent further informed Dr. Forshey he had not taken his medication for a month, and that he was drinking alcohol in the evenings.

Defendant presented testimony by William S. Best ("Best"), a firearms expert, who demonstrated several positions in which decedent could have shot himself in the right temple with his left hand without difficulty. Best also characterized defendant's theory that traces of blood may be found inside the barrel of a weapon due to the

partial vacuum created whenever a gun is fired as "a very reasonable explanation."

Defendant also presented evidence by several witnesses of decedent's actions and demeanor before his death. Edward Jennings ("Jennings"), decedent's attorney, testified that decedent and defendant consulted him at his office on 30 January 1996 regarding some traffic citations issued to decedent. According to Jennings, defendant was "very supportive" of decedent, who appeared "depressed and somewhat despondent" over the citations. Gary Harrington ("Harrington"), decedent's co-worker, testified that decedent was prone to "dramatic mood swings" and became "really depressed" when he consumed alcohol. On the day he died, decedent told Harrington that "he wasn't going back to jail for nobody [sic] and that he'd shoot his self [sic] if he had to." Finally, decedent's friend Michael Caldwell ("Caldwell"), testified that he spoke with decedent on the night of his death. Decedent was upset and threatening suicide, telling Caldwell, "I'm not going back to prison. I'll blow my brains out, but I'm not going back to prison." Caldwell also stated that decedent generally carried a gun. Defendant did not testify.

The jury began deliberations on Friday afternoon. On Monday afternoon, the jury informed the court that it was deadlocked on a vote of nine to three, with no movement. The following morning, the Tuesday before the Thanksgiving holiday, two jury members reported deaths of immediate family members. The jury refused the court's offer of a morning break from deliberations, however, informing the court that it could reach a verdict if granted five more minutes. Shortly thereafter, the jury returned its verdict, finding defendant guilty of first-degree murder in the death of her husband. Accordingly, the trial court sentenced defendant to life imprisonment without parole. Thereafter, defendant filed a motion for appropriate relief, which the trial court denied. Defendant now appeals her conviction and the denial of her motion for appropriate relief to this Court.

While presenting nine assignments of error for our review, the dispositive issues are whether the trial court committed reversible error in failing to redact a reference to defendant's polygraph examination contained in an exhibit tendered to the jury and denying defendant's motion for a mistrial.

[1] Defendant first argues the trial court erred in failing to redact a reference to a polygraph examination contained in one of the exhibits

tendered to the jury. At the beginning of defendant's trial, the court granted the State's motion *in limine* to prohibit any reference to a polygraph test administered to defendant by law enforcement officers, the results of which were favorable to defendant. In publishing the typed report of defendant's 2 April 1996 statement to the jury, however, the State failed to redact the following sentence: "Details of the polygraph examination conducted by SA J. L. Jones will be dictated to this file by SA J. L. Jones." Defendant now contends that this sentence may have given the jury the false and prejudicial impression that defendant had failed a polygraph examination.

We note that defendant did not object to admission of the evidence at trial, nor to its submission to the jury. In fact, defendant requested that the exhibit be published to the jury, although the trial court warned that "there was a part of the defendant's statement that was not properly redacted." The trial court further advised both parties to "[u]nderstand that once you've sent these exhibits out, if later on you discover that there was something in them that wasn't supposed to come in . . . you each have waived that."

North Carolina General Statutes section 15A-1443(c) states that "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443 (c) (1999). Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review. *See State v. Roseboro*, 344 N.C. 364, 373, 474 S.E.2d 314, 318 (1996). In the instant case, defendant requested that the exhibit containing the polygraph evidence be submitted to the jury, despite explicit warnings by the trial court that defendant's statement had not been properly redacted. Thus, if the admission of such evidence to the jury was error, it was invited error, and defendant has therefore waived her right to appellate review of this issue. We overrule defendant's first assignment of error.

[2] Defendant next argues the trial court erred by denying defendant's motion for a mistrial based on evidence of cellular phone records first disclosed to defendant by the State after her trial. Citing *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), defendant contends the State's failure to reveal the phone records violated defendant's due process rights and asserts that, had the phone records been introduced at trial, there is a reasonable probability that the result of the trial would have been different. *See State v. Campbell*, 133 N.C. App. 531, 541, 515 S.E.2d 732, 739, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). At the hearing on de-

fendant's motion for appropriate relief, the trial court found that, although the phone records were exculpatory and unavailable to defendant, they were ultimately immaterial because they merely corroborated other evidence. The trial court therefore denied defendant's motion. We conclude that the State's failure to disclose the phone records was error which prejudiced defendant, thereby entitling her to a new trial.

The cellular phone records at issue reveal that, on the night of decedent's death, Amy Pennell repeatedly telephoned decedent's residence, making two calls at 9:54 p.m. and 9:55 p.m., and six more calls between 1:49 a.m. and 2:41 a.m following decedent's death. Defendant argues these phone records were exculpatory, in that they bolstered Pennell's testimony that she threatened decedent with arrest shortly before his death. Such evidence in turn supported defendant's assertions at trial that decedent killed himself because he was despondent and agitated at the thought of returning to prison. The State concedes it should have disclosed the cellular phone records to defendant, but nevertheless argues that the records merely corroborated other testimony and therefore did not prejudice defendant. We cannot agree.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218. Prejudicial error is determined by examining the materiality of the evidence. *See State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993). Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different. *See id.* at 605-06, 433 S.E.2d at 744. Reasonable probability is "a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985).

At trial, Pennell could only recall that "it was dark" and "nighttime" when she telephoned decedent on the evening of his death. On cross-examination, Pennell agreed that she began telephoning decedent between 9:00 p.m. and 12:00 a.m., but could remember no further details of the calls. Defendant telephoned for emergency assistance at approximately 11:00 p.m. Although the State never directly contradicted Pennell's assertion that she spoke with decedent the night of his death, the State did cast general aspersions upon Pennell's credibility. Referring to Pennell in its closing argument, the State advised

the jury to "consider who these folks are and what they're telling you," adding that, "[i]t's your jobs to determine who's telling you the truth." Furthermore, Chief Deputy Bentley testified that he did not know whether or not his office had ever received the cellular phone records, but that he could "not recall" having ever seen them. Thus, because the phone records show the exact times and duration of Pennell's calls, they were not merely corroborative, but lend crucial factual support to somewhat nebulous testimony by a witness whose credibility was questioned by the State.

At defendant's motion for appropriate relief hearing, the trial court found that "this case could have also resulted in a jury verdict of not guilty. It would have taken very little additional evidence to result in the jury returning a verdict of not guilty." Moreover, in her offer of proof, defendant submitted affidavits from two jurors confirming that, had the phone records been introduced at trial, it "would have" and "could have" affected the verdict. Given the court's finding that "very little additional evidence" could have changed the verdict and the jury's obvious difficulties in resolving the issues, we cannot say that the State's failure to disclose exculpatory evidence did not create a reasonable probability of a different verdict. Accordingly, the evidence was material to defendant.

The State's failure to turn over evidence to defendant that was both favorable and material does not guarantee defendant a new trial, unless the failure was prejudicial to defendant. *See State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983). A violation of defendant's constitutional rights is prejudicial unless this Court "finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (1999).

We have determined that cellular phone records held by the State were both favorable and material to defendant, thereby violating defendant's constitutional right to have the evidence. *See State v. McGill*, 141 N.C. App. 98, 103-04, 539 S.E.2d 351, 356 (2000). The State has the burden of showing the error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b). The State has failed to meet such burden, and defendant is therefore entitled to a new trial.

We have carefully considered defendant's remaining assignments of error and find them to be without merit. Because of the State's failure to disclose exculpatory evidence to defendant, we hold defendant is entitled to a new trial.

New trial.

Chief Judge EAGLES and Judge THOMAS concur.

STATE OF NORTH CAROLINA v. JOHN HENRY STITT

No. COA00-1063

(Filed 6 November 2001)

1. Criminal Law–continuance to examine withheld evidence— denied–intangible hope of exculpatory evidence–insufficient

The trial court did not abuse its discretion by denying a continuance for defendant to examine evidence withheld by the State (a hat) after granting a motion in limine to exclude the hat. Defendant's intangible hope, not based on known facts, that an inspection of the hat would provide exculpatory evidence is insufficient to warrant reversal.

2. Discovery— testimony about excluded evidence— permissible

The trial court did not err in a cocaine prosecution by allowing testimony about the hat in which the cocaine was found after excluding the hat because the State had failed to produce it during discovery. The decision of whether to impose sanctions and which sanctions to impose is within the sound discretion of the trial court. Presuming that defendant realized that he had lost his hat while escaping, he must have known that the charge against him could only have resulted from discovery of the cocaine in the hat, and he had ample reason to know that the hat was an integral part of the incident and that the deputy would likely testify about the hat. The court's decision not to sanction the State by prohibiting that testimony was not an abuse of discretion. N.C.G.S. § 15A-910.

3. Evidence— SBI admission sheet—discrepancy in date

The trial court did not err in a cocaine prosecution by admitting an SBI lab report where defendant was alleged to have possessed the narcotics on 23 October 1998 and the SBI admission sheet referred to narcotics obtained on 28 October 1998. Any

inconsistency went to the credibility of the evidence and not to its admissibility.

4. Evidence— redirect examination—scope—detail not elicited on direct or cross

The court did not abuse its discretion in a cocaine prosecution by allowing on redirect examination certain testimony which defendant contended was beyond the scope of direct or cross-examination. The trial judge has the discretion to permit relevant evidence which could have been brought out on direct examination; in this case, the subject of the redirect examination was an additional detail about an incident which had been addressed in depth during direct and cross-examination.

5. Appeal and Error— preservation of issues—no citation to authority—case of first impression

An assignment of error was not deemed abandoned where defendant did not cite authority in support of his argument because there was no such authority. It was sufficient that defendant stated an argument; otherwise, the ability of parties to bring cases of first impression would be inhibited.

6. Sentencing— habitual felon—admission of prior plea transcripts

There was no error in the admission of prior plea transcripts in the habitual felon phase of a trial where the transcripts were admitted only after defendant's conviction of the principal crimes. Defendant failed to explain how the admission of the transcripts confused the jury or created prejudice in such a way as to affect their verdict.

7. Evidence— cocaine—deputy's opinion—lab report subsequently admitted

There was no prejudice in a cocaine prosecution in the admission of a deputy's opinion that he found in defendant's hat a substance which he thought was crack cocaine where a lab report identifying the substance as cocaine was properly admitted.

Appeal by defendant from judgments entered 31 March 2000 by Judge Sanford L. Steelman, Jr. in Union County Superior Court. Heard in the Court of Appeals 17 September 2001.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John P. Barkley, for the State.

Bobby Khan for defendant-appellant.

HUNTER, Judge.

John Henry Stitt ("defendant") was charged and convicted of one count of felony possession of a Schedule II controlled substance (cocaine), one count of resisting a public officer, and one count of being an habitual felon. Defendant received a prison sentence of 144 to 182 months for the two felony charges, and a sentence of sixty days for the misdemeanor offense of resisting a public officer. Defendant appeals from judgments entered against him on 31 March 2000. We hold there was no error at trial.

The evidence tended to establish the following facts. On 23 October 1998, defendant was walking on Spring Hill Drive in Union County at some time after midnight. Deputy Bill Shaw of the Union County Sheriff's Office was sitting in his patrol car when he saw defendant. Deputy Shaw was aware that there was an outstanding warrant for defendant's arrest, and therefore got out of his car and directed defendant to "come to the car." Defendant complied and walked to the patrol car. At that time, defendant was wearing a light blue ball cap with a "dark blue bill" and a "UNC Ram, Tar Heel emblem on it." Deputy Shaw ordered defendant to place his hands on the car, and as Deputy Shaw began to place handcuffs on defendant, defendant broke away and started running. Deputy Shaw chased after defendant and, while chasing him, observed defendant fall and then get up and continue running. Deputy Shaw also fell when he reached the same spot, tripping over a go-cart. Upon falling to the ground, Deputy Shaw noticed defendant's hat on the ground, but when he got up he continued to chase defendant. When Deputy Shaw saw defendant disappear into the woods, he stopped chasing defendant, returned to where they had both fallen, and picked up defendant's hat. He discovered a small, off-yellow, rock substance in the hat at that time, which he took to his car and placed in an evidence bag. Deputy Shaw wrote the date, 23 October 1998, on the evidence bag. However, when the evidence bag was sent to the State Bureau of Investigation ("SBI"), Deputy Shaw mistakenly wrote the date 28 October 1998 on the SBI submission sheet accompanying the evidence bag. The SBI performed a chemical analysis on the substance and determined that it was cocaine.

The pertinent procedural history is as follows. Prior to trial, on 13 July 1999, defendant filed a "Request for Voluntary Discovery," requesting the State to produce all discoverable materials pursuant to N.C. Gen. Stat. §§ 15A-902(a) and 15A-903 (1999), including "[a]ny physical evidence" and "[a]ny tangible objects, such as . . . personal property possessed by Defendant." On 29 March 2000, the day before trial, the State notified defendant for the first time that it was in possession of defendant's hat. Defendant filed a "Motion to Continue" asking the court for additional time in order to inspect the hat and to prepare for trial. Defendant also filed a "Motion in Limine" asking the court to exclude the hat as evidence. The trial court conducted a hearing and found that the State had failed to produce the hat during discovery without justification. The trial court granted defendant's motion in limine and ordered that the hat would be inadmissible as evidence; however, the court denied defendant's motion to continue.

[1] On appeal, defendant presents six assignments of error, accompanied by six corresponding arguments, for our review. Defendant has abandoned a seventh assignment of error by failing to present it in his brief. *See* N.C.R. App. P. 28(a). Defendant first argues that the trial court erred in denying his motion to continue. Generally, a trial court's ruling on a motion to continue will not be reversed absent an abuse of discretion. *See State v. Brooks*, 83 N.C. App. 179, 183, 349 S.E.2d 630, 633 (1986). Defendant argues that the trial court's denial of his motion to continue constitutes an abuse of discretion because it deprived him of an opportunity to inspect the hat for exculpatory evidence. However, a continuance is proper in such circumstances only "if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts," whereas "a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial." *State v. Pollock*, 56 N.C. App. 692, 693-94, 289 S.E.2d 588, 589, *appeal dismissed and disc. review denied*, 305 N.C. 590, 292 S.E.2d 573 (1982). Defendant's intangible hope, not based on known facts, that an inspection of the hat would provide exculpatory evidence is insufficient to warrant a reversal here.

Moreover, the trial court was not obligated to grant defendant's motion to continue as a result of the State's failure to produce the hat during discovery. In response to the State's failure to produce the hat, the trial court prohibited the State from introducing the hat in evidence at trial. This remedy is one of the permissible remedies set

forth in N.C. Gen. Stat. § 15A-910 (1999), and "[t]he choice of sanction, if any, rests within the discretion of the trial court." *State v. Browning*, 321 N.C. 535, 539, 364 S.E.2d 376, 378 (1988). Defendant has failed to demonstrate any abuse of discretion by the trial court in choosing to grant the motion in limine and deny the motion to continue. This assignment of error is overruled.

[2] Defendant next argues that the trial court erred by allowing Deputy Shaw to refer to the hat at trial because such testimony violated the trial court's order granting defendant's motion in limine. We disagree. In the first place, the trial court's order provided only that the hat itself would not be admissible in evidence, and did not prohibit the State from offering testimony regarding the hat. Nor was it error for the trial court to refuse to sanction the State by prohibiting any testimony regarding the hat. As noted above, the decision of whether to impose sanctions pursuant to N.C. Gen. Stat. § 15A-910, and which sanctions to impose, is within the sound discretion of the trial court and is not reviewable on appeal absent an abuse of discretion. *See State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988). Here, presuming that defendant realized that he had lost his hat while escaping from Deputy Shaw on 23 October 1998, defendant must have known that the charge against him—that he possessed a controlled substance on that date—could only have resulted from Deputy Shaw discovering the cocaine in his hat. Thus, defendant had ample reason to know from the outset that the hat was an integral part of the incident and that Deputy Shaw would likely testify about the hat at trial. The court's decision not to sanction the State by prohibiting testimony about the hat was therefore not an abuse of discretion. This assignment of error is overruled.

[3] Defendant next argues that the trial court erred by admitting in evidence the SBI lab report, identifying the substance as cocaine, because there is a variance between the allegation that defendant possessed the substance on 23 October 1998, and the SBI submission sheet which refers to narcotics obtained on 28 October 1998. Defendant argues that, because of the variance between the date of the alleged offense and the date on the SBI submission sheet, the SBI lab report should have been excluded from evidence because it "bears no relevance to an offense occurring on October 23, 1998." Defendant also states in his brief that his argument "does not depend on the chain of custody," but relates only to the relevance of the SBI lab report and its admissibility.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. We believe the SBI lab report was "relevant evidence" and was properly admitted. Deputy Shaw testified: that he found the substance in defendant's hat and placed it in a clear evidence bag and sealed the bag; that he wrote the date of the offense, 23 October 1998, on the evidence bag, and then inadvertently wrote the date 28 October 1998 on the SBI submission sheet because the "3" on the evidence bag looked like an "8"; that he sent the evidence bag to the SBI on 11 January 1999 in an envelope with his initials; and that the evidence was in his sole care, custody and control between the time he found the substance and the time he sent it to the SBI. Special Agent Irvin Lee Allcox of the SBI Crime Laboratory in Raleigh testified as an expert witness to the following: that the sealed evidence bag containing the evidence was received by the SBI on 14 January 1999 and was analyzed on 15 January 1999; that the chemist who analyzed the evidence prepared a lab report, and the results of the analysis showed the substance to be a free-base form of cocaine, commonly referred to as "crack cocaine"; and that the evidence was then placed back in the evidence bag which was sealed and returned to the Union County Sheriff's Office.

We do not believe that the date on the SBI submission sheet has the effect of creating a variance between the charged offense and the evidence presented at trial. Rather, the date on the submission sheet merely amounts to an *inconsistency* in the evidence presented at trial. The State offered a reasonable explanation for the inconsistency in the evidence, and the jury was entitled to accept or reject that explanation. *See State v. Upright*, 72 N.C. App. 94, 100, 323 S.E.2d 479, 484 (1984) (holding that inconsistency in the evidence goes to credibility of the evidence and that it is within province of jury to determine weight to be accorded the evidence), *disc. review denied*, 313 N.C. 513, 329 S.E.2d 400, *cert. denied*, 313 N.C. 610, 332 S.E.2d 82 (1985). We hold that the SBI submission sheet constituted relevant evidence and was properly admitted, and that any inconsistency in the evidence went to the credibility of the evidence and not to its admissibility. This assignment of error is overruled.

[4] By his fourth assignment of error, defendant argues that the trial court erred by allowing certain testimony to be elicited by the State on redirect examination of Deputy Shaw. Specifically, defendant argues that Deputy Shaw was not questioned on either direct or

cross-examination regarding the duration of time that elapsed between the time that Deputy Shaw stopped chasing defendant and the time that he picked up defendant's hat. Thus, defendant argues, the court erred in overruling defendant's objection to the following question put to Deputy Shaw by the State on redirect examination: "How much time passed between the time that you got to that tree line and . . . turned around and came back?" After the court overruled defendant's objection, Deputy Shaw responded, "[m]aybe three minutes at the most." This redirect examination was not erroneous. "Although the rule is that redirect examination cannot be used to repeat direct testimony or to introduce an entirely new matter, the trial judge has discretion to permit counsel to introduce relevant evidence which could have been, but was not brought out on direct." *State v. Locklear*, 60 N.C. App. 428, 430, 298 S.E.2d 766, 767 (1983). There was no abuse of that discretion here where the subject of the redirect examination simply involved an additional detail about the incident in question, and where the incident had already been addressed in depth during direct and cross-examination. This assignment of error is overruled.

[5] By his next assignment of error, defendant argues that the trial court erred by allowing into evidence during the habitual felon phase of the trial three "transcript of plea" forms relating to defendant's three prior felony convictions. Defendant argues that the transcripts contained irrelevant and highly prejudicial information about defendant's criminal history, which information created unfair prejudice in the minds of the jurors and should have been excluded pursuant to Rule 403 of the North Carolina Rules of Evidence. *See* N.C.R. Evid. 403 ("Rule 403"). The State in its brief argues only that defendant's assignment of error should be deemed abandoned pursuant to Rule 28(b)(5) of the Rules of Appellate Procedure as a result of defendant's failure to cite any authority. *See* N.C.R. App. P. 28(b)(5) ("Rule 28(b)(5)").

We first note that the State's reading of Rule 28(b)(5) has previously been rejected by this Court. Rule 28(b)(5) states, in pertinent part, "[a]ssignments 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." This rule sets out two scenarios in which an assignment of error may be deemed abandoned: (1) where it is not set out in the appellant's brief, or (2) where no reason or argument is stated or authority cited in support of the assignment of error. *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 567, 500 S.E.2d

752, 755, *disc. review denied*, 349 N.C. 240, 514 S.E.2d 274 (1998). "The first requires the party to direct the court to the appropriate assignment of error in the record and the second requires the party to cite authority *or* to make a legal argument for the extension or modification of the law." *Id.* at 567-68, 500 S.E.2d at 755 (emphasis added). The State's interpretation of the rule, that an assignment of error is necessarily deemed abandoned if no authority is cited, cannot be endorsed because it "would inhibit the ability of parties to bring cases of first impression before the appellate courts." *Id.* at 568, 500 S.E.2d at 755.

Here, our research indicates that there is no existing authority directly supporting defendant's argument that certain information, appearing in the transcript of plea forms admitted during the habitual felon phase, was prejudicial to defendant and should have been excluded by the trial court pursuant to Rule 403. For this reason, defendant's failure to cite authority in support of this proposition does not result in abandonment of the assignment of error. It is sufficient that defendant has stated an argument, especially since defendant has properly cited to the rule that he would have us extend to this context, namely Rule 403.

[6] However, we find the assignment of error to be without merit. Section 14-7.5 of our General Statutes requires that "an habitual felon trial be held subsequent and separate from the principal felony trial, and that an habitual felon indictment be revealed to the jury *only* upon conviction of the principal felony offenses." *State v. Wilson*, 139 N.C. App. 544, 548, 533 S.E.2d 865, 868, *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000); *see* N.C. Gen. Stat. § 14-7.5 (1999). As this Court has previously explained,

> the bifurcated procedure set forth in G.S. § 14-7.5, separating the principal felony trial from the habitual felon proceeding, *avoids possible prejudice to the defendant and confusion by the jury* considering the principal felony with issues not pertinent to guilt or innocence of such offense, notably the existence of the prior convictions necessary for classification as an habitual felon, and further precludes the jury from contemplating what punishment might be imposed were defendant convicted of the principal felony and subsequently adjudicated an habitual felon.

Wilson, 139 N.C. App. at 548, 533 S.E.2d at 868-69 (emphasis added) (citing *State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985)).

Here, the plea transcripts in question were admitted only after defendant was convicted of the offenses of felony possession of cocaine and resisting a public officer. Moreover, "[i]n all cases where a person is charged . . . with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, *but only for the purpose of proving that said person has been convicted of former felony offenses.*" N.C. Gen. Stat. § 14-7.4 (1999) (emphasis added). Defendant has failed to explain how the admission of prior plea transcripts during the habitual felon phase of the trial could have created prejudice or confused the jury in such a way as to affect the jury's verdict on whether defendant had been convicted of certain former felony offenses. This assignment of error is overruled.

[7] In his final argument, defendant contends that the State failed to lay a proper foundation for the admission of Deputy Shaw's testimony identifying the substance found in defendant's hat as cocaine. The testimony in question consisted of Deputy Shaw's statement that he found "[a]n off yellow rock substance which [he] *thought* to be a cocaine, crack cocaine." (Emphasis added.) The trial court overruled defendant's objection to this testimony. Defendant acknowledges that this assignment of error has merit only if it is first determined that the SBI lab report, identifying the substance as cocaine, should have been excluded from evidence. This is because, if the SBI evidence was properly admitted, there is no reasonable possibility that the admission of Deputy Shaw's statement affected the outcome of the trial, since such testimony would be merely cumulative of the SBI evidence. *See* N.C. Gen. Stat. § 15A-1443(a) (1999); *State v. Jones*, 329 N.C. 254, 259, 404 S.E.2d 835, 837 (1991). Since we have determined that the SBI lab report was properly admitted, this assignment of error is without merit and is overruled.

No error.

Chief Judge EAGLES and Judge HUDSON concur.

LYNDOLA J. BARBER, PLAINTIFF-APPELLANT v. THE PRESBYTERIAN HOSPITAL, A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT-APPELLEE

No. COA00-1384

(Filed 6 November 2001)

1. **Premises Liability— step-down—duty to warn—hidden dangerous condition—directed verdict**

The trial court erred in a negligence action by granting a directed verdict under N.C.G.S § 1A-1, Rule 50 in favor of defendant hospital based on its conclusion that the hospital did not have a duty to warn plaintiff about the step-down on the other side of a door in the hospital where plaintiff fell and was injured while looking straight ahead rather than down at her feet, because: (1) the evidence taken in the light most favorable to plaintiff could reasonably support a jury's conclusion that the hospital had a hidden dangerous condition on its premises; (2) plaintiff's view was obstructed and even if she had been looking down, she would not have seen the step-down until the door was opened and she was passing through it; and (3) the question of the reasonableness of plaintiff's actions, as well as the question of whether defendant was negligent, are both properly answered by a jury.

2. **Premises Liability— contributory negligence—reasonable behavior—directed verdict**

The trial court erred in a negligence action by granting a directed verdict under N.C.G.S § 1A-1, Rule 50 in favor of defendant hospital based on plaintiff's alleged contributory negligence when she fell and was injured at defendant hospital, because the question of whether plaintiff behaved reasonably by looking straight ahead as she pushed the bar on the door and proceeded through the doorway is one for the jury.

Appeal by plaintiff from judgment entered 9 May 2000 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 September 2001.

Law Offices of Michael J. Bednarik, P.A., by Michael J. Bednarik, for plaintiff appellant.

Cozen and O'Connor, by Anna Daly, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff Lyndola J. Barber instituted this action for negligence against The Presbyterian Hospital (Hospital), located in Charlotte, North Carolina. The evidence at trial showed the following: On 4 October 1994, plaintiff took her husband to the Hospital for outpatient treatment. While she waited for the procedure to conclude, plaintiff decided to eat in the Hospital cafeteria. The cafeteria was closed, but plaintiff was directed to the Hospital coffee shop. Plaintiff made her way through the main hallway of the Hospital, through a door leading to a stairwell, down the stairs, and then through another door which exited the stairwell area.

The door leading out of the stairwell had a push bar attached to it, which plaintiff pushed with both hands to open the door. As plaintiff pushed the door open, she looked straight ahead and stepped through the doorway. Plaintiff did not realize that there was a step-down immediately on the other side of the door. As she stepped forward with her left foot to go through the door, she lost her balance and fell forward; she also twisted her left ankle and landed heavily on her left knee. Plaintiff's kneecap was fractured, and she was placed in a soft cast and given crutches. Plaintiff also underwent physical therapy for approximately two months.

There was no warning sign of the step-down immediately on the other side of the doorway. There were also no painted lines, warning signs, or any indicators which showed that there was a step-down in that area. On the day in question, the doorway and step-down were in good repair and free of debris. Additionally, the area was well lit, and there were no obstructions to plaintiff's line of sight.

On 14 July 1997, plaintiff sued the Hospital for negligence and requested reimbursement of her medical and physical therapy bills, as well as compensation for pain and suffering, permanent injury to her knee, and lost wages. Plaintiff's case proceeded to a trial by jury at the 1 May 2000 Session of Mecklenburg County Superior Court. After plaintiff rested, defendant moved for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a) (1999). The trial court granted defendant's motion, and dismissed plaintiff's case with prejudice. Plaintiff appealed.

[1] On appeal, plaintiff contends that the trial court erred in granting defendant's motion for a directed verdict because she presented sufficient evidence of negligence for her case to be decided by a

jury. For the reasons set forth, we agree with plaintiff's arguments and hold that the trial court erred in granting a directed verdict for defendant.

Motion for a Directed Verdict

A motion for a directed verdict by a defendant pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a) "tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977). To determine whether a directed verdict is warranted, "the trial court must consider the evidence in the light most favorable to the non-moving party, giving it the benefit of all reasonable inferences to be drawn therefrom, and resolving all conflicts in the evidence in its favor." *Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 273, 488 S.E.2d 617, 619, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 408 (1997). *See also Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E.2d 245 (1979).

We are cognizant that

> [o]nly in exceptional cases is it appropriate to enter a directed verdict against a plaintiff in a negligence case. In negligence cases, summary adjudication is normally inappropriate due to the fact that the test of the reasonably prudent person is one which the jury must apply in deciding the questions at issue.

Carter, 127 N.C. App. at 274, 488 S.E.2d at 619 (citations omitted). Moreover,

> [w]here the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided. If the jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b), provided he is convinced the evidence was insufficient. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial. *See* Comment, G.S. 1A-1, Rule 50 (1969); 5A Moore's Federal Practice § 50.14 (2d ed. 1975).

Manganello, 291 N.C. at 669-70, 231 S.E.2d at 680.

Because plaintiff's case arises in negligence, her evidence must prove a *prima facie* case in order to survive a motion to dismiss; that is, she must prove that "[1] defendant owed her a duty of care; [2] defendant breached that duty; [3] the breach was the actual and proximate cause of plaintiff's injury; and [4] damages resulted from the injury." *Frendlich v. Vaughan's Foods*, 64 N.C. App. 332, 335, 307 S.E.2d 412, 414 (1983).

The North Carolina Supreme Court recently eliminated the distinction between a licensee and an invitee with regard to the legal duty owed by the landowner to each, and instead adopted the "pillar of modern tort theory: negligence." *Nelson v. Freeland*, 349 N.C. 615, 633, 507 S.E.2d 882, 893 (1998), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). In *Nelson*, the Supreme Court stated:

> In so holding, we note that we do not hold that owners and occupiers of land are now insurers of their premises. Moreover, we do not intend for owners and occupiers of land to undergo unwarranted burdens in maintaining their premises. Rather, we impose upon them only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.

Id. at 632, 507 S.E.2d at 892. Case law has interpreted "reasonable care" to mean that a landowner must not unnecessarily expose a lawful visitor to danger, and the landowner must also give warning of hidden conditions and dangers of which the landowner has express or implied notice. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981). We now turn to the step-down at the Hospital and consider whether the Hospital had a duty to warn, or whether the step-down was an obvious condition.

In granting defendant's motion for a directed verdict, the trial court made the following findings of fact:

> That this step-down is at an entrance or an exit of a building wherein there is a door. There is not evidence that the step has [sic] not in good repair. There is evidence to show that it's in plain view. There is no evidence to show that there was inadequate lighting, or that it was wet, or that it was slippery. There is no evidence of any obstruction, from plaintiff's viewpoint, as she entered the doorway and stepped off the step, so as the step is unlevel or that its rise is uneven.

THE COURT, THEREFORE, GRANTS THE MOTION FOR DIRECTED VERDICT, IN FAVOR OF THE DEFENDANT.

Plaintiff argues that she was unfamiliar with the layout of the Hospital and had never gone down the staircase and through the doorway in question. She maintains that the step-down was a hidden danger that could not be perceived until the door was open and she was stepping through it. It is undisputed that there were no warnings to alert her to the fact that immediately on the other side of the door was a step-down, and plaintiff testified that she was looking straight ahead and could not see the step-down until she began moving through the door:

Q. What happens, as you first open the door?

A. First open the door, it's a drop off.

Q. Did you know that, when you were going down the stairs, towards that door?

A. No.

Q. Did you know it, when you opened the door?

A. No.

Q. Was there anything telling you or warning you to watch out for that step down?

A. No.

Q. Was the area at the base of the doorway painted a different color, from the rest of the floor?

A. No.

Q. Was there anything that gave you any indication that there was a step down, immediately outside that door?

A. No.

Q. Now, which way does the door open? Does it open from your left-to-right or right-to-left?

A. It opens from my left to my right.

Q. And, as you push the door, did you then walk through?

A. Yes.

Q. And, what happened?

A. When I started through, I stepped out with my left foot. And, my foot went down, because there wasn't anything there. And, as it hit the ground, it twisted and I went down on my knee. I went down on my knee.

Plaintiff contends that this evidence, taken in the light most favorable to her, could reasonably support a jury's conclusion that the Hospital had a hidden dangerous condition on its premises. We agree.

The Hospital, on the other hand, contends it was not required to notify plaintiff of the step-down, because there is no duty to warn of a condition that an ordinarily intelligent person would have seen. *Frendlich*, 64 N.C. App. at 337, 307 S.E.2d at 415. The Hospital argues a step-down is such a common, universal architectural method that it constitutes an open and obvious condition of which there is no duty to warn. The Hospital notes that plaintiff presented no evidence of any debris or obstructions at the stairwell, door or step-down, and there was adequate lighting in place. There is also no evidence of any other accidents at that location. Plaintiff simply did not look down, but instead looked straight ahead and stepped at her own peril.

North Carolina case law is replete with negligence cases involving falls on business properties. For example, in *Yates v. Haley*, 103 N.C. App. 604, 406 S.E.2d 659 (1991), a plaintiff making his way past booths in a McDonald's restaurant slipped and fell in a puddle of water approximately three to five feet from the restaurant's bathroom. *Id.* at 607, 406 S.E.2d at 661. Plaintiff testified that he did not see the puddle because he was looking straight ahead, rather than down at the floor. This Court found a jury issue, stating that the jury could reasonably infer from plaintiff's testimony that his view of the puddle could have been obstructed by a rear booth. *Id.*

Similarly, in the present case, plaintiff's view of the step-down was obstructed by the door. Plaintiff was looking straight ahead, rather than down at her feet, as was the plaintiff in *Yates*. Indeed, plaintiff's view was more obstructed, because even if she had been looking down, she would not have seen the step-down until the door was opened and she was passing through it. We believe the question of the reasonableness of plaintiff's actions, as well as the question of whether defendant was negligent, are both properly answered by a jury. As such, the trial court was in no position to grant a directed verdict in favor of either party.

We also deem plaintiff's case distinguishable from cases such as *Grady v. Penney Co.*, 260 N.C. 745, 133 S.E.2d 678 (1963). In *Grady*, the plaintiff got directions to a dressing room, but did not follow the directions correctly. *Id.* at 747, 133 S.E.2d at 679. She opened a curtain, took two steps inside, then fell down a flight of steps. *Id.* Plaintiff testified that she had shopped at that particular store in the past, and admitted that she could have seen the steps had she looked. *Id.* Our Supreme Court upheld nonsuit in favor of the defendant, based partly on the fact that the plaintiff had gone through the curtain and taken two steps before falling, and because "the stair was in plain view and [plaintiff] was entering the landing at floor level." *Id.* at 748, 133 S.E.2d at 680. In the present case, plaintiff did not take any steps before falling down, and the step-down was not in plain view until after she opened the door.

Defendant cites a number of cases in support of its contention that the step-down was an obvious condition. For example, in *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E.2d 461 (1959), plaintiff fell while exiting defendant's store in a downtown shopping district. *Id.* at 153, 108 S.E.2d at 463. The concrete sidewalk outside the store sloped to the south, and had a six-inch drop-off at one point. Plaintiff fell because she did not see the drop-off near the entryway. *Id.* at 153-54, 108 S.E.2d at 463-64. Plaintiff claimed the sloping sidewalk was an optical illusion and a latent defect of which defendant should have warned her. The Supreme Court allowed nonsuit for defendant because " '[t]he mere fact that a step up or down, or a flight of steps up or down, is maintained at the entrance or exit of a building is no evidence of negligence, if the step is in good repair and in plain view.' " *Id.* at 159, 108 S.E.2d at 467 (quoting *Hollenbaek v. Clemmer*, 66 Wash. 565, 566, 119 P. 1114, 1114, 37 L.R.A. (N.S.) 698 (1912)).

We agree with our Supreme Court that the use of steps is negligent only when by the steps' character, location or surrounding conditions, a reasonably prudent person would not be likely to see the step or expect it. *Harrison v. Williams*, 260 N.C. 392, 395, 132 S.E.2d 869, 871 (1963). Because the step-down in this case was visible only after the door was opened, we hold that plaintiff's evidence is sufficient to present a jury question regarding whether defendant was negligent. Thus, the trial court's grant of a directed verdict to defendant was improper and is hereby reversed.

Contributory Negligence

[2] Plaintiff also maintains she is entitled to argue on appeal that she was not contributorily negligent, because it is unclear from the trial court's findings of fact whether it granted defendant's motion for a directed verdict based on defendant's negligence, her contributory negligence, or both. Defendant argues that plaintiff's evidence clearly establishes her own negligence, such that there is no other reasonable inference or conclusion to be drawn.

The standard of review for contributory negligence was set out by the Supreme Court in *Norwood*:

> The basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for her own safety. The question is not whether a reasonably prudent person would have seen the platform had he or she looked but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.

Norwood, 303 N.C. at 468, 279 S.E.2d at 563.

> With respect to contributory negligence as a matter of law, "[t]he general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge." *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E.2d 506 (1976); *accord*, *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E.2d 789 (1973).

Rappaport, 296 N.C. at 384, 250 S.E.2d at 247.

Plaintiff testified that she looked straight ahead as she pushed the bar on the door and proceeded through the doorway. Defendant maintains that all of plaintiff's evidence points to her contributory negligence as a matter of law. It is not for us to say whether plaintiff behaved reasonably. We believe that "[r]easonable men may differ as to whether plaintiff was negligent at all . . . . What would any reasonably prudent person have done under the same or similar circumstances? Only a jury may answer that question . . . ." *Rappaport*, 296 N.C. at 387, 250 S.E.2d at 249.

Based on the foregoing, we hold that the trial court erred in granting a directed verdict for defendant. Consequently, plaintiff is entitled to a

New trial.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. ALVIN LEWIS KINCAID, SR.

No. COA00-1210

(Filed 6 November 2001)

1. **Search and Seizure— traffic stop—suspicion of revoked license—reasonable**

The trial court did not err by refusing to suppress marijuana seized from a vehicle where defendant contended that the seizure was the result of an illegal stop. The officer testified that he understood that defendant's license had been revoked, that he had never seen defendant drive an automobile in the two or three years he had known him, and that defendant had attempted to conceal his identity when he saw the officer. Although the officer's suspicion that defendant had a revoked license was incorrect, he had a reasonable suspicion based on articulated and specific facts. Under this combination of circumstances, the stop was legal.

2. **Search and Seizure— traffic stop—initial grounds no longer valid—voluntary additional questioning—no coercive action**

The trial court did not err by refusing to suppress marijuana seized after a traffic stop which was based upon suspicion of driving with a revoked license where defendant contended that the officer no longer had grounds to detain defendant after the officer returned defendant's license and registration. While it is true that the initial reasonable suspicion evaporated, the officer was neither prohibited from asking if defendant would consent to additional questioning nor prohibited from questioning defendant after receiving his consent. There was no coercive action by the officer; he was the only officer present, he spoke to defendant in

a regular tone of voice, even addressing him on a first-name basis, and defendant had been allowed to enter a near-by convenience store and buy a soft drink during the license check.

3. Search and Seizure— Fourth Amendment seizure—consensual encounter—volunteered information

There was no Fourth Amendment seizure where an officer recognized defendant, stopped him on suspicion of driving with a revoked license, asked defendant if he could ask some questions after defendant's license proved valid, and defendant volunteered that there was marijuana in the car upon being asked for consent to a search of the car. There was only a consensual encounter from the time defendant consented to additional questioning until the officer began searching the car, and the volunteered information gave the officer probable cause to search the vehicle.

4. Confessions and Incriminating Statements—traffic stop—marijuana in car—volunteered statement

There was no error in the trial court's refusal to suppress marijuana seized from a car after a traffic stop based on the failure to advise defendant of his Miranda rights where defendant was free to leave and the officer was simply conducting a consensual questioning. Defendant knowingly volunteered his statements.

Appeal by defendant from judgment dated 27 March 2000 by Judge Dennis J. Winner in Superior Court, Buncombe County. Heard in the Court of Appeals 12 September 2001.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler and Agency Legal Specialist Kathy Jean Moore, for the State.

Howard C. McGlohon for defendant-appellant.

McGEE, Judge.

Alvin Lewis Kincaid, Sr. (defendant) was indicted on 7 February 2000 for possession with intent to sell or deliver a controlled substance Schedule IV, maintaining a place to keep controlled substances, and two counts of being a habitual felon. Defendant filed a motion to suppress the evidence against him on 21 February 2000, stating he reserved the right to appeal if the motion was denied and he subsequently entered a guilty plea. At a hearing held on 20 March

2000, defendant's motion to suppress was denied. Defendant pled guilty to the charges and was sentenced to seventy to ninety-three months in prison. Defendant appeals from the denial of his motion to suppress.

The State presented as evidence the testimony of Sergeant Timothy B. Splain of the Asheville Police Department, the arresting officer, and his written statement prepared the night of defendant's arrest. This evidence tended to show that Sergeant Splain was driving on Montford Avenue in Asheville, North Carolina on 17 September 1999, when defendant drove past him. When defendant passed Sergeant Splain, defendant quickly looked away and raised his hand in an apparent attempt to conceal his face. Sergeant Splain testified he knew defendant's license had been revoked for two to three years. In the time Sergeant Splain had known defendant, he had seen defendant travel either as a passenger in a car or riding a moped, but never driving a car. Sergeant Splain followed defendant for a short distance. The officer stopped defendant and told him he had been stopped because Sergeant Splain suspected defendant had a revoked license. Defendant produced a license and gave it to the officer. Sergeant Splain allowed defendant to enter a convenience store while Sergeant Splain ran a check on the license. The license check showed the license was valid, and Sergeant Splain returned the license and registration to defendant.

Sergeant Splain then asked if he could question defendant concerning another matter. Defendant consented. Sergeant Splain explained that he had heard defendant routinely sold marijuana. He asked, "Alvin, I am going to ask you for consent to search your vehicle for drugs, do you have anything on you or in the car that I need to be concerned with?" Defendant looked down at the front seat and answered that there was marijuana under the front seat. Sergeant Splain retrieved a small bag containing marijuana from under the front seat of defendant's car. Sergeant Splain then radioed for a K-9 unit to search for more drugs, but defendant answered, "you don't need the dog, there is more under the other seat." After Sergeant Splain recovered more marijuana under the other seat, he placed defendant under arrest.

Defendant testified and substantiated Sergeant Splain's testimony up to the point where Sergeant Splain asked defendant if he had anything the officer should know about. Defendant testified he answered no, and that Sergeant Splain patted him down. Defendant testified that Sergeant Splain searched his vehicle without his consent,

radioed for a K-9 unit, was told they did not have one available, and then returned and continued searching the car without defendant's consent. Defendant denies ever saying there was marijuana under the seat.

At the suppression hearing, the trial court adopted Sergeant Splain's statement in the trial court's findings of fact and made the following conclusions of law: the officer had reasonable suspicion to stop defendant, even though the suspicion proved to be wrong; although the officer never told defendant he was free to leave, under the Fourth Amendment defendant was free to leave after the officer returned the license and registration; and even though the officer did not receive consent to search the vehicle, defendant's responses gave the officer probable cause to believe a crime had been committed. Therefore, the trial court concluded the stop and search were reasonable.

I.

[1] Defendant first argues the trial court erred in denying his motion to suppress evidence because Sergeant Splain made an illegal stop of defendant's vehicle.

A "trial court's findings of fact following a suppression hearing concerning the search of the defendant's vehicle are conclusive and binding on the appellate courts when supported by competent evidence." *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994). However, a trial court's conclusions of law regarding whether the officer had reasonable suspicion to detain a defendant is reviewable *de novo*. *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001) (citing *Brooks* at 141, 446 S.E.2d at 585).

The "Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person." *California v. Hodari D.*, 499 U.S. 621, 624, 113 L. Ed. 2d 690, 696 (1991). These seizures include "brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). An "investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *Id.* (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). To determine whether this reasonable suspicion exists, a court "must consider 'the totality of the circumstances—the whole picture.' " *Watkins* at 441, 446 S.E.2d at 70 (quot-

ing *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

> The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch."

Watkins at 441-42, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)) (other citations omitted).

In the case before us, Sergeant Splain testified that "[i]t was [his] understanding that [defendant's] licenses were revoked. And in the two or three years that [he] had known [defendant] [he] had never seen him drive an automobile." He further testified that he had only seen defendant ride in a car as a passenger or ride a moped. He also testified that defendant attempted to conceal his identity when he saw Sergeant Splain. Although the officer's suspicion turned out to be incorrect, we nonetheless hold that under this combination of circumstances, Sergeant Splain had a reasonable suspicion to stop defendant based on articulated and specific facts; therefore, the stop by Sergeant Splain was legal. We overrule this assignment of error.

II.

[2] Defendant next argues the trial court erred in dismissing his motion to suppress evidence because Sergeant Splain no longer had grounds to detain defendant after the officer returned defendant's license and registration. Defendant contends any reasonable suspicion the officer may have had evaporated after Sergeant Splain learned defendant had a valid license. He also contends he was still being detained after the officer returned the license and registration but did not tell defendant he was free to leave.

The " 'scope of the detention must be carefully tailored to its underlying justification.' " *State v. Morocco*, 99 N.C. App. 421, 427-28, 393 S.E.2d 545, 549 (1990) (quoting *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983)). In the case before us, the officer's underlying justification was to determine if defendant was driving with a valid license. His scope of detention must be tailored to ascertaining whether the license was in fact revoked. Defendant is correct in asserting the reasonable suspicion the officer had in order to stop

defendant for a possible revoked license would not be sufficient to detain defendant any longer than necessary to dispel the officer's suspicion. However, once Sergeant Splain determined defendant had a valid license, he returned the license and registration to defendant.

Although there is no North Carolina case law which specifically states a stop is over when an officer returns a person's license and registration, there is federal case law which suggests, subject to a totality of the circumstances test, that once an officer returns the license and registration, the stop is over and the person is free to leave. In *United States v. Elliott*, 107 F.3d 810 (10th Cir. 1997), the Tenth Circuit Court of Appeals stated that our federal courts

> have consistently concluded that an officer must return a driver's documentation before a detention can end. However, . . . this is not always sufficient to demonstrate that an encounter has become consensual. . . . [T]he return of a driver's documents would not end the detention if there was evidence of a "coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled."

Id. at 814 (quoting *United States v. Turner*, 928 F.2d 956, 959 (10th Cir.), *cert. denied*, 502 U.S. 881, 116 L. Ed. 2d 187 (1991)). Furthermore, "the return of documentation would render a subsequent encounter consensual only if 'a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information.' " *Elliott* at 814 (quoting *United States v. McKneely*, 6 F.3d 1447, 1451 (10th Cir. 1993)).

In the case before us, Sergeant Splain returned defendant's documentation. There is no evidence of any coercive action on the part of the officer. While defendant was being "detained," he was allowed by Sergeant Splain to enter the convenience store and buy a soft drink. Sergeant Splain was the only officer present, and he spoke to defendant in a regular tone of voice, even addressing him on a first-name basis. He asked defendant if he could question defendant about another matter, and defendant consented.

These facts are similar to *Morocco*, where after "returning to the defendant his driver's license and vehicle identification papers as well as the citation, [the officer] requested permission to search the defendant's vehicle for contraband." *Morocco* at 428, 393 S.E.2d at

549. The defendant in *Morocco* consented. Our Court then moved to the next stage of the analysis to determine whether the defendant's consent was valid or the product of coercion. Implied in *Morocco* is that the initial seizure concluded upon the return of the license. While in the case before us the trial court found defendant did not consent to the search, he did consent to additional questioning by the officer. A reasonable person, under the circumstances, would have felt free to leave when the documents were returned. Therefore, the first seizure concluded when Sergeant Splain returned the documents to defendant. While it is true the initial reasonable suspicion evaporated, Sergeant Splain was neither prohibited from simply asking if defendant would consent to additional questioning, nor was the officer prohibited from questioning defendant after receiving his consent.

[3] Next, we must determine whether there was a second Fourth Amendment seizure. Our Supreme Court has held

> police officers may approach individuals in public to ask them questions and even request consent to search their belongings, so long as a reasonable person would understand that he or she could refuse to cooperate. "A seizure does not occur simply because a police officer approaches an individual and asks a few questions." Such encounters are consensual and no reasonable suspicion is necessary. The test for determining whether a seizure has occurred is whether under the totality of the circumstances a reasonable person would feel that he was not free to decline the officer's request or otherwise terminate the encounter.

Brooks at 142, 446 S.E.2d at 585-86 (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991)) (other citations omitted). In the case before us, Sergeant Splain asked defendant to consent to questioning, and defendant agreed. We analyze the situation under a totality of the circumstances standard. Again, the initial stop was over, and defendant did not have to agree to additional questioning. From the time when defendant consented to additional questioning until Sergeant Splain began searching the car, there was no seizure for Fourth Amendment purposes, only a consensual encounter.

Defendant relies on *State v. Falana*, 129 N.C. App. 813, 501 S.E.2d 358 (1998), which, although factually similar to the case before us, is distinguishable. In *Falana*, the officer issued a warning citation to the defendant and asked for consent to search the vehicle, but the defendant expressly refused. The defendant also did not consent to

any additional questioning. Instead of ending the detention, the officer continued to detain the defendant while allowing a police dog to sniff the exterior of the car. Our Court determined the officer's continued detention of the defendant was an illegal seizure.

In the case before us, defendant consented to additional questioning. While defendant did not expressly consent to a search, upon being asked for consent to search, he volunteered to the officer that there was marijuana in the front seat. "A search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search." *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999). " 'Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' " *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76, 93 L. Ed. 1879, 1890 (1949)). A second seizure did occur when Sergeant Splain searched defendant's car. Although defendant did not consent to a search, consent was not needed once defendant volunteered that there was marijuana in the car. The information he volunteered led the officer to have probable cause to search the vehicle; consequently, defendant was not "illegally seized." *Morocco* at 429, 393 S.E.2d at 549. We overrule this assignment of error.

III.

[4] Defendant next argues the trial court erred in denying his motion to suppress based on the officer's failure to advise defendant of his *Miranda* rights before questioning him concerning a criminal offense.

"The *Miranda* warnings and waiver of counsel are required only when an individual is being subjected to custodial interrogation. 'Custodial interrogation' means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *State v. Clay*, 297 N.C. 555, 559, 256 S.E.2d 176, 180 (1979), *rev'd on other grounds by State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966)). In the present case, defendant had not been arrested, nor was he being arrested at the time Sergeant Splain asked if he could question defendant. Furthermore, the officer did not deprive defendant of

freedom of action in any significant way. After Sergeant Splain handed back defendant's license and registration, defendant was free to leave and free to refuse to answer questions. Sergeant Splain was simply conducting a consensual questioning. "Neither *Miranda* warnings nor waiver of counsel is required when police activity is limited to general on-the-scene investigation." *Clay* at 559, 256 S.E.2d at 180. "Ordinarily, when a suspect is not in custody at the time he is questioned, any admissions or confessions made by him are admissible so long as they are made knowingly and voluntarily." *Brooks* at 143, 446 S.E.2d at 586. Defendant knowingly volunteered his statements. We overrule this assignment of error.

No error.

Judges WALKER and HUDSON concur.

EDDIE C. DAVIS, PLAINTIFF-APPELLEE v. CARRIE BROOKS KELLY, DEFENDANT-APPELLANT

No. COA00-1360

(Filed 6 November 2001)

1. Appeal and Error— notice of appeal—filing in county—timeliness

A motion to dismiss an appeal was denied where judgment was entered on 24 August and served on defendant on 1 September; defendant served notice of appeal upon plaintiff on 20 September 2000 but the notice of appeal was filed in the Court of Appeals rather than with the Clerk of Superior Court; a proper notice of appeal was filed with the Clerk of Superior Court on 10 October; and the certificate of service required by N.C.G.S. § 1A-1, Rule 5(d) was not filed until 26 October 2000. The running of the time for filing and serving a notice of appeal was tolled until plaintiff's compliance with the filing requirement of Rule 3(a) of the Rules of Appellate Procedure and defendant's notice of appeal was timely.

2. Costs— attorney fees—action against individual—no findings of unwarranted refusal to pay claim

The trial court did not err when awarding attorney's fees under N.C.G.S. § 6-21.1 by not making a finding of unwarranted refusal to pay plaintiff's claim where the case involved a personal injury suit by plaintiff against an individual defendant rather than a case by an insured or beneficiary directly against an insurance company.

3. Costs— attorney fees—factors considered

The trial court gave proper consideration to the factors established by *Washington v. Horton*, 132 N.C. App. 347, when awarding attorney fees under N.C.G.S. § 6-21.1 where the court considered the settlement offer made prior to the institution of the action; the final judgment was greater than defendant's offer when attorney's fees for work done before and after the offer are included; the absence of a finding concerning the unjust exercise of superior bargaining power does not require reversal when the court makes adequate findings on the whole record; findings of unwarranted refusal to pay a claim by an insurance company were not necessary because this was not an action against an insurance company; the timing of settlement offers was considered; it is clear that the court considered the amount of the settlement offer as compared to the jury verdict; and it is apparent that the court evaluated the whole record. Moreover, the trial court made findings as to the reasonableness of the fee, and the trial court has the authority to award attorney's fees for an appeal.

Appeal by defendant from judgment entered 24 August 2000 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 18 September 2001.

Downer, Walters & Mitchener, P.A., by Stephen W. Kearney and Joseph H. Downer, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Allen C. Smith and Dana M. Mango, for defendant-appellant.

MARTIN, Judge.

Plaintiff was allegedly injured when he was involved in an automobile collision with defendant on 29 June 1996. Defendant offered

to settle plaintiff's claim for $500. Plaintiff rejected this offer and made a counteroffer of $1,400. No settlement was reached and plaintiff filed this action on 7 May 1999 seeking damages for his alleged injuries. Defendant filed an answer, denying that she was negligent and asserting contributory negligence as an affirmative defense. On 22 June 1999, defendant filed an offer of judgment in the amount of $500 pursuant to G.S. § 1A-1, Rule 68. Plaintiff rejected the offer.

The case was submitted to court-ordered arbitration, and plaintiff was awarded $2,350.80 by the arbitrator. Defendant requested a trial *de novo*. The case was tried in Mecklenburg County District Court before a jury on 8 May 2000, resulting in a verdict for plaintiff in the amount of $204.10. Plaintiff then moved for attorney's fees and costs pursuant to G.S. § 6-21.1 and filed two supporting affidavits regarding the total number of hours plaintiff's attorney had spent in preparation for trial and the reasonable hourly rate of compensation for the legal services rendered. The first affidavit claimed a total of $1,125 for the 11.25 hours expended before defendant's offer of judgment on 22 June 1999 and the second affidavit claimed a total of $2,775 for the 27.75 hours expended before and after defendant's offer of judgment, both based upon a suggested rate of $100 per hour. After a hearing, the trial court awarded attorney's fees to plaintiff's counsel in the amount of $2,775, which included the hours expended before and after the offer of judgment. Defendant appeals.

[1] As a threshold matter, we must first consider plaintiff's motion to dismiss the appeal. Plaintiff contends this Court should dismiss defendant's appeal pursuant to N.C.R. App. P. 25 for defendant's failure to properly and timely file notice of appeal. N.C.R. App. P. 3(c) provides that an appeal from judgment in a civil action ". . . must be taken within 30 days after its entry." However, under Rule 3(c), "[t]he running of the time for filing and serving a notice of appeal in a civil action . . . is tolled as to all parties for the duration of any period of noncompliance with the service requirement of Rule 58 of the [North Carolina] Rules of Civil Procedure . . . ." G.S. § 1A-1, Rule 58 requires "[t]he 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." G.S. § 1A-1, Rule 5(d) provides:

> [w]ith respect to all pleadings and other papers as to which service and return has not been made in the manner provided in Rule 4, proof of service shall be made by filing with the court a certifi-

> cate either by the attorney or the party that the paper was served in the manner prescribed by this rule, or a certificate of acceptance of service by the attorney or the party to be served. Such certificate shall show the date and method of service or the date of acceptance of service.

In the present case, judgment was entered 24 August 2000 and was served on defendant 1 September 2000 as evidenced by a copy of a letter from plaintiff to defendant. Plaintiff did not, however, file a certificate of service as required by Rule 5(d) until 26 October 2000. On 20 September 2000, defendant served a notice of appeal upon plaintiff. The notice of appeal was filed, however, with this Court, rather than in the office of the Clerk of Superior Court of Mecklenburg County as required by N.C.R. App. P. 3(a). Defendant subsequently filed a proper notice of appeal with the Clerk of Superior Court of Mecklenburg County on 10 October 2000. Plaintiff argues that defendant filed the notice of appeal more than 30 days after the judgment was entered and that her appeal should therefore be dismissed. We note that plaintiff did not fully comply with the service requirements of Rule 58 of the Rules of Civil Procedure until 26 October 2000 since that is the date he filed a certificate of service with the court. The running of the time for filing and serving a notice of appeal was tolled pursuant to N.C.R. App. P. 3 until plaintiff's compliance, and defendant's notice of appeal is, therefore, timely. Plaintiff's motion to dismiss the appeal is denied.

The sole issue raised by this appeal is whether the trial court abused its discretion in awarding attorney's fees to plaintiff. The general rule in North Carolina is that in the absence of contractual obligation or statutory authority, a successful litigant may not recover attorney's fees as damages or a part of the court costs. *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973). However, G.S. § 6-21.1 provides an exception to the general rule and allows an award of attorney's fees as part of the court costs in certain cases. The statute provides:

> In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in

> his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C. Gen. Stat. § 6-21.1 (2001). The purpose of the statute was stated by the North Carolina Supreme Court in *Hicks*:

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

Hicks, 284 N.C. at 239, 200 S.E.2d at 42. The decision to allow attorney's fees is in the discretion of the presiding judge, and is reversible by an appellate court only for abuse of discretion. *McDaniel v. N.C. Mutual Life Ins. Co.*, 70 N.C. App. 480, 319 S.E.2d 676, *disc. review denied*, 312 N.C. 84, 321 S.E.2d 897 (1984). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Blackmon v. Bumgardner*, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999) (citations omitted).

[2] Defendant first contends that there was no evidence of an unwarranted refusal to pay plaintiff's claim by defendant and therefore the trial judge abused his discretion in awarding attorney's fees. However, our appellate courts have consistently held that a finding of unwarranted refusal to pay a claim is required only in suits brought by an insured or a beneficiary against an insurance company defendant. *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999); *Yates Motor Co. v. Simmons*, 51 N.C. App. 339, 276 S.E.2d 496, *disc. review denied*, 303 N.C. 320, 281 S.E.2d 660 (1981); *Rogers v. Rogers*, 2 N.C. App. 668, 163 S.E.2d 645 (1968). Since the present case involves a personal injury suit by plaintiff against an individual defendant, rather than one by an insured or beneficiary directly against an insurance company, no finding of unwarranted refusal is required. Therefore, the trial court did not err in failing to make a finding of unwarranted refusal to pay plaintiff's claim.

[3] Defendant next argues that the trial court erred in failing to consider the entire record and the factors set forth in *Washington*, before awarding plaintiff attorney's fees. A trial court's discretion in awarding attorney's fees pursuant to G.S. § 6-21.1 is not unbridled. *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334. In *Washington*, this Court stated

> [T]he trial court is to consider the entire record in properly exercising its discretion, including but not limited to the following factors: (1) settlement offers made prior to the institution of the action . . .; (2) offers of judgment pursuant to Rule 68, and whether the "judgment finally obtained" was more favorable than such offers; (3) whether defendant unjustly exercised "superior bargaining power"; (4) in the case of an unwarranted refusal by an insurance company, the "context in which the dispute arose."; (5) the timing of settlement offers; (6) the amounts of the settlement offers as compared to the jury verdict; and the whole record.

Id. at 351, 513 S.E.2d at 334-35 (citations omitted).

For the following reasons, we hold the trial court gave proper consideration to the factors established by *Washington*. As to the first *Washington* factor, it is evident that the trial court considered the settlement offer made prior to the institution of the action. The court noted in its first finding of fact that prior to the filing of the action, defendant made a settlement offer to plaintiff in the amount of $500 but that plaintiff rejected this offer and made a counteroffer of $1,400.

The second *Washington* factor was considered as well. The trial court found "[o]n June 22, 1999, defendant filed an offer of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure in the amount of $500.00 Plaintiff did not accept this offer and sought to resolve the case for $1,400.00 . . . ." The trial court went on to conclude that when the reasonable fees incurred or sought by plaintiff's counsel at the time of the offer of judgment were added to the jury verdict of $204.10, the judgment finally obtained would exceed the offer of judgment. Defendant argues that her offer of judgment was more than twice the amount of the jury verdict and therefore, the trial court's award of attorney's fees was an abuse of discretion. However, our Supreme Court has concluded that "within the confines of Rule 68, 'judgment finally obtained' means the amount ultimately entered as representing the final judgment, i.e., the jury's verdict as modified

by any applicable adjustments, by the respective court in the particular controversy, not simply the amount of the jury's verdict." *Poole v. Miller*, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 722 (1996). Additionally, the Supreme Court has recently held that post Rule 68 offer costs should be included in calculating the final judgment obtained. *Roberts v. Swain*, 353 N.C. 246, 538 S.E.2d 566 (2000). Thus, the attorney's fees for work done both before and after defendant's offer of judgment should be added to the jury verdict in order to determine the final judgment ($2,775.00 + $204.10 = $2,979.10). Since the final judgment ($2,979.10) is greater than defendant's offer of judgment ($500), the trial court did not abuse its discretion based on the second *Washington* factor.

As to the third factor, the court made no findings with respect to whether defendant unjustly exercised "superior bargaining power." However, ". . . the absence of such a finding does not require reversal when the trial court made adequate findings on the whole record to support an award of attorney's fees." *Olson v. McMillian*, 144 N.C. App. 615, 619, 548 S.E.2d 571, 573-74 (2001). As to factor four, findings of fact are not necessary since this suit was not brought by an insured or a beneficiary against an insurance company defendant. *Washington*, 132 N.C. App. at 350, 513 S.E.2d at 334. As to factor five, the trial court made findings of fact indicating that the timing of settlement offers was considered in awarding plaintiff attorney's fees. The trial court noted that prior to the filing of the action, defendant made a settlement offer to plaintiff in the amount of $500 and that on 22 June 1999 defendant filed an offer of judgment in the amount of $500. As to factor six, it is clear from the court's findings of fact that it considered the amount of the settlement offer as compared to the jury verdict since the court cited the settlement offer and jury verdict within the findings. Finally, it is apparent that the trial court evaluated the whole record, in view of the hearing on the motion and its consideration of the affidavits submitted and the arguments of counsel.

An award of attorney's fees must be reasonable. "If the court elects to award attorney's fees, it must also enter findings to support the amount awarded." *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000). In order for the appellate court to determine that the award of counsel fees is reasonable, ". . . the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and

the experience or ability of the attorney." *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 494, 403 S.E.2d 104, 111 (1991), *affirmed*, 335 N.C. 183, 437 S.E.2d 374 (1993). In the present case, the trial court made the following findings of fact with respect to reasonableness:

> Prior to the date of the offer of judgment, Plaintiff's attorneys had expended at least 11.25 hours prosecuting this action and were seeking to recover a fee of at least $350.00. By the end of the trial of this case, a total of 27.75 hours of attorney time had been expended by Plaintiff's counsel pursuing his claim. Given the experience and qualifications of Plaintiff's counsel and the fees charged by attorneys in Mecklenburg County of comparable skill and experience, a rate of $100.00 per hour is a reasonable fee applicable to the services of Plaintiff's counsel.

We hold these findings sufficient to support the award.

Plaintiff has also moved, in this Court, for attorney's fees pending appeal, for work performed during the appellate process. This Court has held that the trial court has the authority under G.S. § 6-21.1 to award additional attorney's fees for an appeal. *Hill v. Jones*, 26 N.C. App. 168, 215 S.E.2d 168, *cert. denied*, 288 N.C. 240, 217 S.E.2d 664 (1975). Therefore, we remand this case for the limited purpose of allowing the District Court, in its discretion, and upon plaintiff's motion, to make findings of fact relevant to a determination of reasonable attorney's fees for services rendered on appeal and to enter an award consistent with those findings.

Affirmed and remanded.

Judges WALKER and TYSON concur.

IN THE MATTER OF: ALEXIS DEXTER, AARON DEXTER, DOMINIQUE DEXTER, ALICIA DEXTER, AARUN DEXTER

No. COA00-1435

(Filed 6 November 2001)

1. Child Abuse and Neglect— neglect—change of custody—sufficiency of findings

The trial court did not abuse its discretion by granting legal and physical custody of neglected children to their father where it was no longer in the children's best interests to stay with their mother in that she had refused to cooperate with DSS and did not make any effort to improve the situation, and placing the children with their father was a feasible option which would allow the children to be supervised by a parent with an extensive network of family members available to assist. Although the mother argued that the evidence was not sufficient to support the best interests conclusion, the facts found by the trial court are binding absent an abuse of discretion.

2. Child Abuse and Neglect— findings—efforts of DSS unsuccessful—not required for neglect action

The trial court did not err in a child neglect action by not making findings that the efforts of DSS to work with plaintiff were not successful or that conditions would not likely be corrected within twelve months as required by N.C.G.S. § 7B-1111(a)(2). That statute refers to termination of parental rights actions.

3. Child Abuse and Neglect— custody removed from parent—review hearing—termination of jurisdiction within ninety days

The trial court did not err in a child neglect action by terminating its jurisdiction without a review hearing. Under N.C.G.S. § 7B-906, review hearings must be conducted within ninety days of the dispositional hearing and within six months thereafter where custody is removed from a parent, but the court is relieved of the duty to conduct periodic reviews when custody is restored to a parent. Here, the father was given exclusive custody only from the date of the dispositional order to the termination of jurisdiction, and custody was restored to both parents by the order terminating jurisdiction prior to the ninety-day period.

Once jurisdiction was terminated, the trial court had no further duty or authority to conduct reviews. Moreover, the parties had a right to file motions for review prior to termination, which would have abrogated the automatic termination of jurisdiction, but neither did so.

Appeal by respondent from judgment entered 15 June 2000 by Judge Kenneth C. Titus in Durham County District Court. Heard in the Court of Appeals 6 June 2001.

Tracy Hicks Barley & Assoc., by Tracy Hicks Barley for respondent-appellant.

Cathy L. Moore, Assistant Durham County Attorney, for petitioner-appellee.

THOMAS, Judge.

Respondent, Delores Evans (Evans), appeals from a dispositional order that granted custody of her five children to their father and then terminated jurisdiction without holding a ninety-day review hearing.

The children had been adjudicated neglected at a hearing two weeks prior to disposition. Evans, the custodial parent during the time the neglect occurred, contends the trial court erred by: (1) abusing its discretion in granting custody to the father, respondent Aaron Dexter (Dexter); and (2) terminating jurisdiction without holding a ninety-day review hearing following disposition. For the reasons discussed herein, we affirm the trial court.

The facts are as follows: Evans and Dexter are the parents of five children: Alexis, born 3 January 1985; Aaron, born 25 October 1986; Dominique, born 8 June 1988; Alicia, born 21 November 1989; and Aarun, born 30 June 1991. While they were in Evans's custody during the late winter and spring of 2000, petitioner, the Durham County Department of Social Services (DSS), received complaints about their well-being.

On 24 February 2000, DSS received a report claiming that Aarun had a gun, the children were truant, and Alexis wanted to go back to school but Evans refused to attend a school conference. It was believed at the time of the report that Evans had "sporadic mood swings" and was a drug-abuser. On 25 February 2000, Evans signed a protection plan.

On 2 March 2000, however, it was reported that Aarun was arriving at school "filthy and smelling" and that he was being "ridiculed by his peers." He also had behavioral problems that were keeping him from concentrating in class. Kimberly D. Sauls (Sauls), a social worker with DSS, attempted to meet with Evans and have her agree to an addendum to the protection plan to address Aarun's needs. Sauls left phone messages and visited Evans's home, but was unable to contact her.

On 5 April 2000, DSS received information that Aarun was "at school crying and hanging on to the flag pole stating he did not want to go home." Sauls interviewed the children at school, but yet again was unable to contact Evans, despite several attempts.

On 17 April 2000, DSS filed a petition alleging that the five children were neglected. The adjudicatory hearing was held on 1 June 2000, with a stipulation by DSS, Evans, Dexter, and the guardian ad litem as to the findings of fact supporting the finding of neglect. They included that: (1) Evans had not attended to the children's basic needs, including hygiene and dirty clothing; (2) Aarun was ridiculed at school due to his poor hygiene; (3) all of the children except Dominique have behavioral problems in school; (4) the children's self-esteem has been affected by their conditions; (5) the children fail to attend school on a regular basis; (6) Evans did not take action to assure their attendance at school; (7) DSS has provided medical referrals, day care, social work counseling, and school counseling to prevent or eliminate the need for the children to be removed from Evans's home; (8) DSS was not requesting custody, but sought an order for Evans to address the needs of the children, including hygiene, school attendance and mental health evaluations; and (9) DSS has made and should continue to make reasonable efforts to prevent or eliminate the need for the children to live outside of Evans's home.

The trial court included the following conclusions of law: (a) the children were neglected children in that they did not receive proper care, supervision, or discipline from Evans, or did not receive proper medical care, or lived in an environment injurious to their welfare; (b) it was in the best interests of the children that they continue in the legal custody of Evans; (c) DSS has made and should continue to make reasonable efforts to prevent or eliminate the need for the children to live outside of Evans's home.

The children continued in the custody of Evans pending the dispositional hearing, which was held on 15 June 2000. At disposition, the trial court made the following findings of fact: (1) Dexter appeared and presented a plan of care for the children in which they would live with him in his Ohio home; (2) Dexter would have support of his extensive family in Ohio; (3) Dexter made arrangements for medical care and expressed an understanding of and commitment to addressing the children's behavioral problems; (4) DSS had provided medical referrals, day care, social work counseling and school counseling in an effort to prevent or eliminate the need for the children to be removed from the home; (5) the DSS court summary and guardian ad litem reports were admitted and incorporated into the order; and (6) DSS made reasonable efforts to prevent or eliminate the need for the children to live outside the home.

The trial court concluded that the children were neglected juveniles and it was in their best interests to be placed in the legal and physical custody of Dexter. The trial court further concluded that it was in the children's best interests for: (a) Evans to assist the father and children in their packing; (b) Dexter to assure that the children attend school every day and for him to attend to their hygiene; (c) the children to receive mental health evaluations and any recommended treatment; and (d) DSS to assist Dexter in paying for the children's bus transportation and to assist the children in the gathering of their clothing and belongings. The trial court's order also contained the following paragraph:

> 5. This matter shall be retained in the Court's jurisdiction until Monday, June 26, 2000, in order to assist the father and children with transportation and transition to Ohio. The Court's jurisdiction will automatically terminate on June 26, 2000, without further orders of the Court, unless a motion is filed by any of the parties. The parties and counsel are relieved of further duties in this matter effective June 26, 2000.

[1] By Evans's first assignment of error, she argues the trial court abused its discretion by granting legal and physical custody of the children to Dexter. We disagree.

The North Carolina Juvenile Code provides:

> The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. If possible,

> the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the court should arrange for appropriate community-level services to be provided to the juvenile and the juvenile's family in order to strengthen the home situation.

N.C. Gen. Stat. § 7B-900 (1999). In the case at bar, it was no longer in the children's best interests for them to remain in the home of Evans. A protection plan had been in place since 25 February 2000, but Evans refused to speak with Sauls or cooperate with DSS. Sauls repeatedly attempted to contact Evans and the children at their home, but Evans shunned visits with Sauls, did not even appear at the dispositional hearing and, overall, did not make any effort to improve the situation that led first to the initial protection plan and then to the adjudication of neglect.

Conversely, placing the children with Dexter was a feasible option which would allow the children to be supervised by a parent and to have an extensive network of family members available to assist. At a dispositional hearing, the trial court must consider the child's best interests. *In re Shue*, 63 N.C. App. 76, 303 S.E.2d 636 (1983), *modified*, 311 N.C. 586, 319 S.E.2d 567 (1984).

Evans argues, nevertheless, that the evidence presented at disposition was not sufficient to support the best interests conclusion. She cites evidence that: (1) Dexter did not have independent housing; (2) he was HIV positive with hepatitis; (3) he had disability income of $460 per month; (4) he received only $60 per month in food subsidies; (5) he could not take HIV medicine because of the hepatitis; (6) he had not had contact with the children since 1997; and (7) he had to rely on DSS to provide financial assistance to transport the children to Ohio. We note there is no burden of proof at disposition. The court solely considers the best interests of the child. *See* N.C. Gen. Stat. § 7B-1110 (1999); *In re McMillon*, 143 N.C. App. 402, 546 S.E.2d 169 (2001). Nonetheless, facts found by the trial court are binding absent a showing of an abuse of discretion. *Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (Aug. 17, 2001) (No. 3PA01). Here, we find there is sufficient evidence to support the conclusion.

[2] Evans further contends the trial court violated N.C. Gen. Stat. § 7B-1111(a)(2) by not making findings that the efforts of DSS to work with her were unsuccessful or that the conditions would not likely be

corrected within twelve months. However, section 7B-1111(a)(2) refers to termination of parental rights actions. This is an action for neglect. We therefore find the trial court did not err and reject Evans's first assignment of error.

[3] By Evans's second assignment of error, she argues the trial court erred by terminating its jurisdiction without conducting a review hearing. We disagree.

Where custody is removed from a parent, review hearings must be conducted within ninety days of the dispositional hearing and within six months thereafter. *See* N.C. Gen. Stat. § 7B-906 (1999). Evans argues that unless the trial court makes a finding under section 7B-906(b)(1-5), the hearings cannot be waived. However, section 7B-906(d) provides, in pertinent part, that "[i]f at any time custody is restored to a parent, guardian, custodian, or caretaker the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." *Id.* In the instant case, custody was restored to a parent. In fact, by the trial court terminating jurisdiction as of 26 June 2000, custody of the children was restored to both Evans and Dexter prior to the expiration of the ninety-day period. They were returned to their original, pre-adjudication status as parents. Dexter was given custody to the exclusion of Evans only from the date of the dispositional order until the effective date of the termination of jurisdiction. The trial court had continuing jurisdiction over the case during that short time period based on N.C. Gen. Stat. § 7B-201. Thereafter, once jurisdiction was terminated by its order, the trial court had no further duty or authority to conduct reviews.

Until that termination, however, the trial court correctly noted that the parties had a right to file motions for review. Such a filing would have abrogated the automatic termination of jurisdiction, but no one filed a motion. Accordingly, we hold the trial court did not err in terminating its jurisdiction without conducting a review hearing.

AFFIRMED.

Judges WALKER and McCULLOUGH concur.

IN THE MATTER OF THE WILL OF WILLIAM ARNOLD McCAULEY, DECEASED

No. COA00-1195

(Filed 6 November 2001)

Wills— caveat—subsequent will—no physical evidence

The trial court did not err by granting summary judgment in favor of the caveators of a will based on revocation by a subsequent will even though no physical evidence of the subsequent will was produced. A written will may be revoked by a subsequent written will and there is no requirement that the subsequent will be presented to the trial court, only that evidence be presented that it was executed according to the formalities of an attested will. Here, there was uncontradicted evidence that a new will was executed, attested by two witnesses, and notarized. It was noted that caveators were not contending that the subsequent will could be probated.

Judge CAMPBELL concurring.

Appeal by Max McCauley, executor of the estate of William Arnold McCauley, from an order and judgment filed 10 May 2000 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 11 September 2001.

Staton, Perkinson, Doster, Post and Silverman, P.A., by W. Woods Doster and Charles M. Oldham, III, for executor-appellant.

Hayes, Williams, Turner & Daughtry, P.A., by Gerald Wilton Hayes, Jr. and Parrish Hayes Daughtry, for caveator-appellees Phyllis M. Thomas, Paige Stallings, and Laurie J. McCauley.

Tart, Willis & Fusco, P.A., by Joseph L. Tart, for caveator-appellee Karen McCauley Thompson.

GREENE, Judge.

Max McCauley (Executor), Executor of the estate of William Arnold McCauley (McCauley), appeals a 10 May 2000 order and judgment (the order) awarding summary judgment in favor of Phyllis M. Thomas (Phyllis), Paige Stallings (Paige), Laurie J. McCauley (Laurie), and Karen McCauley Thompson (Karen) (collectively, Caveators).

Executor, Caveators, and Earl Thomas McCauley (Earl) are the biological children of McCauley. On 13 June 1984, McCauley executed a last will and testament (the 1984 will). The 1984 will made no specific bequests or devises but left "the rest, residue and remainder of the property which [McCauley owned]" in fee and equal share to his two sons, Executor and Earl. After the death of McCauley on 4 February 1999, Executor applied to the probate court on 24 February 1999 for probate of the 1984 will.

On 22 March 1999, Phyllis and Paige filed a caveat to the 1984 will claiming that "in December of 1996[, McCauley], by properly executed paper-writing revoked all prior [w]ills . . . theretofore having been executed by him including, but not limited to, [the 1984 will]." A citation was then issued to Earl, Laurie, and Executor informing them that Paige and Phyllis had entered a caveat to the probate of the 1984 will. On 26 April 1999, Karen filed a motion for permission to intervene as a caveator in the action on the ground she was "a necessary party in [the] action as she [was] the daughter of [McCauley]." Karen's motion to intervene was allowed on 27 April 1999.

In his deposition testimony on 27 May 1999, Neill Ross (Ross) testified he began representing McCauley shortly after World War II. Over the course of the years, Ross represented McCauley on various occasions. At all times Ross was in contact with McCauley, McCauley exhibited the mental capacity necessary to make a will. Ross specifically recalled discussing a new will with McCauley in December 1996 and McCauley advising Ross "to prepare a [w]ill that would leave all of his property, both real and personal, equally to his children, except for a provision . . . with reference to MAX's Used Car Service." Ross, however, had "no independent recollection of ever having dictated [a w]ill [for McCauley in 1996] or of its contents." Although not denying he prepared a will for McCauley in 1996, Ross testified he could not, with certainty, admit he prepared a will for McCauley in 1996. If Ross did prepare a will for McCauley in 1996, he testified it would have had language revoking all wills and codicils previously made. Prior to McCauley's death, McCauley terminated Ross' representation and, as a consequence, Ross mailed all of McCauley's legal papers to McCauley.

In a deposition on 27 May 1999, Amber Shaw (Shaw), Ross' secretary, testified she had worked for Ross for the past eight years and had frequent contact with McCauley. In December 1996, after speaking with Ross concerning a new will, McCauley told Shaw he "had not been very fair to his girls and he wanted to make things right."

McCauley wanted "his children to be able to share alike, everything equally, and he did not want them to fuss after he was gone." Shaw recalled Ross giving her a dictated will for McCauley in December 1996 and reading the 1996 will to McCauley after having typed it. The 1996 will was executed according to the provisions in N.C. Gen. Stat. § 31-11.6 for self-proved wills. Shaw testified she notarized the 1996 will for McCauley in December 1996 and that Beatrice Coats (Coats) was one of the witnesses. Although Shaw recalled having two witnesses, she could not remember who was the other witness to the 1996 will. The 1996 will prepared by Shaw contained a provision revoking all prior wills and codicils.

Coats testified she worked in a law office next to the law office of Ross. Coats stated she did not have any recollection of having witnessed a will for McCauley, although it was not unusual for her not to specifically remember any particular will. Coats often witnessed wills prepared for the clients of Ross.

Executor testified that between 1984 through 1999, he periodically heard his father say he was making a new will. Executor, however, could not state whether or not McCauley followed through with making a new will. Executor recalled McCauley stating he changed his will leaving everything to his two ex-wives, and at their death, everything would be divided equally.

On 20 March 2000, Caveators made a motion for summary judgment asking the trial court find that the 1984 will was revoked by the 1996 will. Subsequently, Executor moved the trial court for summary judgment in his favor because "the discovery materials and pleadings in this action show that no document exists which revokes" the 1984 will. The trial court denied Executor's motion for summary judgment and granted summary judgment in favor of Caveators.

The dispositive issue is whether a will can be revoked by evidence of a subsequent will absent physical evidence of the subsequent will.

Executor argues the trial court erred in awarding summary judgment to Caveators because no paper writing was produced to establish the existence of the 1996 will. We disagree.

A motion for summary judgment is properly granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1999). In ruling on a motion for summary judgment, the trial court is required to view the evidence in the light most favorable to the non-moving party. *Wrenn v. Byrd*, 120 N.C. App. 761, 763, 464 S.E.2d 89, 90 (1995), *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996).

A written will may be revoked either "[b]y a subsequent written will or codicil or other revocatory writing" or by "being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by the testator himself or by another person in his presence and by his direction." N.C.G.S. § 31-5.1 (1999). If a will is revoked by a subsequent writing, the revocation must comply with the formalities necessary for the execution of a written will. N.C.G.S. § 31-5.1(1) (1999); *see In Will of Crawford*, 246 N.C. 322, 326, 98 S.E.2d 29, 32 (1957) (where evidence is lacking that paper writing "was executed according to the formalities necessary to make it a valid will," it was ineffective as a revocatory instrument). An attested written will is valid if it is "signed by the testator and attested by at least two competent witnesses." N.C.G.S. § 31-3.3(a) (1999). This attested will can be probated before the clerk of the superior court upon "the testimony of at least two of the attesting witnesses," upon the testimony of one attesting witness in some situations, and if none of the attesting witnesses are available, upon the proof of the handwriting of both attesting witnesses. N.C.G.S. § 31-18.1 (1999). The attested will can also be probated if made "self-proved in accordance with the provisions of G.S. 31-11.6." N.C.G.S. § 31-18.1(a)(4) (1999). As a general proposition, a will is "self-proved" if a notary verifies the testator signed the will in her presence and declared it to be his last will and testament, and if the notary verifies that two persons witnessed the testator sign the will. N.C.G.S. § 31-11.6 (1999).

In this case, viewing the evidence in the light most favorable to Executor, the non-moving party, the evidence supports a conclusion that the 1984 will was revoked in 1996. Although no tangible evidence of the 1996 will was presented to the trial court, there is no requirement the subsequent written will be presented to the trial court, only that there is evidence presented the subsequent writing was executed according to the formalities required of an attested will. *See* 2 William J. Bowe and Douglas H. Parker, *Page on the Law of Wills* § 21.48, at 432-34 (1960) (a lost will may still operate as a revocation of an earlier will if it is shown the lost will was executed in compliance with the statute and it contained a clause of revocation). There is uncon-

tradicted evidence that in December 1996, McCauley executed a new will attested to by two witnesses and notarized by Shaw. As this satisfies the requirements of a "self-proved" will, it complies with the formalities necessary for the execution of a written will. In addition, the 1996 will specifically contained a provision revoking all prior wills and codicils. Accordingly, as the undisputed evidence establishes McCauley revoked the 1984 will by a self-proved 1996 will,[1] the trial court properly granted summary judgment in favor of Caveators.[2]

Affirmed.

Judge BRYANT concurs.

Judge CAMPBELL concurs in a separate opinion.

CAMPBELL, Judge, concurring.

I concur with the majority that summary judgment was properly granted in favor of Caveators, but wish to call attention to the issue alluded to by the majority in footnote one. As pointed out by the footnote, the holding as to the purported 1996 will is limited. The revocation clause in the purported 1996 will operates as a revocation of the 1984 will, but that does not necessarily mean that the purported 1996 will can be probated. Even though there is evidence that McCauley executed a will in 1996, since it was last heard of in his possession and was not found at his death, there is a legal presumption that he destroyed this will with intent to cancel it. *Scoggins v. Turner*, 98 N.C. 135, 3 S.E. 719 (1887). Since the trial court was presented with evidence of the purported 1996 will, albeit not the writing itself, there is still an issue of *devisavit vel non*. I would remand the case to the trial court to resolve this issue. Once the issue of whether or not McCauley died testate is resolved, then the trial court should remand the matter to the judge of probate (here the Harnett County Clerk of Superior Court) to supervise the administration, settlement, and distribution of the estate pursuant to Chapter 28A of the North Carolina

1. Caveators do not contend, nor do we hold, the 1996 will can be probated. Our holding merely entitles the 1996 will to operate as a revocation of the 1984 will.

2. "Summary judgment is proper where there is no genuine issue as to any material fact." *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 139 N.C. App. 676, 680, 535 S.E.2d 357, 361, *appeal dismissed and disc. review denied*, 353 N.C. 265, 546 S.E.2d 101 (2000); N.C.G.S. § 1A-1, Rule 56 (1999). "An issue is genuine where it is supported by substantial evidence." *Johnson*, 139 N.C. App. at 681, 535 S.E.2d at 361.

General Statutes. In my opinion, the trial court has this further obligation in an *in rem* proceeding such as this. *See In re Will of Hester*, 320 N.C. 738, 360 S.E. 2d 801, *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987); *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965); *see also* 1 James B. McLaughlin, Jr., & Richard T. Bowser, *Wiggins Wills and Administration of Estates in North Carolina* § 124, (4th ed.) (2000) (cases collected at note 2 through note 7).

BERRY O. MONTEAU AND BAY AREA TURF, INC., PLAINTIFFS V. REIS TRUCKING & CONSTRUCTION, INC., LARRY REIS, AEGIS SECURITY INSURANCE COMPANY, ELLIS-DON CONSTRUCTION, INC., FEDERAL INSURANCE COMPANY, TRAVELERS CASUALTY AND SURETY COMPANY, AND GWEN M. REIS, DEFENDANTS

No. COA00-1078

(Filed 6 November 2001)

1. **Construction Claims— payment bond—subcontractor's employee**

The trial court correctly granted summary judgment for defendants Ellis-Don, Federal, Travelers, and Aegis with respect to payment bond claims arising from construction at Raleigh Durham International Airport. None of the work which was the subject of the complaint was "performed in prosecution of the work" called for in the contract between Ellis-Don and Reis Trucking, so that plaintiff was not entitled to reimbursement under any payment bond issued by the parties in this case. N.C.G.S. § 44A-25(5).

2. **Civil Procedure— affidavit—service—day of summary judgment hearing**

The trial court erred by excluding an affidavit from consideration on summary judgment where the affidavit was mailed the day before the hearing and filed in superior court on the day of the hearing. Although this approach afforded no actual notice prior to the hearing, it was proper under the then applicable rules. N.C.G.S. § 1A-1, Rule 5(c) (1999).

3. Corporations— piercing corporate veil—material issue of fact

The trial court erred by granting summary judgment on a claim for piercing the corporate veil where defendants presented an affidavit asserting that their company was not undercapitalized and that company funds were not intermingled with personal funds, and plaintiff submitted an affidavit asserting undercapitalization, commingling of funds, and a failure to keep formal records.

Appeal by plaintiffs from orders dated 26 May 2000 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 21 August 2001.

Bugg, Wolf & Wilkerson, P.A., by William J. Wolf, for plaintiff-appellants.

Safran Law Offices, by Todd A. Jones, for defendant-appellees Reis Trucking & Construction, Inc., Larry Reis, and Gwen M. Reis.

Maupin Taylor & Ellis, P.A., by Gilbert C. Laite, III and Kevin W. Benedict, for defendant-appellee Aegis Security Insurance Company.

Nigle B. Barrow, Jr., for defendant-appellees Ellis-Don Construction, Inc., Federal Insurance Company, and Travelers Casualty and Surety Company.

GREENE, Judge.

Mr. Berry O. Monteau (Monteau) and his company, Bay Area Turf, Inc. (collectively Plaintiff) appeal 26 May 2000 orders granting summary judgment in favor of defendants Larry and Gwen Reis (the Reises), Ellis-Don Construction, Inc. (Ellis-Don), Travelers Casualty and Surety Company (Travelers), Federal Insurance Company (Federal), and Aegis Security Insurance Company (Aegis). Plaintiff also appeals a concurrent order sustaining objections by defendants Reis Trucking and Construction, Inc. (Reis Trucking), the Reises, and Aegis to an affidavit submitted by Plaintiff in opposition to summary judgment.

In November 1997, Plaintiff entered into an oral agreement with Reis Trucking, owned by the Reises, to perform certain estimating and bidding preparation services in return for $500 per week in

expenses plus a six percent commission on gross receipts from successfully bid projects that resulted in a contract award. Plaintiff, pursuant to its contract obligations, enabled Reis Trucking to submit bids to general contractors who were bidding on a project for the Raleigh Durham International Airport (RDU). On 9 January 1998, the RDU project was awarded to Ellis-Don as general contractor. Ellis-Don issued a labor and material payment bond to RDU on 13 January 1998, wherein Ellis-Don and its sureties, Federal and Travelers, promised "that every claimant . . . who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed . . . may sue on this bond . . . ." The bond defined a proper claimant as "one having a direct contract with the Principal [Ellis-Don] or with a Subcontractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the [RDU] Contract." On 17 January 1998, Ellis-Don hired Reis Trucking as a sub-contractor, and a written contract to that effect was signed by Reis Trucking on 6 March 1998 and by Ellis-Don on 9 March 1998.

From 13 February 1998 to 15 February 1998, Plaintiff performed some project management work for Reis Trucking at the RDU site even though, as Plaintiff's deposition testimony shows, Plaintiff and Reis Trucking had not yet agreed on any compensation and there was no intention to apply any future salary retrospectively. Plaintiff's November 1997 agreement with Reis Trucking terminated on 6 March 1998. On 9 March 1998, Reis Trucking issued a subcontract labor and material payment bond to Ellis-Don mirroring the language of the Ellis-Don bond and underwritten by Aegis as surety. Reis Trucking had paid Plaintiff's expenses pursuant to their November 1997 agreement but failed to pay the six percent commission ($58,087.80) Plaintiff claims it earned by securing the RDU project. On 26 June 1998, Plaintiff sent Reis Trucking and the Reises written notice claiming payment under the payment bond issued by Reis Trucking. On 18 August 1998, Plaintiff sent a notice to Ellis-Don requesting payment under the January 1998 payment bond.

On 5 March 1999, Plaintiff filed a complaint seeking relief against Reis Trucking and the Reises for breach of contract and nonpayment under the March 1998 bond. The complaint alleged the Reises, as sole officers and directors of Reis Trucking, had operated Reis Trucking as their mere *alter ego*, grossly undercapitalized the business, and intermingled the company finances with their personal finances. Plaintiff prayed for relief in the amount of $58,078.80, "[t]he value of the labor

and services provided by Plaintiff to Reis [Trucking] on the [RDU] project." Plaintiff asserted Reis Trucking "became indebted to Plaintiff" for this amount "[u]pon Ellis-Don's acceptance of Reis[] [Trucking's] bid."

In addition, Plaintiff joined in its complaint Ellis-Don, Travelers, Federal, and Aegis as defendants. Plaintiff sought judgment against Ellis-Don as principal and Travelers and Federal as sureties under the January 1998 payment bond in the amount of $58,078.80 for work performed by Plaintiff on the RDU project. Plaintiff also requested relief against Aegis as surety under the March 1998 payment bond issued by Reis Trucking.

All defendants except Reis Trucking moved for summary judgment. In support of the motion, Ellis-Don submitted an affidavit denying Plaintiff performed any labor on the project. The Reises presented an affidavit denying any undercapitalization or intermingling of funds and stating that the Reises and Reis Trucking maintained separate bank accounts. On 22 May 2000, Plaintiff mailed to all defendants an opposing affidavit in which Monteau stated Reis Trucking was grossly undercapitalized, the Reises intermingled business and personal funds, committed to projects while lacking the capital to properly perform the work, failed to meet payroll obligations, and did not adhere to formal record keeping. On 22 May 2000 after the close of business, copies of Plaintiff's affidavit were also faxed to defendants' attorneys. The affidavit was filed on 23 May 2000, the day of the summary judgment hearing. Defendants Reis Trucking, the Reises, and Aegis objected to the affidavit on the grounds that service by mail and by fax on 22 May 2000 was not timely. The trial court sustained defendants' objection.

The issues are whether: (I) the work performed by Plaintiff under the November 1997 agreement can support a claim against any of the payment bonds issued by defendants; (II) Plaintiff's affidavit submitted in opposition to defendants' motions for summary judgment was timely served; and (III) genuine issues of material fact exist concerning Reis Trucking's valid corporate existence.

I

[1] Plaintiff argues the trial court erred in granting summary judgment in favor of defendants Ellis-Don, Federal, Travelers, and Aegis in respect to the payment bond claims. We disagree.

A sub-contractor's eligibility to receive reimbursement under a payment bond is determined by North Carolina's Statutory Lien and Charges Law. *See* N.C.G.S. ch. 44A (1999). It states:

> [A]ny claimant who has performed labor or furnished materials in the prosecution of the work required by any contract for which a payment bond has been given . . . and who has not been paid in full therefor . . . may bring an action on such payment bond . . . to recover any amount due him for such labor or materials . . . .

N.C.G.S. § 44A-27(a) (1999). The statute defines "labor or materials" as including "all materials furnished or labor performed in the prosecution of the work called for by the construction contract." N.C.G.S. § 44A-25(5) (1999).

In this case, Plaintiff's claim for $58,078.80 is based entirely on the November 1997 agreement, which was fully performed once Reis Trucking received a contract from Ellis-Don. Thus, none of the work performed by Plaintiff, which is the subject of this complaint, was "performed in the prosecution of the work" called for in the contract between Ellis-Don and Reis Trucking.[1] Accordingly, Plaintiff was not entitled to reimbursement under any payment bond issued by any of the parties in this case and summary judgment for Ellis-Don, Federal, Travelers, and Aegis is affirmed.

II

[2] Plaintiff argues the trial court erred when it excluded Monteau's opposing affidavit. We agree.

In this case, the issue of timely service of an opposing affidavit is governed by N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999), the rule in effect at the time.[2] It provides that "[t]he adverse party prior to the

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1. We acknowledge Plaintiff claims it provided some project management work for Reis Trucking on the RDU job site *after* award of the contract to Reis Trucking. The complaint makes no claim for compensation for this work and indeed the record reveals there was no agreement to pay any compensation for this work. Thus, this management work cannot support a claim under any payment bond.

2. The legislature adopted a new Rule 56(c) on 7 July 2000, which became effective 1 October 2000. It states:

> The adverse party may serve opposing affidavits at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with

day of hearing may serve opposing affidavits." N.C.G.S. § 1A-1, Rule 56(c) (1999). When service is by mail, it is "complete upon deposit." N.C.G.S. § 1A-1, Rule 5(b) (1999). Filing of an affidavit is proper if it occurs "either before service or within five days thereafter." N.C.G.S. § 1A-1, Rule 5(d) (1999).

Plaintiff mailed Monteau's affidavit on 22 May 2000, the day before the hearing, and filed it with the Wake County Superior Court on 23 May 2000. Even though this approach afforded defendants no actual notice prior to the hearing, the service and filing were proper under the then applicable rules. *See Precision Fabrics Group v. Transformer Sales and Service*, 344 N.C. 713, 721, 477 S.E.2d 166, 171 (1996) (quoting 1 G. Gray Wilson, *North Carolina Civil Procedure* § 6-5 (2d ed. 1995)) (the rule permits service the day before the hearing " 'even where the moving party may not receive the affidavits before the hearing' "). Consequently, the trial court erred in excluding the affidavit.

III

[3] Plaintiff argues the trial court erred in granting the Reises' motion for summary judgment. We agree.

Plaintiff's action for breach of contract included the Reises in their personal capacity. When a

> corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person.

Henderson v. Fin. Co., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). Factors that may be considered in piercing the corporate veil under the "mere instrumentality rule" include inadequate capitalization and noncompliance with corporate formalities. *Atlantic Tobacco Co. v. Honeycutt*, 101 N.C. App. 160, 164, 398 S.E.2d 641, 643 (1990), *cert. denied*, 328 N.C. 569, 403 S.E.2d 506 (1991). Yet

> [i]t is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which, when taken together with an element of injustice or abuse of corporate

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the matter without considering the untimely served affidavit, or take such other action as the ends of justice require.

N.C.G.S. § 1A-1, Rule 56(c) (2000).

> privilege, suggest that the corporate entity attacked had "no separate mind, will or existence of its own" and was therefore [a] "mere instrumentality or tool" . . . .

Glenn v. Wagner, 313 N.C. 450, 458, 329 S.E.2d 326, 332 (1985).

In this case, the Reises presented an affidavit asserting that Reis Trucking was not undercapitalized and the funds of the company were not intermingled with their personal funds. Even if this affidavit is sufficient to shift the burden to Plaintiff, *see Eatman Leasing, Inc. v. Empire Fire & Marine Ins. Co.*, — N.C. App. —, —, 550 S.E.2d 271, 273 (2001), Plaintiff submitted an affidavit asserting Reis Trucking was undercapitalized, the company funds were commingled with the personal funds of the Reises, and the Reises did not adhere to formal record keeping. Thus, a genuine issue of material fact was presented and summary judgment was not proper on Plaintiff's claim against the Reises in their individual capacity. *See id.*

Affirmed in part, reversed in part, and remanded.

Judges CAMPBELL and BRYANT concur.

SHARON C. SCHMELTZLE, PLAINTIFF-APPELLANT v. BARRY SCHMELTZLE, DEFENDANT-APPELLEE

No. COA00-1104

(Filed 6 November 2001)

Divorce— alimony—findings—mere recitation of evidence

A holding that an award of alimony would not be equitable pursuant to N.C.G.S. § 50-16.3A was remanded where it was apparent that the court's findings of fact were mere recitations of the evidence rather than ultimate facts required to support the trial court's conclusions of law.

Judge GREENE dissenting.

Appeal by plaintiff from judgment denying permanent alimony entered 8 May 2000 by Judge John L. Whitley in Wilson County Superior Court. Heard in the Court of Appeals 21 August 2001.

Law Offices of Mark E. Sullivan, P.A., by Deborah Sandlin, for Plaintiff-Appellant.

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by Thomas R. Sallenger, for Defendant-Appellee.

BRYANT, Judge.

Plaintiff and Defendant were married for over twenty years and raised two children. Plaintiff stayed at home and was unemployed for most of the marriage. She had a high school diploma but no advanced degrees. Prior to separating, Plaintiff began seeing a therapist for depression, anxiety, excessive compulsive disorder and bipolar disorder. The couple separated on 9 August 1997 and divorced on 18 November 1999.

Defendant had associate's and bachelor's degrees at the time of the hearing. He has sole custody of the two minor children and pays for all of their support. He has also paid Plaintiff $800 per month pursuant to a voluntary temporary order. After separating, Defendant paid all of the marital debt.

Plaintiff filed a complaint seeking divorce from bed and board, child custody, child support, alimony and attorney's fees. Defendant answered and counterclaimed for an absolute divorce. Defendant raised as a defense to Plaintiff's claim for alimony that Plaintiff had engaged in a course of conduct deliberately calculated to render Defendant's condition intolerable and his life burdensome.

At a non-jury trial, Plaintiff's claim for permanent alimony was denied. The judge concluded that Plaintiff's conduct constituted marital misconduct without just cause or excuse, and that Plaintiff caused Defendant to suffer indignities. *See* N.C. Gen. Stat. § 50-16.3A(b)(1) (1999). Thus, the court held that an award of alimony would not be equitable pursuant to Section 50-16.3A of the North Carolina General Statutes. N.C. Gen. Stat. § 50-16.3A (1999).[1] Plaintiff appealed.

On appeal, Plaintiff raises five assignments of error. At the outset, we note that Plaintiff's brief fails to comply with at least two North

1. Specifically, subsection (a) provides: "The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section." N.C. Gen. Stat. § 50-16.3A(a) (1999). Marital misconduct is one of the factors in subsection (b). *See* N.C. Gen. Stat. § 50-16.3A(b) (1999).

Carolina Rules of Appellate Procedure, Rules 28(b) and 26(g). Rule 28(b)(5) states:

> (b) An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules . . . :
>
> . . . .
>
> (5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal.

N.C. R. App. P. 28(b)(5). Rule 26(g) states in part that "[t]he format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules." N.C. R. App. P. 26(g). Appendix B which discusses the format and style of documents filed in either appellate court states under "Topical Headings" that "[w]ithin the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin." N.C. R. App. P. app. b at 213. Furthermore, all headings should be single-spaced. *Id.* Contrary to these rules, the assignments of error in Plaintiff's brief are in bold face type and double spaced, and they fail to identify the pages at which they appear in the record on appeal. *See* N.C. R. App. P. apps. b, e.

The rules are mandatory and the failure to comply with the rules may result in dismissal. *See, e.g., Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999). However, we will invoke Rule 2 and reach the first assignment of error. Rule 2 allows this Court to suspend the rules on its own initiative "[t]o prevent manifest injustice to a party." N.C. R. App. P. 2.

In her first assignment of error, Plaintiff argues that the trial court erred in determining that Plaintiff was not entitled to permanent alimony on the ground that she caused Defendant to suffer indignities, rendering his condition intolerable and life burdensome. Specifically, Plaintiff alleges that the trial court simply adopted Defendant's testimony without making independent findings of fact. We agree.

There is no hard and fast rule as to what constitutes indignities. Rather, the courts make this determination based on the facts and cir-

cumstances of each case. *See Taylor v. Taylor*, 76 N.C. 433, 437-38 (1877); 1 Suzanne Reynolds, *Lee's North Carolina Family Law* § 6.12(A) (5th ed. 1989). "The fundamental characteristic of indignities is that it must consist of a *course* of conduct or *continued* treatment which renders the condition of the injured party intolerable and life burdensome. The indignities must be *repeated and persisted in* over a period of time." *Traywick v. Traywick*, 28 N.C. App. 291, 295, 221 S.E.2d 85, 88 (1976) (quoting 1 Robert E. Lee, *North Carolina Family Law* § 82, at 311 (3d ed. 1963)).

North Carolina General Statute Section 1A-1, Rule 52(a)(1) governs findings by the trial court and applies to permanent alimony. Rule 52(a)(1) states:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (1999). There are two kinds of facts, evidentiary facts and ultimate facts. *Woodard v. Mordecai*, 234 N.C. 463, 67 S.E.2d 639 (1951). Evidentiary facts are "those subsidiary facts required to prove the ultimate facts." *Id.* at 470, 67 S.E.2d at 644 (citations omitted). Ultimate facts are "the final facts required to establish the plaintiff's cause of action or the defendant's defense . . . ." *Id.* In applying Rule 52(a)(1), this Court held in *Williamson v. Williamson* that the findings of fact must be "more than mere evidentiary facts; they must be the 'specific ultimate facts . . . sufficient for [an] appellate court to determine that the judgment is adequately supported by competent evidence.' " *Williamson v. Williamson*, 140 N.C. App. 362, 363-64, 536 S.E.2d 337, 338 (2000) (alteration in original) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977)).

In *Williamson*, Plaintiff alleged that the trial court failed to make sufficient findings of fact and conclusions of law necessary to determine the issues. The record in that case reveals that the trial court, in awarding alimony to Defendant, included the summaries of witnesses' testimony in several findings of fact. On appeal, this Court reversed, holding that many of the trial court's findings of fact were "mere recitations of the evidence and are not the ultimate facts required to support the trial court's conclusions of law regarding the needs of the parties." *Williamson*, 140 N.C. App. at 364, 536 S.E.2d at

339. The *Williamson* Court illustrated by pointing to several findings of fact including the following:

> 12. From her *testimony* and her *financial affidavit* filed August 14, 1998, the Defendant has needs and expenses of approximately $3,010.00 per month. . . .
>
> 13. The Plaintiff *testified* to his family (new spouse, her daughters, and himself) having total needs and expenses of $6,861.00. He *estimated* his personal needs and expenses to be $4,394.00 per month. *Plaintiff testified* he took as his expenses 1/4 of household expenses, as 4 people were living in the house (the Plaintiff, his new wife, and her two children).

Id. (alteration in original). We find *Williamson* to be helpful.

In the case at bar, Plaintiff objects to the trial court's verbatim recitation of Defendant's amended Narrative.[2] For example, Plaintiff points to the following testimony in Defendant's amended Narrative:

> 12. The Defendant testified that due to the repeated interference with the children's schooling, the Plaintiff had been directed by the Headmaster of Greenfield School to stay away from the campus.
>
> 13. The Defendant testified that the principal of Vinson Bynum School directed Plaintiff to report to her office and not to go on her own through the halls and classrooms of the children.
>
> 14. The Defendant testified that the Plaintiff was heard yelling while in a meeting with the principal of Forest Hills Middle School while the Defendant, his daughters and staff members waited outside.
>
> . . .
>
> 17. The Defendant testified that the Plaintiff slept alone downstairs on the sofa.

The trial court's parallel findings of fact are as follows:

> 23. Due to repeated interference with the children's schooling, the Plaintiff had been directed by the Headmaster of Greenfield School to stay away from the campus.

2. The parties discovered after the trial that the recording device was not on or had malfunctioned. Both parties submitted narrations to create a record of the proceedings.

24. The principal of Vinson-Bynum School directed the Plaintiff to report to her at the office and not go on her own through the halls and classrooms of the children.

25. The Plaintiff was heard yelling while in a meeting with the principal of Forest Hills Middle School while the Defendant, his daughters and staff members waited outside.

. . .

28. The Plaintiff slept alone downstairs on the sofa.

It is apparent from the record that the trial court's findings of fact were, as we held in *Williamson*, "mere recitations of the evidence," rather than the ultimate facts required to support the trial court's conclusions of law. *Williamson*, 140 N.C. App. at 364, 536 S.E.2d at 339. Moreover, the trial court's findings of fact do not appear adequate to support a conclusion of marital misconduct.

For the reasons stated above, we vacate the judgment and remand to the trial court to enter ultimate facts. As such, it is unnecessary to address Plaintiff's other assignments of error.

Reversed and remanded.

Judge CAMPBELL concurs.

Judge GREENE dissents with a separate opinion.

GREENE, Judge, dissenting.

The majority vacates the order of the trial court on the ground its findings of fact were "mere recitations of the evidence" and thus inadequate to support the order denying alimony. I disagree and instead believe this Court should squarely address the dispositive issue of whether Plaintiff's conduct as found by the trial court constitutes marital misconduct within the meaning of N.C. Gen. Stat. § 50-16.1A(3). In this case, there is a very good reason why the findings appear to be a mere recitation of the evidence. This is so because the trial testimony was not recorded and the parties were required to reconstruct the evidence after the trial. In so doing, the parties relied in large part on the findings entered by the trial court. Thus, in this case, the evidence as compiled after the trial is essentially a mere

recitation of the findings of fact and their similarity is understandable and should not constitute a basis for vacating the order denying Plaintiff's claim for alimony.

REBECCA S. RASPET, PLAINTIFF v. TIMOTHY A. BUCK, DEFENDANT

No. COA00-957

(Filed 6 November 2001)

1. Appeal and Error— appealability—denial of arbitration

An order denying a demand for arbitration affects a substantial right which might be lost if the appeal is delayed and is thus immediately appealable.

2. Arbitration and Mediation— arbitration enjoined—multiple business dealings—dispute not within arbitration clause

The trial court correctly granted plaintiff's motion for a permanent injunction staying arbitration in that the dispute between the parties did not fall within the arbitration clause in the operating agreement of a limited liability company formed by the parties. Plaintiff and defendant had several business connections over a period of years, but there is no evidence that this dispute concerned the affairs, conduct, or operation of the limited liability company. Indeed, there was no evidence that the company became operational after its initial creation.

Appeal by defendant from order entered 22 May 2000 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 23 May 2001.

Gordon Law Offices, by Harry G. Gordon, for plaintiff-appellee.

Matthew E. Bates, P.A., for defendant-appellant.

BIGGS, Judge.

Timothy Buck (defendant) appeals from the trial court's order permanently enjoining him from proceeding with arbitration. We affirm.

Rebecca Raspet (plaintiff), and defendant were both employed as investment representatives with Metropolitan Life Insurance Co. in 1995. Later that year, each separately left the company, although they continued to work as investment representatives. Plaintiff was based in Durham, while defendant operated out of Asheboro. At some point in 1995, desiring to handle certain clients jointly, plaintiff and defendant created a limited liability company, titled Plan First, LLC. (Plan First). Each signed an "Operating Agreement" which contained an arbitration clause. The two jointly rented an office in Reidsville, while retaining their separate offices and accounts. Between 1995 and 1997 both plaintiff and defendant became employed by Mariner Financial Services, and later by Select Capital Corporation. While employed with Select Capital, plaintiff was defendant's supervisor. They also managed some Select Capital accounts jointly.

On 9 September 1997, Select Capital terminated defendant with thirty days notice. The company instructed defendant to transfer his clients to another broker no later than 120 days after 10 October 1997. In early February 1998, Select Capital wrote defendant to reiterate that the deadline for his transfer of clients to another broker would be 10 February 1998. Select Capital also directed plaintiff to cease any business relationship with defendant, and not to divide any commissions with defendant. Following defendant's dismissal, his name was removed from jointly held client accounts, which then were changed to reflect that plaintiff had become the sole representative for those accounts.

In July 1998, plaintiff and defendant signed Articles of Dissolution formally dissolving Plan First. Approximately eighteen months later, on 3 January 2000, defendant filed a Demand for Arbitration. Defendant alleged that he and plaintiff had an "oral buy-out agreement," under which plaintiff owed him money for client accounts they had previously managed jointly, and that he had not received this "buy-out" money. Defendant based his demand for arbitration upon an arbitration clause contained in the Operating Agreement for Plan First, which had been signed by both parties when Plan First was formed.

On 6 April 2000, plaintiff filed suit against defendant, seeking damages for slander and defamation, sexual harassment, negligent and intentional infliction of emotional distress, harassment by telephone, breach of contract, indemnity, and unfair and deceptive trade practices. On 6 April 2000, plaintiff also filed a separate motion for a

temporary restraining order (TRO) and for a permanent injunction staying arbitration. Plaintiff obtained a TRO the same day, 6 April 2000. This order was replaced by a permanent injunction on 22 May 2000. In its order granting a permanent injunction staying arbitration, the trial court concluded "that no valid, applicable arbitration agreement exists that binds plaintiff to arbitrate the current dispute between plaintiff and defendant." Defendant appeals from this order.

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[1] Defendant's appeal from the trial court's order staying arbitration is interlocutory in that plaintiff's claims remain unresolved. *Miller v. Two State Construction Co.*, 118 N.C. App. 412, 455 S.E.2d 678 (1995). Interlocutory orders are not usually appealable; however, this Court has held that the denial of a demand for arbitration is an order that affects "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), and thus is immediately appealable. *CIT Grp./Sales Fin., Inc. v. Bray*, 141 N.C. App. 542, 539 S.E.2d 690 (2000); *Martin v. Vance*, 133 N.C. App. 116, 514 S.E.2d 306 (1999).

[2] Defendant argues that his dispute with plaintiff is subject to mandatory arbitration under the arbitration clause in Plan First's Operating Agreement. We disagree.

As a general matter, public policy favors arbitration. *See, e.g., Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 74 L. Ed. 2d 765 (1983) (ambiguities or doubts as to the scope of arbitrable disputes are to be resolved in favor of arbitration); *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992) (noting North Carolina's "strong public policy" in favor of resolving disputes by arbitration). However, before a dispute can be ordered resolved through arbitration, there must be a valid agreement to arbitrate. *United Steelworkers v. Warrior & G. Nav. Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409 (1960); *LSB Financial Services, Inc. v. Harrison*, 144 N.C. App. 542, 548 S.E.2d 574 (2001). Thus, whether a dispute is subject to arbitration is a matter of contract law. *Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 531 S.E.2d 874, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 129 (2000). Parties to an arbitration must specify clearly the scope and terms of their agreement to arbitrate. *Futrelle v. Duke University*, 127 N.C. App. 244, 488 S.E.2d 635, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 412 (1997). *See also Ruffin Woody and Associates v. Person County*, 92 N.C. App. 129, 374 S.E.2d 165 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989)

(court holds that dispute concerning architect's performance is within arbitration clause in construction contract, stating that determination of arbitrability of specific claim is governed by language of parties' contract). Moreover, a party cannot be forced to submit to arbitration of any dispute unless he has agreed to do so. *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 89 L. Ed. 2d 648 (1986) (citation omitted). *See also United Steelworkers*, 363 U.S. 574, 4 L. Ed. 2d 1409; *LSB Financial Services*, 144 N.C. App. 542, 548 S.E.2d 574 (court finds that securities transaction dispute is subject to arbitration clause, noting that arbitration is required only when parties have previously agreed to submit dispute to arbitration); *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

The question of whether a dispute is subject to arbitration is an issue for judicial determination. *AT&T Technologies*, 475 U.S. 643, 89 L. Ed. 2d 648; and a trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court. *Tohato, Inc. v. Pinewild Management, Inc.*, 128 N.C. App. 386, 496 S.E.2d 800 (1998). Whether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether "the specific dispute falls within the substantive scope of that agreement." *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990). This Court has adopted the *PaineWebber* analysis. *Ragan*, 138 N.C. App. 453, 531 S.E.2d 874 (in considering a motion to compel arbitration, the trial court should determine the validity of the contract to arbitrate, and whether the subject matter of the arbitration agreement covers the matter in dispute); *Rodgers Builders*, 76 N.C. App. 16, 331 S.E.2d 726 (arbitrability is determined by relationship between claim and subject matter of arbitration clause). In the case *sub judice*, the dispositive issue involves the second prong of the analysis (whether the parties' dispute falls within the purview of the arbitration clause).

The Operating Agreement signed by plaintiff and defendant upon the formation of Plan First included an arbitration clause stating in pertinent part the following:

> The Members hereby agree to submit to arbitration any and all matters in dispute and in controversy between them and concerning, directly or indirectly, the affairs, conduct, operation and management of the LLC, to the end that all such disputes

and controversies be resolved, determined and adjudged by the arbitrators.

Defendant and plaintiff ended their professional relationship in September 1997, when Select Capital terminated defendant's employment with the company. Defendant contends that at that time, plaintiff agreed to an "oral buy-out agreement," requiring plaintiff to pay him for the value of his share of jointly managed accounts. Defendant further argues that this oral agreement is subject to mandatory arbitration under the arbitration clause in the Operating Agreement. Assuming *arguendo*, that such an "oral buy-out agreement" does exist, to be subject to mandatory arbitration, it must be "concerning, directly or indirectly, the affairs, conduct, operation and management of the LLC[.]" The record does not support such a finding.

Defendant has submitted no evidence that Plan First ever became operational after its initial creation, and appears to argue that the creation of Plan First effectively converted all of the parties' subsequent business dealings into Plan First affairs. The record demonstrates that the parties had several business connections over a period of years. Between 1995 and 1998, they were employed by three investment firms, each being employed by the same company for some period of time during the three year period. As Select Capital employees, they appear to have jointly advised several clients. For over a year, the parties rented an office space together for part-time use, but also maintained their separate offices at all times. When their business relationship ended, there may have been various matters for the parties to resolve. The record includes several memoranda pertaining to defendant's exit from Select Capital; all are on Select Capital's paper, and address issues pertaining to Select Capital's termination of defendant's employment. The record does not support defendant's contention that a dispute over fees or commissions arose from the activities of Plan First.

The record further indicates that Plan First, was never funded, did not own any assets, cash, or furniture, had no employees, and paid no taxes. Moreover, Plan First did not have a license to sell securities, and therefore had no customers or clients, and no revenues or income. There is no evidence of any joint transactions, other than investment accounts maintained and supervised by Select Capital. The record does not include documentation that Plan First had any joint bank accounts, jointly assumed debts, jointly owned assets, or jointly undertaken sales or contracts. Thus, we find no evidence that the dispute between the parties concerned the "affairs, conduct, operation [or] management" of Plan First.

We conclude that the trial court correctly granted plaintiff's motion for a permanent injunction staying arbitration, in that the subject dispute does not fall within the arbitration clause in Plan First's Operating Agreement. Accordingly, we affirm the trial court.

Affirmed.

Judges WYNN and CAMPBELL concur.

ELIOT TOD GASKILL, PLAINTIFF v. JENNETTE ENTERPRISES, INC., A NORTH CAROLINA CORPORATION, DEFENDANT

No. COA00-1220

(Filed 6 November 2001)

Vendor and Purchaser— sales contract–time is of the essence provision–specific performance

The trial court erred by granting summary judgment for defendant seller in an action for specific performance of a contract to sell real estate where the contract required plaintiff to obtain financing on or before a specified date, plaintiff buyer did not secure financing by the loan commitment date but had obtained financing on the closing date, and the contract contained a "time is of the essence" provision. That provision was ambiguous and cannot be found to apply to the loan commitment date as a matter of law. Moreover, there was a genuine issue of material fact as to plaintiff's ability to close on the closing date.

Appeal by plaintiff from judgment entered 12 May 2000 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 17 September 2001.

Battle Winslow Scott & Wiley, P.A., by M. Greg Crumpler, for plaintiff-appellant.

Vandeventer Black, L.L.P., by Norman W. Shearin, Jr. and Robert L. O'Donnell, for defendant-appellee.

EAGLES, Chief Judge.

Plaintiff appeals the trial court's 12 May 2000 entry of summary judgment in favor of defendant. After careful review of the record and briefs, we reverse and remand.

On 13 July 1999, plaintiff-buyer entered into a contract with defendant-seller for the purchase of Lots 1 and 2 in Barnette Woods in Buxton, North Carolina. The contract was a pre-printed form on which the following specifics were inserted by the parties: (1) the sale price for the property was $160,000; (2) plaintiff was to obtain financing on or before 30 August 1999; and (3) closing date was 10 September 1999. The pre-printed form included Paragraph 6, titled "Other Provisions and Conditions." It provided a blank space that allowed for the inclusion of additional provisions. There, defendant-seller added the following: "All closing costs to be paid by buyer except for deed preparation to be paid by seller. Time is of the essence!!"

On 2 or 3 September 1999, plaintiff informed Anderson Midgett of defendant Jennette Enterprises, Inc. that financing had not been secured. In response, Midgett told plaintiff that defendant considered the contract void, that defendant would not go forward with the sale of the property, and that defendant was going to sell the property to another purchaser. Plaintiff reminded Midgett that the closing date was 10 September 1999. Midgett reiterated that defendant would not honor the contract because financing had not been obtained by the 30 August 1999 loan commitment date as stated in the contract.

Notwithstanding defendant's claim that it would not honor the contract, plaintiff continued to pursue financing that would permit him to close on 10 September 1999. On the morning of 10 September 1999, East Carolina Bank agreed to lend plaintiff sufficient funds for the purchase of defendant's property. Plaintiff notified Midgett that he had secured financing necessary to close, that the closing attorney had been instructed to proceed with closing, that the necessary documentation could be prepared by 3:00 p.m. on 10 September 1999, and that it was plaintiff's intention to close the transaction on 10 September 1999, as stated in the contract. Defendant took no action to pursue closing the transaction.

On 14 September 1999, plaintiff initiated this action seeking specific performance of the contract or, in the alternative, damages for breach of contract. Defendant and plaintiff each filed motions for

summary judgment on 24 March 2000 and 31 March 2000, respectively. On 12 May 2000, after a hearing, the trial court denied plaintiff's summary judgment motion and granted summary judgment for defendant. Plaintiff filed timely notice of appeal on 6 July 2000.

The standard for determining if a movant is entitled to summary judgment requires a two-part analysis of whether: (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994). On appeal, this Court must view the record in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Aetna Casualty & Surety Co. v. Welch*, 92 N.C. App. 211, 213, 373 S.E.2d 887, 888 (1988).

Plaintiff contends on appeal that: (1) a genuine issue of fact exists as to whether time was of the essence; (2) the "time is of the essence" provision applied only to the closing date, not the loan commitment date; (3) the provisions in the contract regarding financing were for the benefit of plaintiff and could only be waived by him; and (4) plaintiff was able to close on 10 September 1999 and was not in breach of contract.

Though the sales contract stated that "time is of the essence," plaintiff first argues that the evidence raised a question of fact as to whether the parties considered time to be of the essence. In *Crawford v. Allen*, 189 N.C. 434, 127 S.E. 521 (1925), our Supreme Court held that facts of the case established that time was not of the essence even though the contract contained a recital to that effect. Similarly, this Court has held that even though the contract stated that time is of the essence, the Court could not determine as a matter of law under the facts of the case that a failure to meet the deadline constituted a material breach of the contract. *Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 344 S.E.2d 68 (1986).

Here, the "time is of the essence" provision was written into the contract as an additional provision and was acknowledged by both parties. A court must construe a contract as it is written and give effect to every part and provision whenever possible. *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 504, 320 S.E.2d 892, 897 (1984). Even when viewed in the light most favorable to plaintiff, the record here shows that defendant inserted the "time is of the essence" provision

into the contract, that plaintiff signed the contract *after* the provision was inserted, that defendant did not waive or attempt to change the provision, and that plaintiff thought it important to be prepared to close by 10 September 1999. The record shows that the "time is of the essence" provision was part of the contract.

Because the inserted language is an enforceable provision in the contract, we must consider the scope of the clause, i.e. whether the "time is of the essence" provision applied only to the closing date or to both the closing date and the loan commitment date. The language inserted by defendant into Paragraph 6, titled "Other Provisions and Conditions," stated in its entirety: "All closing costs to be paid by buyer except for deed preparation to be paid by seller. Time is of the essence!!"

"[A]n ambiguity exists in a contract if the 'language of the [contract] is fairly and reasonably susceptible to either of the constructions asserted by the parties.' " *Carolina Place Joint Venture v. Flamers Charburgers, Inc.*, 145 N.C. App. 696, 699, 551 S.E.2d 569, 571 (2001) (quoting *Taha v. Thompson*, 120 N.C. App. 697, 701, 463 S.E.2d 553, 556 (1995) (citations omitted)). Where the intended meaning of a contract term cannot be ascertained with certainty, ambiguous terms should be construed against the party who prepared the contract. *Federal Realty Investment Trust v. Belk-Tyler of Elizabeth City, Inc.*, 56 N.C. App. 363, 367, 289 S.E.2d 145, 148 (1982).

While neither this Court nor our Supreme Court has directly considered the effect of a "time is of the essence" provision on a loan commitment date as seen here, the following footnote from *Fletcher v. Jones* is instructive:

> If the condition precedent were of crucial import to either or both parties and needed to be fulfilled by a certain date, other than that set for closing, a separate date should have been explicitly included to govern the condition precedent, along with a separate time-is-of-the-essence provision if necessary. It would then have been clear that this particular condition, separate from the act of closing, must be strictly performed by a different date.

Fletcher v. Jones, 314 N.C. 389, 393 n.1, 333 S.E.2d 731, 734 n.1 (1985).

In *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973), the purchasers of real property brought suit for specific performance of the sales contract. The contract stated that the purchasers were required to secure a loan from NCNB. The sellers, *in Mezzanotte*,

contended that the purchasers breached the contract by failing to secure a loan from NCNB. This Court rejected the seller's argument noting that the purchasers obtained other financing and that the failure to acquire financing from NCNB was not detrimental to the interests of the sellers.

Considering our Supreme Court's footnote in *Fletcher*, this Court's holding in *Mezzanotte*, and the prevailing principles of contract construction, we hold that the trial court erred in holding, as a matter of law, that the time is of the essence provision in this contract applied to the loan commitment date. Based on careful analysis of the facts in the record on appeal, the time is of the essence provision, inserted by defendant, was ambiguous and cannot be found to apply to the loan commitment date as a matter of law.

Finally, the parties disagree over whether it was possible for plaintiff to close on 10 September 1999 as required by the contract and the time is of the essence provision. A careful review of the facts in the record regarding plaintiff's ability to close on 10 September 1999, indicates that a genuine issue of material fact exists. Genuine issues of material fact should be reserved for determination by a fact-finder. For the foregoing reasons, we conclude that genuine questions of material fact exist and that the trial court erred in granting summary judgment in favor of defendant. Accordingly, we reverse and remand this case for further consideration not inconsistent with this opinion.

Reversed and remanded.

Judges HUNTER and HUDSON concur.

AMERICAN RIPENER COMPANY, INC., PLAINTIFF v. MURIEL K. OFFERMAN, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA00-1346

(Filed 6 November 2001)

Taxation–sales–statutory exemption–plant growth regulators

The trial court correctly granted summary judgment for plaintiff in an action seeking a sales tax refund under the N.C.G.S. § 105-164.13(2a)d exemption for plant growth regulators or stim-

ulators. The determination of whether plaintiff's sales of plant regulator gas and generators fell under the statutory exemption depends solely on statutory interpretation and the issue was thus properly resolved by the trial court. Plaintiff's president provided evidence by affidavit that the company was in the business of manufacturing and selling a plant growth regulator and stimulator and generators for its release, and the court could not consider defendant's arguments concerning the purpose for which defendant sold the product because the record contained no evidence as to whom and for what purpose the product was sold. Finally, defendant's reliance on a definition which allegedly excluded machinery such as generators was misplaced; moreover, plaintiff provided uncontradicted evidence that the generators are used to control the release of the product and thus to regulate the speed of ripening of fruits and vegetables.

Appeal by defendant from order and judgment entered 9 August 2000 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 September 2001.

Newitt & Bruny, by John G. Newitt, Jr., and Roger H. Bruny, for plaintiff-appellee.

Attorney General Michael F. Easley, by Associate Attorney General David J. Adinolfi, II, for the State.

MARTIN, Judge.

Defendant Secretary of Revenue of the State of North Carolina appeals from a summary judgment granted in favor of plaintiff American Ripener Company, Inc., requiring defendant to refund plaintiff certain taxes assessed for the period 1 January 1990 through 30 November 1995.

Plaintiff is in the business of manufacturing and selling ethylene concentrate, a plant growth regulator or stimulator which controls the speed of the ripening of fruit and vegetables. Plaintiff also manufactures, sells, and leases generators that are utilized to control the release of the ethylene gas. For the period from 1 January 1990 through 30 November 1995, defendant assessed plaintiff $10,821.54 in sales tax for the sale of ethylene, $8,020.31 in use tax for its generators, $810.81 in use tax for the replacement parts for its generators, less a credit of $259.44, plus $8,442.41 in interest, for a total of $27,835.63.

Plaintiff appealed the assessment in writing and received a hearing before the Assistant Secretary for Legal and Financial Services for the North Carolina Department of Revenue who affirmed defendant's assessment. Subsequently, plaintiff petitioned the North Carolina Tax Review Board to review the Assistant Secretary's decision. By decision rendered 3 March 1998, the Tax Review Board affirmed. Pursuant to G.S. §§ 105-241.4 and 105-267, plaintiff paid the $27,835.63 tax and interest on 1 April 1998 under protest and, by letter of the same date, demanded a refund of the tax from defendant. Upon defendant's failure to refund the tax within 90 days after 1 April 1998, plaintiff instituted this action pursuant to G.S. §§ 105-241.4 and 105-267 to recover the tax.

Defendant moved for summary judgment without supporting affidavits. Plaintiff filed a response to the motion for summary judgment and a cross motion for summary judgment with supporting affidavits. By judgment dated 9 August 2000, the trial court concluded that there was no genuine issue as to any material fact, granted plaintiff's motion for summary judgment, and ordered defendant to refund to plaintiff the sum of $27,835.63 with interest at the rate of 8% per annum from 1 April 1998 until paid and the costs of the action. Defendant appeals.

Defendant Secretary of Revenue assigns error to the denial of her motion for summary judgment and to the granting of plaintiff's cross motion for summary judgment. We affirm.

Summary judgment is appropriate where "the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2000). According to Rule 56(e) of the North Carolina Rules of Civil Procedure:

> . . .[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2000). However, if the adverse party fails to respond, that does not automatically mean that sum-

mary judgment is appropriate. *Perry v. Aycock*, 68 N.C. App. 705, 315 S.E.2d 791 (1984). "The moving party must still succeed on the strength of its evidence, and when that evidence contains material contradictions or leaves questions of credibility unanswered, the movant has failed to satisfy its burden." *Id.* at 707, 315 S.E.2d at 793-94. Additionally, the evidence must be viewed in the light most favorable to the non-movant. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 472 S.E.2d 358 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172-73 (1997).

Two statutes are applicable to the audit period at issue in this case, 1 January 1990 through 30 November 1995. G.S. § 105-164.13(2) was in effect from 1 January 1990 through 31 July 1995 and G.S. § 105-164.13(2a)d was in effect from 1 August 1995 through 30 November 1995. Until 1 August 1995, G.S. § 105-164.13(2) provided:

> The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article:
>
> (2) . . . plant growth inhibitors, regulators, or stimulators for agriculture including systemic and contact or other sucker control agents for tobacco and other crops.

G.S. § 105-164.13(2a)d, applicable for the last four months of the audit period provides:

> The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article:
>
> (2a) Any of the following when purchased for use in the commercial production of animals or plants, as appropriate:
>
> d. Plant growth inhibitors, regulators, stimulators, including systemic and contact or other sucker control agents for tobacco and other crops.

The determination of whether plaintiff's sales of ethylene gas, use of generators, and use of replacement parts for its generators falls under an exemption for the retail sales and use tax depends solely on statutory interpretation which is a matter of law. *See Taylor Home of Charlotte v. City of Charlotte*, 116 N.C. App. 188, 447 S.E.2d 438, *disc. review denied*, 338 N.C. 524, 453 S.E.2d 170 (1994). Therefore, this issue was appropriately resolved by the trial court.

In her answer, defendant admitted that plaintiff "is engaged in the manufacture of ethylene concentrate and generators [and that] [e]thylene is a plant growth regulator or stimulator which controls the speed of the ripening of fruit and vegetables." Plaintiff's president provided evidence by affidavit in support of plaintiff's motion for summary judgment, including the following:

> 5. That the Plaintiff, American Ripener Company, Inc., is in the business of manufacturing and selling ethylene concentrate and manufacturing, selling and leasing generators.
>
> 6. That ethylene is a plant growth regulator or stimulator which controls the speed of the ripening of fruit and vegetables.
>
> 7. That the generators are utilized to control the release of the ethylene gas which thus regulates the speed of the ripening of the fruits and vegetables and are plant growth regulators and stimulators.

Since "plant growth inhibitors, regulators, or stimulators" are "specifically exempted" under G.S. §§ 105-164.13(2)and 105-164.13(2a)d, plaintiff contends that the court was correct in granting its motion for summary judgment.

Defendant argues, however, that plaintiff's sale of the ethylene was not for a purpose falling under the exemption statutes. In order for the sale of ethylene to be exempted under G.S. § 105-164.13(2), the ethylene must be sold "for agriculture," and under G.S. § 105-164.13(2a)d, the ethylene must be sold "for the commercial production of animals or plants." The record, however, contains no evidence as to whom and for what purpose the ethylene was being sold by plaintiff and to rebut plaintiff's showing that the sale of the gas and the use of the generators were exempt. Thus, this Court is unable to consider defendant's arguments concerning the purpose for which plaintiff sold the ethylene gas as defendant produced no evidence to support her argument. *See* N.C.R. App. P. 9(a). We therefore conclude that plaintiff has carried its burden by showing that there was no genuine issue as to any material fact and that its sale of ethylene gas fell under the exemption statutes.

Defendant also argues that plaintiff is not exempt from any tax under G.S. §§ 105-164.13(2) and 105-164.13(2a)d with respect to its purchase of generator parts. However, the affidavit of plaintiff's president asserts that the generators were utilized to control the release of ethylene gas and therefore they should be considered plant growth

regulators and stimulators under the sales and use statutes. Thus, plaintiff argues that it is entitled to recover the $8,020.31 in use tax for its generators and $810.81 in use tax for the replacement parts for its generators.

Defendant relies on the definition of "plant regulator" provided in G.S. § 143-460(32) which states:

> The term "plant regulator" means any substance or mixture of substances, intended through physiological action, for accelerating or retarding the rate of growth or rate of maturation, or for otherwise altering the behavior of ornamental or crop plants or the produce thereof, but shall not include substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants, and soil amendments.

Defendant points out that this definition does not include hardware or machinery such as generators but is limited to chemical substances. Therefore, defendant argues that the generators at issue are not exempted under the applicable statutes. However, defendant's reliance on this definition is misplaced since that definition is confined to Article 52, North Carolina Pesticide Law of 1971, G.S. § 143-434 *et seq.*

Defendant additionally argues that plaintiff's specific use of the generator parts in question is not exempted under the retail sales and use statutes. However, in the absence of evidence in the record as to the purpose for which plaintiff used the generator parts, we are unable to consider defendant's arguments with respect thereto. *See* N.C.R. App. P. 9(a). Plaintiff provided uncontradicted evidence that the generators are used to control the release of the ethylene gas and to regulate the speed of the ripening of fruits and vegetables and, therefore, are plant growth regulators or stimulators. Since "plant growth inhibitors, regulators, or stimulators" are specifically exempt from the North Carolina Sales and Use Tax pursuant to G.S. §§ 105-164.13(2) and 105-164.13(2a)d, plaintiff's motion for summary judgment was properly granted.

Affirmed.

Judges WALKER and TYSON concur.

KHIN KHIN SHWE, PLAINTIFF-APPELLEE v. AMAD M. JABER AKA MUHAIMEN JABER, DEFENDANT-APPELLANT

No. COA00-1356

(Filed 6 November 2001)

1. Process and Service—requests for admissions—discovery requests—mailed to employer's address—last known address

The trial court did not err in an action alleging multiple claims including fraud, conversion, unfair trade practices, and breach of contract arising out of the sale of a restaurant business and the sublease of the pertinent premises by ruling that plaintiff's first and second requests for admissions had been properly served upon defendant even though the discovery requests were mailed to pro se defendant at his employer's address, because defendant's last known address was his employer's address when that was the address plaintiff used to serve defendant with the summons and complaint, N.C.G.S. § 1A-1, Rule 5(b).

2. Discovery— deemed admissions—pro se defendant

The trial court did not abuse its discretion in an action alleging multiple claims including fraud, conversion, unfair trade practices, and breach of contract arising out of the sale of a restaurant business and the sublease of the pertinent premises by refusing to allow pro se defendant to withdraw his deemed admissions, because: (1) plaintiff properly served the requests for admissions as required by N.C.G.S. § 1A-1, Rule 5; (2) although defendant denied he actually received the requests for admissions, the trial court did not find his denials credible; (3) defendant has offered nothing to show that the trial court refused to consider any particular evidence or otherwise acted inappropriately; and (4) even though defendant was acting pro se, the North Carolina Rules of Civil Procedure must be applied equally to all parties to a lawsuit without regard to whether they are represented by counsel.

Appeal by defendant from judgment entered 17 August 2000 by Judge Paul G. Gessner in Wake County District Court. Heard in the Court of Appeals 18 September 2001.

Danny Bradford for plaintiff-appellee.

Calvin B. Bennett, III, for defendant-appellant.

MARTIN, Judge.

Plaintiff filed this action alleging multiple claims for relief, including fraud, conversion, unfair practices in violation of N.C. Gen. Stat. Chapter 75, and breach of contract, all arising out of defendant's sale to plaintiff of a restaurant business and sublease of premises located in Zebulon, N.C.

Service of the summons and complaint upon defendant was attempted at 6300 Creedmoor Road, 138-275, Raleigh, N.C., an address which had been provided by defendant in response to discovery in an earlier lawsuit brought by plaintiff arising out of the same transaction. The summons was returned unserved, however, because the address was a mailbox rather than a physical address. An alias and pluries summons was issued, directed to defendant at 6069-B Shadetree Lane, Raleigh, N.C., but was returned unserved by a Wake County deputy sheriff with the following: "Subject no longer at given per [sic] leasing office." Subsequent alias and pluries summons were issued, directed to defendant at 110 Corning Rd., Suite 200, Cary, N.C., which was believed to be defendant's work address. Plaintiff hired a process server to serve the summons and complaint on defendant at the Corning Rd. address. Four attempts were made to obtain service. On the first attempt at service, defendant denied that he was defendant, and on the second and third attempts defendant refused to make himself available so that he could be served. On 25 February 1998, the process server was finally able to personally serve the summons and complaint on defendant.

Following personal service of the summons and complaint, plaintiff mailed, on 14 April 1998 and on 7 July 1998, two discovery documents entitled "Request to Admit Facts and Genuineness of Documents" to defendant at the Corning Rd. address. After defendant failed to answer the complaint and the first set of discovery requests, plaintiff filed a motion for summary judgment on 18 May 1998. On 19 August 1998, the Clerk of Superior Court mailed a motions calendar to defendant at the Creedmoor Rd. mailbox address, setting the hearing on plaintiff's motion for 14 September 1998. Defendant responded by filing a *pro se* answer on 13 September 1998, and he appeared *pro se* for the summary judgment hearing the following day. By order dated 18 September 1998, Judge Alice Stubbs granted partial summary judgment in plaintiff's favor establishing defendant's liability upon the claims alleging unfair practices, breach of contract, and conversion, based on defendant's failure to answer plaintiff's discovery in accordance with G.S. § 1A-1, Rule 36.

Defendant, still *pro se*, filed motions for relief under Rules 59 and 60 of the North Carolina Rules of Civil Procedure on 28 September 1998, in which he denied that he had been served with the discovery requests or the motion for summary judgment. Counsel for defendant filed a notice of appearance on 19 October 1998. Defendant's motions for relief were denied by Judge Stubbs on 20 October 1999.

The issues relating to damages were tried before Judge Paul G. Gessner, sitting without a jury. By judgment entered 17 August 2000, Judge Gessner awarded plaintiff damages in the amount of $20,536. Defendant appeals.

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[1] Defendant contends on appeal that the trial court erred in ruling that plaintiff's first and second requests for admissions had been properly served upon defendant since the discovery requests were mailed to the *pro se* defendant's employer's address, rather than to defendant's "last known address", i.e., the Creedmoor Rd. address.

Service of discovery requests is governed by G.S. § 1A-1, Rule 5. According to Rule 5(b), service of discovery requests may

> be made by delivering a copy to [the *pro se* party] or by mailing it to him at his *last known address* or, if no address is known, by filing it with the clerk of court. . . . Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

N.C. Gen. Stat. § 1A-1, Rule 5(b) (2000) (emphasis added). According to the certificates of service, plaintiff mailed the two discovery requests to defendant at his employer's address at 110 Corning Rd., Suite 200, Cary, N.C. This address was the same one used by plaintiff to personally serve defendant with the summons and complaint.

Defendant argues that his "last known address," and thus the address to which plaintiff should have mailed the discovery requests, was 6300 Creedmoor Rd. 138-275, Raleigh, N.C. Defendant relies on *Barnett v. King*, 134 N.C. App. 348, 517 S.E.2d 397 (1999) to support his argument. In *Barnett*, the plaintiff had mailed a notice of hearing to the address where the defendant was initially served by the sheriff even though the defendant had subsequently provided a different address in a responsive pleading. The plaintiff in *Barnett* contended that the defendant's "last known address" was the ad-

dress where the defendant had originally been served. This Court disagreed holding,

> [w]here a defendant, especially one acting *pro se*, provides a mailing address in a document filed in response to a complaint and serves a copy of that filing on opposing counsel, he or she should be able to rely on receiving later service at that address; by the same token, opposing counsel (or a *pro se* party) may also rely on that address for service of all subsequent process and other communications until a new address is furnished.

Barnett, 134 N.C. App. at 351, 517 S.E.2d at 400. However, in the present case, after plaintiff served the complaint on defendant at the Corning Road address, defendant did not file any responsive pleadings which provided plaintiff with a new mailing address for defendant. Therefore, defendant's "last known address" was his employer's address since that was the address plaintiff used to serve defendant with the summons and complaint, and we hold that the trial court did not err in finding that defendant was properly served with the requests for admissions. *See* N.C. Gen. Stat. § 1A-1, Rule 5(b) ("[s]ervice by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.")

[2] Defendant further contends that even if the service of the requests for admissions was effective, the trial court erred by refusing to allow defendant to withdraw his deemed admissions. We disagree.

According to G.S. § 1A-1, Rule 36(a), matters as to which admission is requested are deemed admitted unless the party to whom the request is directed serves a written response within the time permitted by the rule. The trial court has discretion to allow a withdrawal of an admission upon a party's motion. N.C. Gen. Stat. § 1A-1, Rule 36(b) (2000); *Whitley v. Coltrane*, 65 N.C. App. 679, 309 S.E.2d 712 (1983). Once a matter is admitted by failure to respond, the matter is conclusively established for purposes of the pending action unless the court, upon motion, allows withdrawal or amendment of the admission. N.C. Gen. Stat. § 1A-1, Rule 36. Moreover, matters admitted pursuant to Rule 36(b) may be sufficient to support a grant of summary judgment. *Rhoads v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637, *disc. review denied*, 306 N.C. 386, 294 S.E.2d 211 (1982).

As we have decided, plaintiff properly served the requests for admissions as required by G.S. § 1A-1, Rule 5. Though defendant denied he actually received the requests for admissions, the trial court, after considering such denials at both the hearing on his Rule 59 and 60 motions and at the summary judgment hearing apparently did not find his denials credible. Defendant has offered nothing to show this Court that the trial court refused to consider any particular evidence or otherwise acted inappropriately. Therefore, we conclude that the trial court did not abuse its discretion in refusing to permit defendant to withdraw his deemed admissions.

Defendant suggests that the trial court should have taken into account that defendant was acting *pro se* at the time the partial summary judgment was entered and therefore should have been more inclined to allow defendant to withdraw his admissions. However, as our Supreme Court has stated: "the [North Carolina Rules of Civil Procedure] must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel." *Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999).

Affirmed.

Judges WALKER and TYSON concur.

MILDRED H. DUNCAN, PLAINTIFF v. JAMES W. DUNCAN, II AND PATSY D. PHIPPS, CO-EXECUTORS OF THE ESTATE OF PAGIE P. DUNCAN, JAMES W. DUNCAN, II, PATSY DUNCAN PHIPPS, ERNEST C. DUNCAN AND LOUISE DUNCAN MITCHUM, DEFENDANTS

No. COA00-1358

(Filed 6 November 2001)

1. Wills— agreement not to revoke or alter—share of estate

The trial court properly determined that plaintiff was entitled to a one-fifth interest in testator's estate based on the enforcement of an agreement between the testator and her five children not to revoke the testator's 1997 will, because: (1) in return for the testator's promise not to revoke or alter her 1997 will, her children promised to refrain from filing a caveat, objection, or

claim against the estate; (2) this forbearance in exchange for a promise not to revoke or alter the 1997 will is sufficient consideration to enforce the agreement; and (3) the later execution of a 1998 will and its attempted revocation of the 1997 will constituted a breach of the agreement.

2. Wills— agreement not to revoke or alter—testator's real property

The trial court erred by concluding that plaintiff daughter-in-law was the fee simple owner of a one-fifth undivided interest in testator's lands conveyed to testator's four surviving children, because: (1) a strict construction of the language of the agreement shows the deeding away of property by testator's attorney-in-fact did not breach the agreement not to revoke or alter testator's 1997 will even though the property constituted the bulk of testator's estate; (2) N.C.G.S. § 32A-14.1(b) allows the attorney-in-fact to make a gift of real property to himself if so authorized in the power of attorney; and (3) N.C.G.S. § 31-5.6 permits the conveyance of property which comprises the estate under a will without revoking or altering that will.

Appeal by defendants from judgment entered 2 August 2000 by Judge James E. Ragan, III in Craven County Superior Court. Heard in the Court of Appeals 18 September 2001.

Donald J. Dunn for plaintiff-appellee.

Henderson, Baxter, Taylor & Gatchel, P.A., by Brian Z. Taylor, for defendants-appellants.

WALKER, Judge.

Defendants appeal from a summary judgment order which determined the plaintiff's interest in certain property and in the estate of Pagie P. Duncan. On 9 October 1997, Pagie Duncan executed a Last Will and Testament (1997 Will). Article II of the 1997 Will left all of her property, real and personal, in pertinent part as follows:

> unto my five children, ERNEST C. DUNCAN, JAMES WILLIAM DUNCAN, II, PATSY DUNCAN PHIPPS, LOUISE DUNCAN MITCHUM, and LAWRENCE C. DUNCAN, JR., in equal shares in fee simple, provided, however, that if . . . my Son, LAWRENCE C. DUNCAN, JR., shall not be living at the time of my death, then and in such an event, I will and devise the share of my estate

> which he would have received, had he survived me, unto his Wife, MILDRED H. DUNCAN, absolutely and in fee simple.

Simultaneous to the execution of the 1997 Will, Pagie Duncan entered into an agreement with her five children not to revoke or alter it. The agreement provided:

> 1. PAGIE PUGH DUNCAN, party of the first part, agrees with the parties of the second part, that she will not at any time destroy, revoke, rescind, alter, or modify the Will executed by her on this 9th day of October, 1997, nor will she execute any codicil to said Will.
>
> 2. ERNEST C. DUNCAN, JAMES WILLIAM DUNCAN, II, PATSY DUNCAN PHIPPS, LOUISE DUNCAN MITCHUM and LAWRENCE C. DUNCAN, JR., parties of the second part, have and do hereby covenant and agree among themselves and with the party of the first part that they will not, either acting jointly or individually, file any caveat, or other objection to the probate of the above-mentioned Will of the party of the first part, nor will they make any claim against the estate of said party of the first part, except as provided in said Will.

On 14 December 1997, Lawrence C. Duncan, Jr. died, leaving the plaintiff as his surviving spouse. Later, on 26 June 1998, Pagie Duncan executed a power of attorney naming her son, James William Duncan, II (James) or her daughter, Patsy D. Phipps (Patsy), as her attorney-in-fact. Pagie Duncan authorized her attorney-in-fact to make gifts of her real property "to himself or herself." On the same day, James, acting as Pagie Duncan's attorney-in-fact, executed a deed conveying all of Pagie Duncan's real property to her four surviving children. The deed also recited a consideration of ten dollars and other good and valuable consideration. On 17 November 1998, Pagie Duncan executed another will (1998 Will) revoking the 1997 Will and leaving all real, personal, and mixed property to her four surviving children. On 5 December 1998, Pagie Duncan died and the 1998 Will was admitted to probate.

Plaintiff brought suit against the estate of Pagie Duncan and the four surviving children claiming that she has an undivided one-fifth interest in the estate and in the real property deeded to the children based on the 1997 Will and the contract not to revoke. She also claimed that the defendants exerted undue influence over their mother which resulted in her executing the power of attorney to the

children and her deeding the property on 26 June 1998. The trial court granted summary judgment declaring plaintiff the fee simple owner of a one-fifth undivided interest in the lands deeded on 26 June 1998 and that plaintiff was entitled to a one-fifth interest in the estate of Pagie Duncan.

[1] The first issue before this Court is whether the agreement not to revoke the 1997 Will is enforceable. The agreement provided that Pagie Duncan would "not at any time destroy, revoke, rescind, alter, or modify the Will executed by her on this 9th day of October, 1997, nor will she execute any codicil to said Will." In return, her five children, as beneficiaries under the 1997 Will, agreed that they would not "file any caveat, or other objection to the probate of the [1997] Will of [Pagie Duncan], nor will they make any claim against the estate of [Pagie Duncan], except as provided in said Will."

"[I]n order for a contract to be enforceable it must be supported by consideration." *Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342, 345 (1972). Consideration exists if "the promisee, in return for the promise, . . . refrains from doing anything which he has a right to do." *Id.* at 196, 188 S.E.2d at 345 (*citing Stonestreet v. Oil Co.*, 226 N.C. 261, 37 S.E.2d 676 (1946)). "Forbearance or a promise to forbear the exercise of a legal right is a sufficient consideration for a promise made on account of it . . . . However, forbearance of a right which does not exist, or a promise to refrain from doing that which the promisee cannot legally do, cannot constitute consideration." *Zorbra's Inn, Inc. v. Nationwide Mut. Fire Ins. Co.*, 93 N.C. App. 332, 334, 377 S.E.2d 797, 798-99 (1989). Although the defendants contend the agreement fails for lack of consideration, we conclude otherwise. In return for Pagie Duncan's promise not to revoke or alter her 1997 Will, her children promised to refrain from filing a caveat, objection or claim against the estate. This forbearance in exchange for a promise not to revoke or alter the 1997 Will is sufficient consideration to enforce the agreement.

Therefore, based on the agreement, the interest of the plaintiff was established in the 1997 Will. The later execution of the 1998 Will and its attempted revocation of the 1997 Will constituted a breach of the agreement. Thus, the trial court properly determined that the plaintiff was entitled to a one-fifth interest in the estate.

[2] The trial court concluded that "the Plaintiff is the fee simple owner of a one-fifth (1/5th) undivided interest in the Pagie P. Duncan lands as described in that certain deed dated June 26, 1998." Plaintiff

contends that the deeding of the property on 26 June 1998 constituted a breach of the agreement.

Our Supreme Court has held:

> All wills are by nature ambulatory, and thus their provisions may be changed prior to death by the maker unless by contractual provisions others' rights thereunder become fixed. In other words, a will is revocable only to the extent that the testator has not contracted to make it irrevocable.

Rape v. Lyerly, 287 N.C. 601, 618, 215 S.E.2d 737, 748 (1975) (emphasis omitted). While an agreement not to revoke or alter a will is valid and enforceable, it places a restriction on alienation in that a testator is thereafter limited in the disposition of his or her property. Because of this restraint on alienation, an agreement not to revoke or alter a will should be strictly construed. *See* Webster, Jr., James A., *Webster's Real Estate Law in North Carolina 5th Ed.*, § 12-14, 498 (1999). *See also* 17A Am. Jur. 2d 345; Lord, Richard A., *Williston on Contracts* 4th Ed., § 30:9, 104 (1999) (Agreements which place a restraint on legal rights should be strictly construed).

Here, the agreement only precluded Pagie Duncan from revoking or altering her 1997 Will. The agreement did not restrict Pagie Duncan's ability to convey her property by deed after the 1997 Will. "[I]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987). Thus, under a strict construction of the language of the agreement, the deeding away of property did not breach the agreement not to revoke or alter the 1997 Will. Furthermore, under N.C. Gen. Stat. § 32A-14.1(b) the attorney-in-fact may make a gift of real property to himself if so authorized in the power of attorney.

Plaintiff also contends that the conveyance of the property by deed to the four surviving children had the effect of revoking her 1997 Will because the real property conveyed constituted the bulk of her estate. Further, the purpose of the agreement would be destroyed if this conveyance is upheld. Plaintiff's argument must be weighed in light of N.C. Gen. Stat. § 31-5.6 which states in pertinent part:

> No conveyance . . . made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, . . . shall prevent the operation of the will with re-

spect to any estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

Clearly, this statute permits the conveyance of property which would comprise the estate under a will without revoking or altering that will. Similarly, the conveyance of real property to Pagie Duncan's children on 26 June 1998 did not have the effect of revoking or altering the 1997 Will.

In summary, the trial court's order is affirmed as to its holding that plaintiff is entitled to a one-fifth interest in the estate of Pagie Duncan. However, the trial court erred in holding that the plaintiff was the fee simple owner of a one-fifth undivided interest in the Pagie Duncan lands conveyed to Ernest Duncan, Patsy Phipps, Louise Mitchum and James Duncan on 26 June 1998. The case is remanded to the trial court for proceedings consistent with this opinion.

Affirmed in part and reversed in part.

Judges MARTIN and TYSON concur.

DEBORA W. MOORE, PLAINTIFF v. DONNA MEEKS WOOD AND WILLIAM M. MERCER, INC., DEFENDANTS AND DONNA M. WOOD, PLAINTIFF v. WILLIAM M. MERCER, INC., DEFENDANT

No. COA00-1179

(Filed 6 November 2001)

Pensions and Retirement— determining beneficiary—non-ERISA plan—equivalent Internal Revenue Code section

The trial court did not err by granting summary judgment for plaintiff in an action to determine the recipient of a local government employee's retirement benefit after his death where he had designated plaintiff, his sister, as the beneficiary when the plan was established; he subsequently married defendant; and he did not change the earlier beneficiary designation. This is a "government plan" exempt from ERISA and the section of the Internal Revenue Code concerning the payment of benefits to surviving spouses to which it referred does not create substantive rights

that an individual can enforce as the potential beneficiary of a retirement plan.

Appeal by defendant Donna Meeks Wood[1] from judgment entered 31 July 2000 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 September 2001.

William F. Burns, Jr. for plaintiff-appellee.

Plumides Law Office, by Daniel J. Clifton, for defendant-appellant.

CAMPBELL, Judge.

Donna Meeks Wood ("defendant") appeals from the trial court's entry of summary judgment in favor of Debora W. Moore ("plaintiff"). We affirm.

Defendant is the surviving spouse of Walter J. Wood ("decedent"), as well as the administrator of decedent's estate. Plaintiff is the surviving sister of decedent. Prior to his death on 6 April 1999, decedent was an employee of the Housing Authority of the City of Charlotte ("CHA") and a participant in the CHA's Housing-Renewal and Local Agency Retirement Plan ("the Plan"), which was administered by William M. Mercer, Inc. ("Mercer"). At the time of his death, decedent had built up a retirement account under the Plan.

In 1993, when the original contract was signed by decedent establishing his retirement account under the Plan, decedent named plaintiff, his sister, the primary beneficiary of the retirement account. At that time, decedent was not married to defendant. Decedent subsequently married defendant, but the record does not show that decedent ever executed any change to his earlier beneficiary designation under the Plan.

On 21 January 2000, plaintiff filed a complaint in 00 CVS 1045 against defendant and Mercer, as administrator of the Plan, seeking a declaratory judgment that as the designated beneficiary she was entitled to all of the benefits due and payable under the Plan. In addition to the aforementioned background facts, plaintiff alleged that decedent's designation of her as beneficiary was done while decedent

1. Appellant, Donna Meeks Wood, is the defendant in 00 CVS 1045 and the plaintiff in 00 CVS 1053. The two cases were consolidated by order of the trial court filed 17 April 2000. In this opinion, any reference to the parties will be consistent with their status in 00 CVS 1045.

was fully competent, and that at no time thereafter had decedent intended to change his beneficiary designation. Plaintiff further alleged that the Plan was a "government plan" within the meaning of 29 U.S.C. § 1002(32), and therefore exempt from compliance with the Employment Retirement Income Security Act ("ERISA"). 29 U.S.C. § 1003(b)(1) (1999).

That same day, defendant filed a complaint in 00 CVS 1053 against CHA and Mercer seeking recovery of all the benefits due and payable under the Plan. Defendant alleged that the Plan *was* covered by ERISA, and as the surviving spouse she was entitled to the benefits of decedent's retirement account pursuant to 29 U.S.C. § 1055. That section requires that all retirement plans covered by ERISA must provide benefits to the surviving spouses of employees who die before retirement. 29 U.S.C. § 1055(a)(2) (1999). These survivorship benefits are payable unless they are expressly waived by the employee with the consent of the spouse. 29 U.S.C. §§ 1055(c)(1)(A), (2)(A). Defendant alleged that she had never consented to any such waiver.

On 23 February 2000, CHA filed a motion to dismiss defendant's claim against it in 00 CVS 1053 pursuant to N.C. R. Civ. P. 12(b)(6). On 8 March 2000, plaintiff filed a motion to consolidate the two actions pursuant to N.C. R. Civ. P. 42(a). On 17 April 2000, the trial court entered an order consolidating the two actions and an order dismissing defendant's complaint against CHA.

On 9 May 2000, plaintiff moved for summary judgment as to all issues in the consolidated actions. The trial court granted summary judgment in favor of plaintiff in an order signed 27 July 2000 and filed 31 July 2000. In its order the trial court ruled that plaintiff was "entitled to receive all vested retirement benefits and supplemental death benefits afforded by the plan to the decedent's designated beneficiary." Defendant filed notice of appeal on 27 July 2000.

By her sole assignment of error, defendant argues that the trial court erred in granting summary judgment in favor of plaintiff. We disagree. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). Having reviewed the record and found no genuine issue of material fact, we must determine whether the trial court erred in holding that plaintiff was entitled to judgment as a matter of law.

Defendant concedes in her brief that the Plan is a "government plan" and therefore exempt from the requirements of ERISA concerning the payment of benefits to surviving spouses. 29 U.S.C. § 1003(b)(1). Nonetheless, defendant argues that since the Plan was drafted "with Section 401 of the Internal Revenue Code as the reference point,"[2] that sections 401 and 417 of the Internal Revenue Code ("IRC"), which are identical to ERISA provisions concerning the payment of benefits to surviving spouses, apply and entitle defendant to decedent's retirement benefits. Defendant's argument assumes that section 401 of the IRC creates substantive rights that an individual can enforce as the potential beneficiary under a retirement plan. We disagree.

Title II of ERISA sets out requirements pertaining to the qualification of pension plans for favorable tax treatment. *See* 26 U.S.C. §§ 401-419A (1999). Defendant attempts to use these provisions to assert that the Plan is required to pay her decedent's retirement benefits. However, defendant fails to cite any case law to support her position that section 401 of the IRC creates substantive rights that can be enforced by an individual in a private cause of action. Defendant's failure to cite such case law is very likely for the same reason that our research did not uncover such case law—it simply does not exist.

Federal courts have consistently held that there is no basis to find that the provisions of section 401 of the IRC—which relate solely to the criteria for tax qualification under the Internal Revenue Code—are imposed on pension plans by the substantive terms of ERISA. *See Reklau v. Merchants Nat. Corp.*, 808 F.2d 628, 631 (7th Cir. 1986), *cert. denied*, 481 U.S. 1049, 95 L. Ed. 2d 836 (1987); *Cowan v. Keystone Emp. Profit Sharing Fund*, 586 F.2d 888, 890 n.3 (1st Cir. 1978) ("This section [§ 401 of the I.R.C.] does not appear to create any substantive rights that a beneficiary of a qualified retirement trust can enforce."); *Wiesner v. Romo Paper Products Corp., Etc.*, 514 F. Supp. 289, 291 n.2 (E.D.N.Y. 1981) ("The sections relied on, 26 U.S.C. §§ 401, 404 and 503, do not create a substantive right that a beneficiary, participant, or fiduciary could enforce."); *Vermeulen v. Cent. States, Southeast and Southwest*, 490 F. Supp. 234, 237 n.6 (M.D.N.C.

2. Section 9.3 of the Plan provides:

> Notwithstanding any other provisions of this Plan to the contrary, each participating Employer's adoption of this Plan must result in the Plan for that organization being a plan "qualified" for favorable tax treatment under Section 401(a) and 501(a) of the Internal Revenue Code, as amended from time to time . . . .

1980) ("This court agrees with the First Circuit's holding in *Cowan v. Keystone Employees Profit Sharing Fund*, 586 F.2d 888, 890 n.3 (1st Cir. 1978)."). While all of these federal cases deal with attempts to use provisions of the Internal Revenue Code as the basis for actions against retirement plans which are covered by ERISA, we find no reason why a different rule should apply in the context of an attempt to use section 401 of the IRC as the basis of an implied private cause of action against a government retirement plan that is exempt from ERISA. Therefore, we hold that the trial court did not err in finding that there was no genuine issue of material fact and plaintiff was entitled to judgment as a matter of law.

Affirmed.

Judges GREENE and BRYANT concur.

GERALD L. FULCHER, JR. AND SUSAN HIBBS, INDIVIDUALLY AND AS CO-ADMINISTRATORS OF THE ESTATE OF GERALD FULCHER, PLAINTIFFS v. DELMAR C. GOLDEN, JR., A/K/A DELMER C. GOLDEN, JR., DEFENDANT

No. COA00-1474

(Filed 6 November 2001)

1. Deeds— deed of gift—evidence insufficient

The trial court did not err when sitting without a jury by finding that a deed was a deed of gift where defendant testified that he did not pay decedent at the time the deed was delivered to him, but had given him other money over the years; defendant had indicated to the register of deeds that there were no revenue stamps to be paid; and defendant and the deceased were not parent and child. Other than defendant's testimony that decedent was like a father to him, there was no evidence of "kindness" and "care" furnished by defendant to decedent in obedience to a moral obligation between parent and child.

2. Deeds— recordation twenty years after making—void

A deed of gift which was recorded 20 years after its making was void under N.C.G.S. § 47-26.

Appeal by defendant from judgment entered 18 August 2000 by Judge James E. Ragan, III in Carteret County Superior Court. Heard in the Court of Appeals 11 October 2001.

Beswick, Marquardt & Goines, P.A., by George W. Beswick, for plaintiff-appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, III, for defendant-appellant.

TYSON, Judge.

Delmar C. Golden, Jr. ("defendant") appeals the trial court's order declaring the defendant's Deed as a deed of gift and therefore void, and ordering that said Deed be stricken from the public records. We affirm the trial court's judgment.

I. Facts

On 14 November 1978, the deceased, Gerald Linwood Fulcher, executed a deed to defendant for property located in Carteret Count ("Deed"). Defendant placed the Deed in his gun cabinet at his residence. On or about 20 February 1979, defendant moved the Deed to a safe deposit box owned by the deceased. Sometime in 1982, defendant moved and took up residence in Ohio, leaving the Deed in the safe deposit box.

On 2 June 1999, a funeral was held for the deceased. Defendant returned to North Carolina to attend the funeral. On 2 June 1999, defendant went to the safe deposit box, removed the Deed and recorded it with the Carteret County Register of Deeds.

Gerald L. Fulcher, Jr. and Susan Hibbs ("plaintiffs") are the only heirs of Gerald Linwood Fulcher and co-administrators of his estate. Plaintiffs filed a complaint on 25 June 1999 seeking to set aside the Deed. The parties waived a jury trial and the matter was heard before Judge James E. Ragan, III on 26 June 2000. The trial court found the Deed to be a deed of gift which was void pursuant to G.S. § 47-26. The trial court ordered the Deed stricken from the public records and that a copy of the judgment be recorded in the Register of Deeds Office. Defendant appeals.

II. Issues

The sole issue presented by this appeal is whether the Deed from Gerald Linwood Fulcher to defendant was a deed of gift. Defendant

argues that the trial court erred in finding the Deed to be a deed of gift and finding the Deed void as not being recorded within two years from its making. Defendant's assignment of error requires a determination of whether there was consideration given for the grant of the Deed. We hold that there was not adequate consideration and that the Deed was a deed of gift.

III. Consideration

[1] In all actions tried without a jury, the trial court is required to make specific findings of fact, state separately its conclusions of law, and then direct judgment in accordance therewith. N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (1999). "It is well settled that although the sufficiency of the evidence to support the trial court's findings may be raised on appeal, the 'appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary.' " *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 460, 490 S.E.2d 593, 596 (1997) (quoting *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984)).

Defendant contends that plaintiffs failed to overcome the presumptions created by the recital of consideration in the deed and the execution of the deed under seal.

If consideration has been paid for a deed, it is not a deed of gift and its recordation is necessary only as against purchasers for value and lien creditors. *Higdon v. Davis*, 71 N.C. App. 640, 655, 324 S.E.2d 5, 15 (1984), *aff'd in part and rev'd in part*, 315 N.C. 208, 337 S.E.2d 543 (1985). A deed of gift is valid as to the parties and their heirs and assigns. Patrick K. Hetrick and James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina*, § 17-9 (1999). Where a deed recites the payment and receipt of a consideration, it is presumed to be correct and is prima facie evidence of that fact. *Pelaez v. Pelaez*, 16 N.C. App. 604, 606, 192 S.E.2d 651, 652 (1972). However, it is also true that this presumption of consideration may be rebutted by parol evidence. *Westmoreland v. Lowe*, 225 N.C. 553, 555, 35 S.E.2d 613, 614 (1945).

Our courts have also stated in many cases that a seal on a deed "imports" consideration or gives rise to a presumption that consideration was present. That presumption, too, can also be overcome by proof. *Patterson v. Wachovia Bank & Trust Co.*, 68 N.C. App. 609, 614, 315 S.E.2d 781, 784 (1984).

The trial court found: (1) that defendant did not in fact pay any money to decedent at the time the Deed was delivered to him, (2) that money given by defendant to decedent involving various business transactions was subsequent to the delivery of the Deed, (3) that the Deed bears no revenue stamps, and (4) that the Deed was a deed of gift. Since the trial court found that the Deed was a deed of gift, we proceed to the question of whether the findings are supported by competent evidence.

Defendant testified that decedent was like a father to him. Defendant further testified that he did not actually pay decedent ten dollars at the time the Deed was delivered to him, but gave decedent other money over the years. Defendant also testified that the Register of Deeds informed him that if there was any value paid for the property that he would need to pay revenue stamps. Defendant testified that he indicated to them that there were no revenue stamps to be paid.

Defendant relies on *Jones v. Saunders*, 254 N.C. 644, 119 S.E.2d 789 (1961) to support his proposition that the Deed was given in consideration of their close relationship. Our Supreme Court in *Jones* stated that "[l]ove and affection, recognition of kindness and care, and provision for the future of a child furnish adequate consideration as between parent and child . . . ." *Id.* at 649, 119 S.E.2d at 793.

Defendant and the deceased were not parent and child. Other than defendant's testimony that decedent was like a father to him, there was no evidence of "kindness" and "care" furnished by defendant to decedent in obedience to a moral obligation found between parent and child. *Id.* (citing *Allen v. Seay*, 248 N.C. 321, 323, 103 S.E.2d 332, 333 (1958)). We conclude that competent evidence was presented to support the trial court's finding this Deed to be a deed of gift.

IV. Recordation

[2] N.C. Gen. Stat. § 47-26 (1999) provides: "[a]ll deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration." The record shows that the Deed to defendant was recorded over twenty years after its making; therefore, by statute, the Deed is void. We hold that the trial court's finding that the Deed is void is supported by competent evidence.

The judgment of the trial court is affirmed.

Affirmed.

Judges MARTIN and WALKER concur.

RALPH LINDSEY, JR., PLAINTIFF v. BODDIE-NOELL ENTERPRISES, INC., D/B/A HARDEE'S SKAT-THRU, DEFENDANT

No. COA00-1420

(Filed 20 November 2001)

1. Discovery— motion to compel—not timely

The trial court did not abuse its discretion in a negligence action arising from defendant serving plaintiff a cup of water poured from a pitcher which had contained a chlorine cleaning solution by denying plaintiff's motion to compel discovery one month before the trial. Although the documents requested by plaintiff (identifying similar claims) were relevant to punitive damages, plaintiff had not requested the documents during the twenty months since the complaint was filed. Plaintiff had ample opportunity to obtain the documents. N.C.G.S. § 1A-1, Rule 26(b)(1).

2. Jury— disregard of instructions—definition of willful and wanton

The trial court erred by denying plaintiff's motion for JNOV in a negligence action arising from a fast food restaurant serving water from a container which had contained a chlorine cleaning solution where a juror brought into the jury room definitions of "willful" and "wanton" he had obtained from his computer during a lunch recess. There was prejudice because it would be more difficult to show willful and wanton conduct under the computer definitions than the pattern jury instructions given by the court, the court was unaware of the use of the computer definitions until after the trial and did not have an opportunity to instruct the jury to disregard those definitions, and the jury did not award punitive damages despite 25 similar incidents between 1994 and 1995.

3. Negligence— definition of willful and wanton—applicable instruction

The trial court did not abuse its discretion in a negligence action by not giving the jury instruction requested by plaintiff on the definition of willful and wanton where the instruction requested by plaintiff was not applicable and the court gave the jury the correct instruction.

4. Evidence— polygraph—negligence action—not admissible

The trial court did not err in a negligence action by refusing to admit evidence from a polygraph test tending to show that plaintiff had lost his sense of taste as alleged. It is well established that polygraph evidence is not admissible in North Carolina trial courts.

5. Appeal and Error— error in punitive phase only—remand of entire action

A negligence action was remanded for a new trial on all issues, including liability for compensatory damages, where the jury considered an outside definition of willful and wanton but plaintiff did not assign error to the compensatory damages phase of the trial. N.C.G.S. § 1D-30 is clear in its mandate that the same trier of fact try both the compensatory and punitive phases of the trial and does not provide exceptions. Moreover, remand on the punitive damages issues only would deprive the jury of an opportunity to consider all of the evidence presented during the compensatory phase that bears upon the actual damages suffered by the claimant. N.C.G.S. § 1D-35(2)(e).

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff from judgment entered 21 July 1999 and order entered 22 February 2000 by Judge Mark E. Klass in Guilford County Superior Court. Heard in the Court of Appeals 12 September 2001.

Brooks, Pierce, McLendon, Humphrey, & Leonard, L.L.P., by L.P. McLendon, Jr. and John W. Ormand III, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by H. Lee Evans, Jr. and Jaye E. Bingham, for defendant-appellee.

HUNTER, Judge.

Ralph Lindsey, Jr. ("plaintiff") appeals the trial court's entry of judgment awarding plaintiff compensatory damages but no punitive damages. Plaintiff also appeals the trial court's order denying his motion for judgment notwithstanding the verdict ("JNOV") or, in the alternative, for a new trial. We remand for a new trial on all issues.

The evidence at trial tended to establish the following facts. On 13 December 1996, plaintiff entered the drive-thru window of the

Skat-Thru owned by Boddie-Noell Enterprises, Inc., d/b/a Hardee's ("defendant") in Reidsville, North Carolina. Plaintiff ordered breakfast and a cup of water, and observed the drive-thru employee, Frankie Settle ("Settle"), pour water into a cup from a pitcher. Settle then handed plaintiff his food and water. After plaintiff received his food, he pulled into the parking lot to eat his breakfast. Plaintiff ate all of his food before taking a drink of water. As plaintiff started to drive away, he removed the top to the cup of water and took a large drink. Plaintiff did not notice anything out of the ordinary about the look or smell of the water, and he did not feel any burning to his tongue as he drank the water. After drinking the water, plaintiff's throat began to burn and he vomited several times. Plaintiff returned to the restaurant and informed the manager, Martha Settle, that something was wrong with the water. The manager drew water from the faucet and tasted it, informing plaintiff that nothing was wrong with the water.

Plaintiff presented evidence showing that the water had contained a chlorine concentration of more than two-hundred parts per million. Plaintiff asserted at trial that the cup of water which he drank contained a sanitizing solution known as Q-25 Alkaline Sanitizer ("sanitizer"). The evidence at trial showed that the sanitizer was usually mixed at the restaurant in water to clean and sanitize the dishes and counters. The water pitchers were cleaned with the sanitizer each night and air dried. The morning shift employees would fill the pitchers with water from the faucet in the morning.

After drinking the water and confronting the manager, plaintiff drove himself to Annie Penn Hospital, taking the partially filled cup with him. Plaintiff left the hospital but returned later that day complaining of throat pain, stomach pain, and shortness of breath. Three days later, on 16 December 1996, plaintiff reported to Urgent Medical Center where it was noted that plaintiff had no sense of taste, was dehydrated, disoriented and that his veins were collapsed. In June of 1997, plaintiff was examined by Dr. Susan Schiffman, a professor at Duke University Medical School. Dr. Schiffman testified that plaintiff suffered a total and permanent loss of his sense of taste. In October of 1998, plaintiff submitted to a taste test by Dr. Beverly Cowart, a research psychologist at Monell Chemical Senses Center in Philadelphia. Dr. Cowart testified by video deposition at trial that plaintiff did not have a complete loss of taste and that her testing could not confirm that plaintiff had a partial loss of taste.

Plaintiff filed suit against defendant on 28 August 1997. The compensatory and punitive damages phases were bifurcated upon defendant's motion. The jury found that defendant was negligent and awarded plaintiff $32,500.00 in compensatory damages. Evidence was then heard in the punitive damages phase of the trial by the same jury. The trial court's charge included the definitions of "willful" and "wanton" as set forth in N.C.P.I., Civ. 810.05, and each juror was provided a copy of the jury instructions. During the jury's deliberations, a note from a juror was delivered to the trial court. The note stated:

> Your Honor:
>
> I'm writing this note because as of now I'm one of the [ones] having difficulty coming to some conclusion. The reason for this is because of the way the wording in your charge is written.
>
> As I understand, according to your charge we must rule based on the understanding that Boddie-Noell intentionally wronged Mr. Lindsey. This to me says that the only way we can rule is for the defense, because there is no way we can rule for the plaintiff because we can't really prove that the incident was willing and wanton (intentionally).
>
> I said all that to say this. Is it possible to allow us another option?

In response to the note, the trial court stated to the jury, "[y]'all have the charge, and the definition is in that charge of what willful and wanton means, so, that's all I can tell you on that, and there's no other option that I can—you know, that's what the law is, so, you have to go by what's in that charge." At that time, plaintiff's counsel requested that the court instruct the jurors on the definitions of "willful" and "wanton" as set forth in N.C.P.I., Civ. 102.86. The trial court denied the request. The jury returned and awarded no punitive damages to plaintiff.

After the trial, plaintiff filed a motion for JNOV or, in the alternative, a new trial, accompanied by affidavits from four jurors. The affidavits indicated that during deliberations, Juror Couch brought definitions of the words "willful" and "wanton" into the jury room *which he had obtained from a dictionary through a computer.* The trial court received the affidavits and considered them, and subsequently denied plaintiff's motion. Plaintiff appeals.

Plaintiff has entered eight assignments of error in the record, but has abandoned two of these by failing to raise them in his appellate

brief. *See* N.C.R. App. P. 28(b)(5). The remaining assignments of error have been condensed into four arguments for our review: (1) that the trial court erred in denying plaintiff's motion to compel discovery; (2) that the trial court erred in denying plaintiff's motion for JNOV or, in the alternative, a new trial; (3) that the trial court erred by refusing to charge the jury using N.C.P.I., Civ. 102.86; and (4) that the trial court erred by refusing to admit polygraph evidence.

I.

[1] Plaintiff first argues that the trial court erred in denying his motion to compel discovery. Plaintiff filed his complaint on 28 August 1997. Between that time and the commencement of trial on 7 June 1999, plaintiff apparently filed four separate requests for production of documents, although only two have been included in the record. In his fourth request for production of documents, filed 5 May 1999 (approximately twenty months after the complaint was filed and one month before trial), plaintiff requested that defendant produce all documents generated between 1 January 1986 and May of 1999 relating to any incident in which a customer or employee of any Hardee's restaurant owned or operated by defendant claimed to have been served a beverage containing sanitizer. As far as we are able to discern from the record, this fourth request for production was the first time plaintiff specifically requested the production of such documents from this time period.

At the time of this fourth request for production, defendant had already produced documents identifying claims involving beverages containing sanitizer between 1992 and 1997. By response filed 4 June 1999, defendant objected to the request for documents from 1986 through 1999. Three days later, on the day trial was scheduled to commence, 7 June 1999, plaintiff filed a motion to compel defendant to produce additional documents generated from 1990 to 1992, and from 1997 through 1999. The motion was heard by the trial court on 7 June 1999, immediately prior to trial, and the trial court denied the motion. Having reviewed the record on appeal, we are unable to conclude that the trial court abused its discretion in this matter.

"Under the rules governing discovery, a party may obtain discovery concerning any unprivileged matter as long as relevant to the pending action and reasonably calculated to lead to the discovery of admissible evidence." *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123 (citing N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (1999) ("Rule 26(b)(1)")), *disc.*

review denied, 336 N.C. 615, 447 S.E.2d 414 (1994). "Whether or not [a] party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Id.*

Plaintiff argues that the trial court erred in denying his motion to compel discovery because the documents which he sought to have defendant produce were relevant to establishing that defendant's conduct was willful and wanton and warranted an award of punitive damages. We agree with plaintiff that the documents sought were relevant to the punitive damages issue. Our General Statutes provide that, in determining the amount of punitive damages, the jury may consider evidence that relates to:

> c. The degree of the defendant's awareness of the probable consequences of its conduct.
>
> d. The duration of the defendant's conduct.
>
> . . . .
>
> g. The existence and frequency of any similar past conduct by the defendant.

N.C. Gen. Stat. § 1D-35(2)(c), (d), (g) (1999). The evidence sought by plaintiff in his motion to compel was relevant to these issues and, therefore, relevant to the issue of punitive damages and reasonably calculated to lead to the discovery of evidence that would have been admissible during the punitive damages phase of the trial.

Nevertheless, we do not believe the trial court abused its discretion in denying the motion to compel given the timing of plaintiff's fourth request for production of documents and the timing of the motion to compel. Rule 26(b)(1) provides that the court may limit the use of discovery methods,

> if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Rule 26(b)(1). Although the record does not indicate that the evidence sought by plaintiff would have been unreasonably cumulative or unduly burdensome for defendant to produce, the record does indicate that plaintiff had "ample opportunity by discovery in the action to obtain the information sought." *Id.*

As noted, plaintiff filed its fourth request for production of documents approximately twenty months after the complaint was filed, and one month before trial was scheduled. In this document, plaintiff requested defendant to produce all documents generated between 1 January 1986 and May of 1999 relating to any incident involving beverages containing sanitizer. Plaintiff failed to request production of such documents in its second request for production, which appears in the record, and we are unable to determine whether plaintiff requested such documents in the first or third requests because these documents have not been included in the record. Presuming, as we must, that plaintiff first requested production of these documents one month prior to trial, and failed to make such a request during the previous twenty months, we cannot say that the trial court abused its discretion in denying the motion to compel.

II.

[2] In his second argument, plaintiff contends that the trial court erred in denying his motion for JNOV or, in the alternative, a new trial. Plaintiff contends that the jury's use of dictionary definitions of the words "willful" and "wanton" was improper, and that this conduct resulted in prejudice to plaintiff. We agree.

As noted above, plaintiff filed a motion for JNOV or, in the alternative, a new trial, accompanied by affidavits from four jurors. The affidavits indicate that during deliberations, Juror Couch brought definitions of the words "willful" and "wanton" into the jury room which he had obtained from a dictionary through a computer. The trial court properly received the affidavits and considered them, pursuant to Rule 606(b) of the North Carolina Rules of Evidence, which provides that the trial court may receive juror testimony as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." N.C. Gen. Stat. § 8C-1, Rule 606(b) (1999). After considering the affidavits, the trial court denied plaintiff's motion. We believe that the trial court erred because the jury's consideration of the dictionary definitions was improper, and because plaintiff was prejudiced by the jury's improper conduct.

In North Carolina, as well as in every jurisdiction that has considered the issue, it has been held that it is improper for a jury to consider or rely upon extraneous information, such as definitions found in a dictionary, during deliberations. *See In re Will of Hall*, 252 N.C. 70, 87, 113 S.E.2d 1, 13 (1960) (" '[i]t generally is ground for reversal that the jury obtained and took into the jury room a dictionary which they consulted to determine the meaning of legal or other terms, which they do not understand' " (citation omitted)); *State v. Barnes*, 345 N.C. 184, 226, 481 S.E.2d 44, 67 (1997) ("[c]ourts throughout the United States have generally concluded that a jury's reliance on extraneous sources during deliberations is error"), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998); *State v. McLain*, 10 N.C. App. 146, 148, 177 S.E.2d 742, 743 (1970) ("[i]t was improper for the jury to obtain and read a dictionary definition of one of the offenses charged in the bill of indictment"); *see also* Jean E. Maess, Annotation, *Prejudicial Effect of Jury's Procurement or Use of Book During Deliberations in Civil Cases*, 31 A.L.R.4th 623 (1984). However, even where it is shown that a jury has been improperly influenced by extraneous information, a party challenging the verdict must further show that the jury was prejudiced against him as a result in order to be entitled to relief. *See Pinckney v. Van Damme*, 116 N.C. App. 139, 149, 447 S.E.2d 825, 831 (1994).

Here, the dictionary definitions used by the jury clearly had the potential to prejudice plaintiff. Plaintiff sought punitive damages based on the contention that defendant's conduct was willful and wanton. According to N.C.P.I., Civ. 810.05, willful and wanton conduct "means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage or other harm." According to the dictionary definitions considered by the jury, however, "willful" means "deliberate" or "done on purpose," and "wanton" means "gratuitously cruel; merciless; [m]arked by unprovoked, gratuitous maliciousness." The potential prejudice to plaintiff is clear: it is more difficult to show that a defendant harmed a plaintiff deliberately and "on purpose," and that the defendant acted in a gratuitously cruel and malicious way, than it is to show that a defendant merely acted with an intentional disregard of, or indifference to, a plaintiff's safety.

Moreover, we believe the following factors establish that the use of these definitions did, in fact, prejudice plaintiff in this case. First, during deliberations, Juror Jackson submitted a note to the trial court judge which stated, in part:

> As I understand, according to your charge we must rule based on the understanding that [defendant] intentionally wronged [plaintiff]. This to me says that *the only way we can rule is for the defense*, because there is no way we can rule for the plaintiff because we can't really prove that the incident was willing and wanton (intentionally).

(Emphasis added.) Second, according to the juror affidavits, this note was precipitated by the fact that Juror Couch provided to all of the jurors the dictionary definitions at issue, which he had obtained from his computer during a lunch recess. Third, the trial court here did not have an opportunity to instruct the jury to disregard the dictionary definitions because the trial court was unaware until after the trial that the jury had considered these definitions. *See Pinckney*, 116 N.C. App. at 152, 447 S.E.2d at 833 (holding that one factor in determining prejudice resulting from jury consideration of extraneous information is whether trial court instructed jury to consider only matters introduced at trial). Finally, the jury here did not award any punitive damages to plaintiff, despite evidence that similar incidents had occurred on approximately twenty-five separate occasions between 1994 and 1997. We believe these factors indicate that plaintiff was prejudiced in this case and, thus, we hold that the trial court's denial of plaintiff's motion was clearly erroneous and constituted an abuse of discretion. *See id.* at 148, 447 S.E.2d at 831.

In concluding that defendant has failed to show that he was prejudiced, the dissent relies upon *Hall*, 252 N.C. 70, 113 S.E.2d 1, and *McLain*, 10 N.C. App. 146, 177 S.E.2d 742. These cases are distinguishable from the present case. In *Hall*, the Court held that the definition of "undue influence" provided by an encyclopedia and considered by the jury during deliberations was actually more favorable to appellants than the definition applied by North Carolina courts. *See Hall*, 252 N.C. at 88, 113 S.E.2d at 13. The Court concluded that, because the definition could not have prejudiced the appellants, it was not error to deny the appellants' motion to set aside the verdict. *See id.* at 88, 113 S.E.2d at 14. In *McLain*, defendant moved for a new trial on the grounds that the jury considered a dictionary definition of the offense of "uttering" during deliberations. *See McLain*, 10 N.C. App. at 148, 177 S.E.2d at 743. This Court held that the trial court did not err in denying the motion because (1) the trial court specifically instructed the jury before it reached a verdict to disregard the definition taken from the dictionary, and (2) the defendant failed to show that he was prejudiced in any way by the jury's conduct. *Id.*

III.

[3] Plaintiff next argues that the trial court erred by refusing to instruct the jury as to the definitions of "willful" and "wanton" as contained in N.C.P.I., Civ. 102.86. We disagree. It is within the trial court's discretion to determine whether additional instructions are needed to dispel jury confusion. *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). We review the trial court's decision under an abuse of discretion standard in determining whether the trial court erred in refusing to give plaintiff's requested instruction. *Id.* "It is well settled '[t]he trial court must give the instructions requested, at least in substance, if they are proper and supported by evidence. . . .' " *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995) (citation omitted). "A requested instruction which is not, in its entirety, a correct statement of the law applicable to the evidence may be refused, the court being under no duty to modify or qualify it so as to remedy the defect therein." *King v. Higgins*, 272 N.C. 267, 270, 158 S.E.2d 67, 70 (1967) (holding that the trial court did not err by refusing to give a requested definition that did not apply to the evidence).

Here, the trial court properly refused to instruct the jury using the pattern jury instruction requested by plaintiff. The note which accompanies N.C.P.I., Civ. 102.86 states: "Use this instruction only where an issue as to plaintiff's contributory negligence will be submitted and where the plaintiff seeks to overcome a prospective adverse finding on the issue of contributory negligence by proving defendant's conduct was willful or wanton." (Footnote omitted.) The issue of contributory negligence was not submitted to the jury. Therefore, this jury instruction was not applicable to this case. Moreover, the trial court properly instructed the jury using the definitions of "willful" and "wanton" set forth in N.C.P.I., Civ. 810.05, which is intended to be used for the purpose of determining liability for punitive damages. We hold that the trial court did not abuse its discretion in refusing to instruct the jury using the jury instruction requested by plaintiff.

IV.

[4] In his final argument, plaintiff contends that the trial court erred in refusing to admit evidence from a polygraph test tending to show that plaintiff had lost his sense of taste. Although we are remanding for a new trial on all issues (as discussed below), we briefly address this issue because we believe it is likely to arise again during the new trial. It is well-established that polygraph evidence is not admissible

in North Carolina trial courts. *See State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983) (Court found polygraph evidence inherently unreliable and held that polygraph evidence is no longer admissible in either civil or criminal trials). Thus, the trial court did not err in refusing to admit the polygraph evidence.

V.

[5] Finally, we hold that this case must be remanded for a new trial on all issues. Defendant argues that if a new trial is ordered, it should be limited to the issue of punitive damages only, because plaintiff has not assigned error to the compensatory damages phase of the trial. In general, appellate courts in North Carolina have discretionary authority to determine whether a case should be remanded for a partial new trial. *See, e.g., Robertson v. Stanley*, 285 N.C. 561, 568, 206 S.E.2d 190, 195 (1974). However, in this case the compensatory and punitive damages phases of the trial were bifurcated pursuant to section 1D-30 of our General Statutes, which states:

> Upon the motion of a defendant, *the issues of liability for compensatory damages and the amount of compensatory damages*, if any, shall be tried separately from *the issues of liability for punitive damages and the amount of punitive damages*, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. *The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages.*

N.C. Gen. Stat. § 1D-30 (1999) (emphasis added). Defendant contends that the final sentence of the statute should not apply, and was not intended to apply, where an appellate court remands a case to the trial court after concluding that there was error in the punitive damages phase of the trial but not in the compensatory damages phase. In support of this argument defendant relies upon an opinion from the Court of Appeals of Minnesota, *Nugent v. Kerr*, 543 N.W.2d 688, 691 (Minn. App. 1996). In *Nugent*, the plaintiff argued that a retrial after remand could not be limited to the issue of punitive damages only because the pertinent statute authorizing separate proceedings for the issues of compensatory and punitive damages required the same trier of fact to determine both compensatory and punitive damages. The court rejected this argument and ordered a new trial on punitive damages only because it concluded that "the issues of liability are

uncomplicated and neither party has demonstrated that it would be prejudiced by a retrial on punitive damages alone." *Id.* at 691. However, we believe *Nugent* is unpersuasive because the pertinent statute in that case did not, as our statute does, expressly mandate that the same trier of fact "shall" try both phases of the trial. *See* Minn.Stat. § 549.20, subd. 4 (2000). Our statute is clear in its mandate, and does not provide any exceptions.

Further, we believe that we are required to remand for a new trial on *all* issues, including *liability* for compensatory damages. This conclusion is based upon the language of N.C. Gen. Stat. § 1D-30, which contemplates four issues at trial (liability for compensatory damages, the amount of compensatory damages, liability for punitive damages, and the amount of punitive damages) grouped into two categories ("the issues relating to compensatory damages" and "the issues relating to punitive damages"), and which contemplates that the same trier of fact must try both categories (i.e., all four issues). Therefore, where an appellate court concludes that a case that was bifurcated at trial pursuant to N.C. Gen. Stat. § 1D-30 must be remanded for a new trial on the issues relating to punitive damages, we believe the statute requires that the case must also be remanded for a new trial on the issues of liability for compensatory damages and the amount of compensatory damages, so that the same jury may try all of these issues.

Our interpretation is buttressed by N.C. Gen. Stat. § 1D-35, which provides that the jury, in determining the amount of punitive damages, may consider evidence that relates to a variety of factors, including "[t]he actual damages suffered by the claimant." N.C. Gen. Stat. § 1D-35(2)(e). Were we to remand for a new trial only on the issues relating to punitive damages, the jury would be deprived of an opportunity to consider all of the evidence presented during the compensatory damages phase of the trial that bears upon the actual damages suffered by the claimant.

We remand for a new trial on all issues. We also affirm the trial court's denial of plaintiff's pretrial motion to compel production of documents.

New trial.

Judge WYNN concurs.

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

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

I concur in parts I, III, IV and V of the majority's opinion. I respectfully dissent from part II of the majority's opinion. Plaintiff fails to show that the trial court manifestly abused its discretion in refusing to grant a new trial.

II. Extraneous prejudicial information

Plaintiff moved for a new trial pursuant to G.S. § 1A-1, Rule 59(a)(2) on the grounds of jury misconduct. In support of the motion, plaintiff tendered four affidavits from jurors concerning dictionary definitions of "willful" and "wanton" brought into the jury room during deliberations. Plaintiff demands a new trial and argues that these definitions constitute extraneous information which was prejudicial to him.

Appellate review of an order of a trial court granting or denying a new trial pursuant to G.S. § 1A-1, Rule 59 is limited to the question of whether the record discloses a manifest abuse of discretion or that the ruling was clearly erroneous. *Pinckney v. Van Damme*, 116 N.C. App. 139, 447 S.E.2d 825 (1994).

The general rule is that, once rendered, a verdict may not be impeached by the jurors. *See In Re Will of Hall*, 252 N.C. 70, 87-88, 113 S.E.2d 1, 13 (1960) ("It is firmly established in this State that jurors will not be allowed to attack or overthrow their verdicts, nor will evidence from them be received for such purpose.") (citations omitted); *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 222, 230 S.E.2d 380, 389-90 (1976) (jurors will not be allowed by testimony or affidavit to impeach, to attack, or to overthrow their verdicts) (quoting *State v. Hollingsworth*, 263 N.C. 158, 139 S.E.2d 235 (1964)) (citations omitted).

Rule 606(b) of the North Carolina Rules of Evidence creates an exception to the general rule. *Berrier v. Thrift*, 107 N.C. App. 356, 364, 420 S.E.2d 206, 210-11 (1992). Rule 606(b) permits testimony by a juror as to whether extraneous prejudicial information was improperly before the jury. N.C. Gen. Stat. § 8C-1, Rule 606(b) (1999). A juror may not testify as to the subjective effect of the extraneous information upon the jury's decision. *State v. Lyles*, 94 N.C. App. 240, 245, 380 S.E.2d 390, 394 (1989) (citing N.C. Gen. Stat. § 8C-1, Rule 606(b)).

Extraneous information is "information dealing with the defendant or the case being tried, which information reaches a juror without being introduced in evidence. It does not include information which a juror has gained in his experience which does not deal with the defendant or the case being tried." *State v. Rosier*, 322 N.C. 826, 832, 370 S.E.2d 359, 363 (1988). No presumption of prejudice arises in a civil action from a showing that extraneous information or perceived extraneous information was improperly brought to the jury's attention. *Pinckney*, 116 N.C. App. at 148, 447 S.E.2d at 831. Plaintiff, as the moving party, must demonstrate "actual" prejudice. *Id.*

The trial court in its findings of fact and conclusions of law stated: "[t]he jury did not ignore the instructions of the Court, nor did it apply extraneous definitions or information in reaching its verdict. Furthermore, while the jury was exposed to the above definitions, the Court finds that this was not 'extraneous information' pursuant to Rule 606, and the Court finds no prejudice to the movant."

I agree with the trial court that the contents of the affidavits in this case do not fall within the exception as extraneous prejudicial information. The definitions do not specifically concern the defendant or the evidence presented in this case. *Rosier*, 322 N.C. at 832, 370 S.E.2d at 363.

The majority opinion states that it is "apparent" that the definitions of "willful" and "wanton" in a case involving a claim for punitive damages constitutes "extraneous information" because they pertain to the case being tried and the governing law at issue. I find that the reading of the dictionary definitions by Juror Couch is analogous to a situation where one of the jurors informs the jury what "willful" and "wanton" mean, according to his knowledge of the English language. The definition of words in our standard dictionaries has been considered a matter of common knowledge which the jury is supposed to possess. *State v. Asherman*, 478 A.2d 227, 252 (Conn. 1984); *Dulaney v. Burns*, 119 So. 21, 25 (Ala. 1928), *rev'd on other grounds*, *Whitten v. Allstate Ins. Co.*, 447 So.2d 655 (Ala. 1984).

The information received in this case does not fall within the definition of extraneous information contemplated by our Supreme Court. *See generally Rosier*, 322 N.C. 826, 370 S.E.2d 359 (1988) (juror affidavit showed that juror watched prohibited program on child abuse, held not extraneous information because the matters reported to the jury did not deal with the defendant or the evidence introduced); *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994)

(affidavits from jurors that they were mistakenly informed about defendant's eligibility for parole, found to be internal influences and not extraneous information); *Berrier*, 107 N.C. App. 356, 420 S.E.2d 206 (1992) (juror affidavits that foreman misinformed them that punitive damages were only a statement of what decedent's life was worth rather than a money judgment, did not fall within the exception as extraneous information). *But See Lyles*, 94 N.C. App. 240, 380 S.E.2d 390 (1989) (writing at bottom of photograph uncovered by juror indicating that defendant was in the area on the date of the crime, held inadmissible evidence which affected defendant's alibi and was extraneous information).

Even if the "willful" and "wanton" definitions were determined to be extraneous information, courts cannot presume prejudice. Plaintiff must also demonstrate that he suffered "actual" prejudice. *Pinckney*, 116 N.C. App. at 148, 447 S.E.2d at 831. The majority's opinion states that the dictionary definitions had the "potential to prejudice the plaintiff." Potential prejudice is not actual prejudice.

Our Supreme Court addressed a similar issue where a juror brought into deliberations an encyclopedia containing the definition for "undue influence." *In Re Will of Hall, supra.* The court stated that "it generally is ground for reversal that the jury obtained and took into the jury room a dictionary which they consulted to determine the meaning of legal or other terms, which they do not understand." *Id.* at 87, 113 S.E.2d at 13. The court held, however, that the definition of "undue influence" did not **prejudice** the caveators and was more favorable to them. *Id.* at 88, 113 S.E.2d at 13.

This Court addressed a similar issue where a juror brought a definition of "uttering" from a dictionary into the jury room during deliberations in a criminal trial. *State v. McLain*, 10 N.C. App. 146, 148, 177 S.E.2d 742, 743 (1970). Although it was improper for the jury to obtain and read the definition, we held that no reversible error had occurred. *Id.* The trial court instructed the jury to disregard the definition and defendant had not shown any **prejudice** by the jury conduct. *Id.*

Other states have addressed the issue of dictionary definitions brought before the jury and found no prejudice. In *State v. Klafta*, 831 P.2d 512 (Haw. 1992), the Supreme Court of Hawaii held that the conduct of three jurors in looking up terms in Black's Law Dictionary was harmless beyond a reasonable doubt where the verdict was not shown to be influenced by the misconduct. The Supreme Court of

Alabama stated that actual prejudice may not be inferred merely from exposure, and found no prejudice where jurors obtained a dictionary definition of "standard." *Pearson v. Fomby By and Through Embry*, 688 So.2d 239, 242-43 (Ala. 1997). The court noted that there was no evidence that any juror stated that the collective decision of the jury had been influenced. *Id.* The Iowa courts have also addressed the issue of jurors looking up dictionary definitions and found no prejudice. *See Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821 (Iowa 1993) (no competent evidence that the misconduct improperly influenced the jury); *In the Matter of Estate of Cory*, 169 N.W.2d 837 (Iowa 1969) (juror looked up and shared the definitions of "undue" and "undue influence" in a will contest case, held the dictionary definitions were no different than the jurors' common knowledge of the terms); *Harris v. Deere & Co.*, 263 N.W.2d 727 (Iowa 1978) (juror looked up "control" and "lever" in a products liability case, held no error in denial of a new trial), *overruled on other grounds*, *Ryan v. Arneson*, 422 N.W.2d 491 (Iowa 1988).

At bar, it was unknown to the trial court, during deliberations, that the jury had obtained the dictionary definitions. After receiving a question regarding the definitions of "willful" and "wanton," the trial court further instructed the jury "the definition is in that [jury] charge of what willful and wanton means . . . there's no other option . . . that's what the law is, so, you have to go by what's in that charge." The trial court essentially gave the same instruction as given in *McLain*, which this Court held cured any potential prejudice, and that defendant failed to show that he was prejudiced. *McLain*, 10 N.C. App. at 148, 177 S.E.2d at 743. Additionally, the affidavit of Juror Couch, offered by plaintiff, states that upon returning to deliberations, the law contained in the court's instructions was applied.

The majority's opinion lists several factors which it contends establish prejudice to plaintiff. First, the fact that Juror Jackson submitted a note after receipt of the dictionary definitions. This merely indicates that the jury was grappling with the issue of whether defendant's conduct was willful or wanton. Second, the fact that the trial court did not instruct the jury to disregard the definitions. The trial court instructed the jury that they must apply the law and definitions of the jury charge which they had in their possession. Finally, the failure to award any punitive damages despite evidence of twenty-five similar incidents does not establish prejudice. The jury heard evidence of the prior incidents and also testimony from plaintiff that he did not notice that the water looked or smelled any dif-

ferent and did not feel any burning to his tongue as he drank the water. Punitive damages require an element of aggravation which plaintiff has not conclusively shown here. *See Lashlee*, —— N.C. App. ——, ——, 548 S.E.2d 821, 827 (2001) (citation omitted).

The record supports the trial court's finding and conclusion that the jury applied the law and definitions given in the court's instructions, and that plaintiff was not prejudiced. I would affirm the trial court's denial of plaintiff's motion for a new trial. I respectfully dissent from part II of the majority's opinion.

IN THE MATTER OF: PETITION OF UTILITIES, INC., FOR TRANSFER OF THE CERTIFICATE N.C. UTILITIES COMMISSION OF PUBLIC CONVENIENCE AND NECESSITY FOR PROVIDING SEWER UTILITY SERVICE ON NORTH TOPSAIL ISLAND AND ADJACENT MAINLAND AREAS IN ONSLOW COUNTY FROM NORTH TOPSAIL WATER AND SEWER, INC., AND FOR TEMPORARY OPERATING AUTHORITY

No. COA00-606

(Filed 20 November 2001)

1. **Utilities— certificate of public convenience and necessity—operation of sewage treatment facilities—operational and managerial trouble**

The North Carolina Utilities Commission did not err in its order granting Utilities, Inc.'s application under N.C.G.S. §§ 62-111(a) and 62-116 to acquire the certificate of public convenience and necessity for operation of the pertinent sewage treatment facility by concluding that the sewage treatment facility was not an operationally and managerially troubled utility, because: (1) all of the Commission's findings on this issue were supported by the testimony of customers at the hearings to the effect that service by the current management under the supervision of the Commission was satisfactory; and (2) the only operational violations found by the Commission occurred during the period of prior management.

2. **Utilities— certificate of public convenience and necessity—operation of sewage treatment facilities—acquisition adjustment**

The North Carolina Utilities Commission did not err in its order granting Utilities, Inc.'s (UI) application under N.C.G.S.

§§ 62-111(a) and 62-116 to acquire the certificate of public convenience and necessity for operation of the pertinent sewage treatment facility by denying UI's request to include the purchase price for the sewage treatment facility in the rate base and by failing to give adequate weight to the alleged harmful conduct of the prior owners, because: (1) the Commission pointed out that it is incumbent on the hearing examiner to look at each acquisition adjustment on a case-by-case basis; (2) the Commission observed that a majority of regulatory agencies had not allowed the acquisition adjustment to be reflected in rate base; and (3) the Commission weighed all the evidence bearing upon its articulated standard and determined UI had failed to carry its burden.

3. Utilities— certificate of public convenience and necessity—operation of sewage treatment facilities—connection fees

The North Carolina Utilities Commission did not err in its order granting Utilities, Inc.'s (UI) application under N.C.G.S. §§ 62-111(a) and 62-116 to acquire the certificate of public convenience and necessity for operation of the pertinent sewage treatment facility by reducing connection fees in the instant transfer proceeding under N.C.G.S. § 62-111 without complying with the general rate case procedures established under N.C.G.S. § 62-133, because: (1) UI did not preserve this issue for appellate review by failing to object, and UI is estopped from asserting on appeal a position contrary to that advanced before the Commission; and (2) the Commission determined that the issue of connection fees was appropriate in the instant proceeding and that a general rate case was not required.

Appeal by Utilities, Inc. from order entered 6 January 2000 by the North Carolina Utilities Commission. Heard in the Court of Appeals 26 March 2001.

Hunton & Williams by Edward S. Finley, Jr. for appellant Utilities, Inc.

Public Staff Legal Division by James D. Little, Staff Attorney for appellee Public Staff—North Carolina Utilities Commission.

Attorney General Michael F. Easley, by Assistant Attorney General Margaret A. Force for appellee Attorney General.

JOHN, Judge.

Utilities, Inc. (UI), appeals a 6 January 2001 order (the Order) of the North Carolina Utilities Commission (the Commission) granting UI's application pursuant to N.C.G.S. §§ 62-111(a) (1999) and 62-116 (1999) to acquire the certificate of public convenience and necessity for operation of the sewage treatment facilities of North Topsail Water and Sewer, Inc. (North Topsail) in Onslow County. UI challenges certain provisions of the Order. We affirm the Commission.

Pertinent procedural and factual background information includes the following: From 1981 to 1994, North Topsail had been owned and operated in the Topsail Beach and Sneads Ferry area of Onslow County by developers Marlow Bostic (Bostic) and Roger Page (Page). During that time, North Topsail repeatedly failed to meet its public utility responsibilities and the developers engaged in multiple improper and fraudulent actions. By 1994, the system had become degraded, North Topsail was subject to numerous judgments and other debts, the state had imposed environmental penalties, and the accounting of funds was deficient. As a consequence, the Commission intervened, removed Bostic from active management, and appointed a manager directly responsible to the Commission.

Subsequently, Bostic filed personal bankruptcy, including ownership of fifty percent of the corporate stock of North Topsail among his assets. In 1999, UI filed a bid to purchase North Topsail with the federal bankruptcy court, which bid contained no acquisition adjustment allowing rate base treatment of the purchase price. Rate base is the capital investment upon which a public utility is permitted to earn a rate of return or profit.

UI subsequently entered into a 7 May 1999 Asset Purchase Agreement (the Agreement) with the bankruptcy trustee for acquisition of the sewer assets of North Topsail for $2.7 million, subject to "Court Approval" and "Regulatory Consent." The sale included conveyance of the fifty percent interest of Page. "Court Approval" was obtained in consequence of an "Order Approving Sale" issued 11 June 1999 by the bankruptcy court.

"Regulatory Consent" was defined in the Agreement as "consent of the [] Commission and its Public Staff to the sale contemplated hereunder." On 23 June 1999, UI petitioned the Commission for approval of the purchase and acquisition of the requisite certificate of

public convenience and necessity to operate the sewage treatment facilities of North Topsail. UI also sought permission to include the $2.7 million purchase price within its rate base.

Following evidentiary hearings conducted 30 September and 12 October 1999 (the hearings), the Commission issued its 6 January 2000 Order authorizing transfer of the certificate, but denying rate base treatment of the purchase price. Included in the Commission's thorough and detailed Order were the following findings of fact:

> 53. Although [North Topsail] is a financially-troubled utility, there are no serious operational problems currently affecting the system. The sewer system is currently being operated in a satisfactory manner.
>
> 54. All other things remaining equal, inclusion of the proposed acquisition adjustment in rate base would support a $12.00 per month or 38% increase in [North Topsail's] residential rates.
>
> 55. The purchase price of $2.7 million that UI agreed to pay for the North Topsail system, which was established through an arms length bidding process, was prudent.
>
> 56. UI is obligated to purchase North Topsail whether the proposed acquisition adjustment is included in rate base or not.
>
> 57. Approval of the proposed acquisition adjustment is not in the public interest since the benefits to customers resulting from the allowance of rate base treatment of an acquisition adjustment in this case would not outweigh the resulting burden or harm to customers associated therewith.
>
> 58. The proper level of connection fees is $1,200 per residential equivalent unit.
>
> . . . .
>
> 63. The transfer of the franchise and assets of [North Topsail] to UI is in the public interest and should be approved.

In addition, the Commission found that the North Topsail sewer collection system was "adequately serving the needs of [its] customers," that no new customer had been denied service, and that the public had expressed no service complaints.

N.C.G.S. § 62-94 (1999) prescribes the scope of appellate review of a decision by the Commission. *State ex rel. Utilities Comm'n. v.*

Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 165, 363 S.E.2d 73, 80 (1987). According to the section, the reviewing court:

> (b) . . . may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

G.S. § 62-94(b).

Further, on appeal, "a, rule, regulation, finding, determination, or order made by the Commission is deemed *prima facie* just and reasonable." *State ex rel. Utilities Comm'n. v. Public Staff*, 123 N.C. App. 43, 45, 472 S.E.2d 193, 195 (1996); N.C.G.S. § 62-94(e) (1999). The appellate standard of review is whether the Commission's findings of fact are supported by competent, material and substantial evidence. *State ex rel. Utilities Comm'n. v. Nantahala Power & Light Co.*, 313 N.C. 614, 745, 332 S.E.2d 397, 474, *rev'd on other grounds*, 476 U.S. 953, —— L. Ed. 2d —— (1986); N.C.G.S. § 62-94(b)(5). Substantial evidence is defined as

> more than a scintilla or a permissible inference. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State ex rel. Utilities. Comm'n. v. Southern Coach Co., 19 N.C. App. 597, 601, 199 S.E.2d 731, 733 (1973). All findings of fact made by the Commission which are supported by competent, material and substantial evidence are conclusive. *State ex rel. Utilities Comm'n. v. Public Staff and Lacy H. Thornburg*, 317 N.C. 26, 34, 343 S.E.2d 898, 903 (1986).

In determining whether to uphold the Commission's actions, the appellate court is to review the whole record. N.C.G.S. § 62-94(c) (1999). In doing so, the court may not replace the Commission's judgment with its own when there are two reasonably conflicting views of the evidence, *State ex rel. Utilities Comm'n. v. Carolina Indus. Group for Fair Utility Rates*, 130 N.C. App. 636, 639, 503 S.E.2d 697, 699-700 (1998), and

> it is for the administrative body . . . to determine whether the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts and to appraise conflicting and circumstantial evidence,

State ex rel. Utilities Comm'n. v. Thornburg, 314 N.C. 509, 515, 334 S.E.2d 772, 775 (1985). Finally, the appellate court ". . . may not substitute its judgment, either with respect to factual disputes or policy disagreements, for that of the Commission." *State ex rel. Utilities Commission v. North Carolina Textile Manufacturers Association*, 59 N.C. App. 240, 245, 296 S.E.2d 487, 490 (1982), *rev'd on other grounds*, 309 N.C. 238, 306 S.E.2d 113 (1983).

In order to facilitate appellate review, the Commission must comply with the following statutory provisions:

> (a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:
>
> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and
>
> (2) The appropriate rule, order, sanction, relief or statement of denial thereof.

N.C.G.S. § 62-79(a) (1999). Further, although the Commission need not comment upon every single fact or item of evidence presented by the parties, *Nantahala* at 745, 332 S.E.2d at 474,

> [t]he failure to include all the necessary findings of fact is an error of law and a basis for remand upon N.C.G.S. § 62-94(b)(4) because it frustrates appellate review.

State ex rel. Utilities Comm'n. v. The Public Staff, 317 N.C. 26, 34, 343 S.E.2d 898, 904 (1986).

Bearing the foregoing principles in mind, we now turn to a consideration of UI's assignments of error.

I.

[1] Relying heavily upon the uncontroverted evidence of mismanagement of North Topsail when operated by Bostic and Page, UI first challenges the Commission's finding and subsequent conclusion that North Topsail was not an operationally and managerially troubled utility. UI contends the Commission's determination was not based upon record evidence and was in any event arbitrary and capricious. We do not agree.

The significance of this first issue lies in the requirements that ownership transfer of a public utility serve the public convenience and necessity, *see* G.S. § 62-111(a), and that the Commission inquire into all aspects of anticipated service and rates occasioned and engendered by the proposed transfer, *see State ex rel. Utilities Comm. v. Village of Pinehurst*, 99 N.C. App. 224, 229, 393 S.E.2d 111, 115 (1990).

In addition to the findings noted earlier, the Commission found that the North Topsail system did

> not suffer from the various system deficiencies, ongoing environmental regulatory violations and frequent customer complaints that typify operationally-troubled systems,

and found and concluded that

> the facilities owned and operated by [North Topsail] are in satisfactory condition and are currently sufficient to provide sewer utility service to [its] customers.

We initially reiterate that the Order was most comprehensive and replete with detail. The Commission thereby met the obligations imposed upon it by *Comm'n. v. Public Staff*, 317 N.C. at 34, 343 S.E.2d at 904. Examination of the whole record, *see* G.S. § 62-94(c), moreover, reveals that all the Commission's findings touching upon the first issue were supported by the testimony of customers at the hearings to the effect that service by the current management of North Topsail (under the supervision of the Commission) was satisfactory, the sole problem mentioned being occasional odor from a pumping station, as well as by the testimony of UI's own witness that there were no immediate plans for substantial changes in operation of the system. Indeed, the only operational violations found by the

Commission occurred during the period of management by Bostic and Page, and the record sustains the Commission's observation that "since 1994, [North Topsail] management has operated its facilities in a sound and reasonable manner." The Commission's "not operationally troubled utility" finding was thus supported by competent, material, and substantial evidence, *see Comm. v. Nantahala Power & Light Co.*, 313 N.C. at 745, 332 S.E.2d at 474, is thereby conclusive, *see Comm. v. Public Staff and Lacy Thornburg*, 317 N.C. at 34, 343 S.E.2d at 903, and supports its like conclusion.

As to UI's contention the Order was arbitrary and capricious, we note initially that such a characterization is difficult to sustain. The actions of an administrative agency may be considered arbitrary and capricious only when there is "a lack of fair and careful consideration; [and] when they fail to indicate 'any course of reasoning and the exercise of judgment.' " *White v. N.C. Dept. of E.H.N.R.*, 117 N.C. App. 545, 547, 451 S.E.2d 376, 378, *disc. review denied*, 340 N.C. 263, 456 S.E.2d 839 (1995). In the case *sub judice*, careful review of the record and Order reflects fair and thorough consideration by the Commission of the issues before it, and compels the determination that the Commission's final decision was the product of reasoning and the exercise of judgment. Accordingly, we reject UI's first argument.

II.

[2] UI next advances what appears to be its primary contention, *i.e.*, that the Commission erred by denying UI's request to include the purchase price for North Topsail in the rate base. According to UI, the Commission "fundamentally altered the standard" applied in prior acquisition adjustment cases. The Commission's "new standard," UI continues, requires the buying utility to show it will create benefits for the ratepayer

> in the period beginning *after the transfer* that are separate and apart from those arising from replacing the old owner and that outweigh the negative rate impact of including the plant acquisition adjustment in rate base.

Thus, UI concludes,

> the acquiring utility must make concessions or promise improvements above and beyond those that accrued to ratepayers by relieving them of the negative features of the erstwhile owner's management that can be quantified and shown to outweigh the

> negative rate impact of return on increased investment before rate base treatment of the plant acquisition adjustment can be allowed.

UI also maintains the Commission failed to give adequate weight to the "harmful conduct of Bostic and Page," asserting it "seemed to dismiss this conduct as irrelevant because it did not impact current operations." We consider UI's assertions under its second argument *ad seriatim.*

It appears our appellate courts have not previously addressed the acquisition adjustment issue. In its Order, however, the Commission carefully analyzed its own prior decisions, *see* N.C.G.S. § 62-65 (1999) (Commission may take judicial notice of its opinions), and determined it had not articulated a single, definitive test for resolving acquisition adjustment issues in water and sewer transfer cases. The Commission pointed out its earlier observation that "it is incumbent upon the Hearing Examiner to look at each acquisition adjustment on a case-by-case basis." *In re Carolina Water Service, Inc. of North Carolina (Carolina I)*, 76 NCUC Orders and Decisions 739, 755 (1986).

In addition, the Commission set out numerous factors that appeared to have been considered in prior cases:

> the prudence of the purchase price paid by the acquiring utility; the extent to which the size of the acquisition adjustment resulted from an arms length transaction; the extent to which the selling utility is financially or operationally 'troubled;' the extent to which the purchase price will facilitate system improvements; the size of the acquisition adjustment; the impact of including the acquisition adjustment in rate base on the rates paid by customers of the acquired and acquiring utilities; [and] the desirability of transferring small systems to professional operators . . .,

none of which, the Commission noted, had been deemed "universally dispositive".

Nonetheless, the Commission, citing treatises on public utility law, observed that a majority of regulatory agencies had not allowed the acquisition adjustment to be reflected in rate base:

> most commissions are skeptical of transfers between utilities at excess costs, so rate base adjustments are generally not made unless the utility can demonstrate actual, distinct and substantial

> benefits to all affected ratepayers. J Bonbright, A. Danielson, and D. Kamerschen, *Principles of Public Utility Rates* 286 (1987). See also 1 A. Priest, *Principles of Public Utility Regulation* 189 (1969) (although the majority of regulatory commissions have refused to include acquisition adjustments in rate base, such treatment has been allowed where 'the transactions was at arm's length,' 'resulted in operating efficiencies,' 'received regulatory approval as having been in the public interest,' or 'made possible a desirable integration of facilities").

Ultimately, the Commission concluded it was appropriate to articulate a test for identifying the circumstances in which inclusion of acquisition adjustments in rate base might be appropriate. According to the Commission, the "virtually unlimited" number of relevant considerations, some of which have been set out above, all

> relate to the question of whether the acquiring utility paid too much for the acquired utility and whether the customers of both the acquired and the acquiring utilities are better off after the transfer than they were before that time.

Accordingly, the Commission adopted an approach, "contrary to [those] advocated by [] UI and the Public Staff," under which the Commission would

> refrain from allowing rate base treatment of an acquisition adjustment unless the purchasing utility [has] establishe[d] by the greater weight of the evidence [] that the price the purchaser agreed to pay for the acquired utility was prudent and that both the existing customers of the acquiring utility and the customers of the acquired utility would be better off (or at least no worse off) with the proposed transfer, including rate base treatment of any acquisition adjustment, than would otherwise be the case.

The Commission commented that the foregoing method of analysis was consistent with sound regulatory policy and with the construction of G.S. § 62-111(a) adopted by this Court, that is, that the Commission "must inquire into all aspects of anticipated service and rates occasioned and engendered by the proposed transfer," *Village of Pinehurst*, 99 N.C. App. at 229, 393 S.E.2d at 115. We agree.

Contrary to UI's assertion of a "fundamentally altered standard," the lengthy quotations from the Order quoted above amply reveal that the Commission merely reviewed factors it had previously deemed

relevant as well as those cited by treatises on regulatory law, and then simply articulated a standard incorporating consideration of all such factors. *See id.* Rather than failing to give appropriate weight to the "troubled" aspect of North Topsail, as UI insists, moreover, review of the Order indicates the Commission carefully weighed all the evidence bearing upon its articulated standard and determined UI had failed to carry its burden. Again, it is for the Commission "to determine the weight and sufficiency of the evidence." *Comm. v. Thornburg*, 314 N.C. at 515, 334 S.E.2d at 775.

First, the Commission considered whether the purchase price was prudent. Taking judicial notice that North Topsail was "located in an area which is experiencing or is likely to experience significant growth," the Commission found that a prudent purchaser might well elect to pay more than net book value on the assumption that acquiring the right to operate North Topsail had independent value over and above the net book value of its assets. The Commission also observed that the purchase price had been established in "an arm's length bidding process" in the bankruptcy court and that the price agreed to by UI "was the minimum amount apparently necessary [for it] to prevail" in the bidding. Based upon these factors, the Commission concluded that the purchase price was "prudent."

The Commission next reviewed the evidence bearing upon benefits and costs of the transfer should an acquisition adjustment be allowed. Regarding whether North Topsail was a "troubled" utility, the Commission commented that this question, while "relevant to a proper resolution of the acquisition adjustment issue," should not "be deemed dispositive." Indeed, as pointed out by the Commission, placing undue weight upon the "troubled" condition of the system would be inconsistent with the requirements of G.S. § 62-111(a) and *Comm. v. Village of Pinehurst*, 99 N.C. App. at 229, 393 S.E.2d at 115, that the Commission consider all relevant factors.

The Commission concluded North Topsail at the time of the hearing was "financially troubled," but that North Topsail's "past travails," notwithstanding "[t]he fervor of the parties' advocacy," were "relevant" to the acquisition adjustment issue "to the extent that earlier developments impact[ed] North Topsail's current situation." The Commission went on to observe that North Topsail customers were not plagued with serious operational problems at the time of the transfer and that transfer would not immediately affect the quality of service provided to them.

In addition, the Commission noted UI's willingness to purchase the system "was not conditioned on inclusion of the proposed acquisition adjustment in the rate base," and that North Topsail's customers would

> get the benefit of ownership and operation by an adequately-capitalized and professionally-run utility regardless of [the Commission's] decision

regarding the acquisition adjustment. Further, the Commission pointed out that

> [t]he fact that UI's obligation to purchase North Topsail is not conditioned upon approval of the proposed acquisition adjustment distinguishes this case from the numerous recent Commission decision upon which UI places emphasis.

The Commission also considered the impact of the acquisition adjustment on rates. It found that inclusion of the acquisition adjustment would increase North Topsail's per-customer investment from $503.00 to $1,390.00 and would

> place upward pressure on the uniform rates charged by UI's largest North Carolina subsidiary in the event the two systems were to be consolidated.

Before the Commission, UI relied heavily upon *In re Heater Utilities, Inc. (Hardscrabble)*, NCUC Docket No. W-274, Sub 122, 9 (1997), a case in which purchase of the utility was not conditioned upon inclusion of the purchase price in rate base. The Commission distinguished *Hardscrabble*, calculating the impact on rates of the proposed acquisition in the case *sub judice* to be eight times that allowed in *Hardscrabble*.

Finally, the Commission observed that UI's willingness to purchase North Topsail was not conditioned upon inclusion of the acquisition adjustment in rate base and that at least one other adequately-capitalized utility had attempted to buy North Topsail without seeking rate base treatment for an acquisition adjustment. Accordingly, the Commission concluded, customers of North Topsail would obtain the benefit of ownership and operation by an adequately capitalized and professionally run utility whether or not inclusion of the acquisition adjustment in rate base was approved.

In short, UI's assertions to the contrary, the Commission did not create a "new standard," but rather properly considered all factors

and rendered a decision consistent with prior acquisition adjustment cases. We therefore reject UI's second argument.

III.

[3] Lastly, UI assigns error to the Commission's "reduc[tion of] rates outside of a general rate case." UI cites the Commission's reduction in the instant transfer proceeding under G.S. § 62-111 of connection or "tap" fees and contends the Commission erred in doing so without complying with the general rate case procedures established in N.C.G.S. § 62-133 (1999). UI's final argument is unfounded.

First, we note Public Staff's (Staff) response in its appellate brief. Staff, in statements sustained by reference to the instant record, observed that UI

> stated in its proposed order [to the Commission], 'At the hearing and in its proposed order, UI agreed with the Public Staff recommendation that connection fees charged after the transfer should be reduced' . . . . [UI] offered no evidence during the hearing contesting a lowering of the connection fee. There is also nothing in the record to substantiate the claim in [UI]'s brief that ' . . . the substantial reduction ordered in this case affects revenues to a substantial degree and significantly lowers rate of return.'

It appears, therefore, that UI may have failed to preserve this final contention for our review, *see* N.C.R. App. P. 10(b) (1999) ("to preserve a question for appellate review, a party must have presented to the trial [tribunal] a timely request, objection or motion, stating the specific grounds for the ruling the party desired"), and that it is in any event estopped from asserting on appeal a position contrary to that advanced before the Commission, *see Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]").

Further, N.C.G.S. § 62-137 (1999) provides in pertinent part as follows:

> the Commission shall declare the scope of the hearing by determining whether it is to be a general rate case, under G.S. 62-133, or whether it is to be a case confined to the reasonableness of a specific single rate, a small part of the rate structure, or some classification of users involving questions which do not require a determination of the entire rate structure and overall rate of return.

G.S. § 62-137. In its 3 August 1999 order setting a public hearing on the proposed transfer of North Topsail to UI, the Commission designated "appropriate tap-fees" as among the issues to be addressed.

Finally,

> [c]ourts should be hesitant to disturb the Commission's expert determination with regard to the nature of the case presented, particularly when its determination is made prior to hearing and for the initial purpose of setting the scope of the hearing and the resulting amount of information which the public utility will be required to furnish.

State ex rel. Utilities Comm'n. v. Rail Common Carriers, 42 N.C. App. 314, 318, 256 S.E.2d 508, 511 (1979).

In short, the Commission having determined that the issue of connection fees was appropriate in the instant proceeding and that a general rate case was not required, and UI having interposed no objection thereto, we decline to disturb the Commission's determination. *See id.*

Affirmed.

Chief Judge EAGLES and Judge McCULLOUGH concur.

CAMILIA MICHELLE HAMILTON, TIMOTHY WAYNE HAYES, CLAUDE RICHARD HUGGINS, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS v. FRANKLIN FREEMAN, AND HAZEL KEITH, DEFENDANTS

No. COA00-1470

(Filed 20 November 2001)

1. Parties— intervention—timeliness—legal commonality

The trial court did not abuse its discretion by granting an inmate's motion to intervene under N.C.G.S. § 1A-1, Rule 24 in plaintiff inmates' class action complaint seeking declaratory and injunctive relief from acts committed by officials at the North Carolina Department of Correction (DOC) including unilaterally modifying judgments to conform to state statutes even if it was in violation of an inmate's plea agreement, because: (1) the inmate made his motion prior to any hearing on the merits of this action

and prior to the entry of final judgment; (2) defendants have not shown any unfairness or prejudice resulting from the trial court's granting of the motion; (3) this inmate, like the other plaintiffs, is in the custody of DOC and his sentence was subsequently modified by DOC; (4) the reason for delay in the motion to intervene was reasonable and legitimate since the inmate would not have needed to intervene had the trial court granted plaintiffs' motion for class certification; and (5) the inmate's claim contained sufficient legal commonality with the claims presented by plaintiffs to permit his intervention.

2. Declaratory Judgments— standing—actual controversy

The trial court did not err by concluding that it had jurisdiction in plaintiff inmates' action seeking declaratory and injunctive relief from acts committed by officials at the North Carolina Department of Correction (DOC) including unilaterally modifying judgments to conform to state statutes even if it was in violation of an inmate's plea agreement, because: (1) an actual controversy existed between plaintiffs and defendants at the time the complaint was filed since plaintiffs were in DOC custody serving sentences never ordered by any trial court; (2) although plaintiffs received some relief after instituting the present action, they did not receive specific performance of their original plea agreements; and (3) the trial court's conclusion that plaintiffs were not entitled to specific performance of their original plea bargains does not render the former proceedings moot.

3. Declaratory Judgments— injunctive relief—motion to dismiss

The trial court did not err by denying defendants' motion to dismiss plaintiff inmates' complaint seeking declaratory and injunctive relief from acts committed by officials at the North Carolina Department of Correction (DOC) including unilaterally modifying judgments to conform to state statutes even if it was in violation of an inmate's plea agreement, because: (1) plaintiffs' claims were not moot; and (2) an inmate's motion to intervene was timely.

4. Sentencing— legal effect—contravention of statutory law

The trial court did not err by ordering the North Carolina Department of Correction (DOC) to give legal effect to judgments by the trial courts that contravene statutory law, because: (1) the sentencing courts had authority over the dispute and control over

the parties, thus requiring the resulting judgments to be honored as received by DOC; (2) DOC usurped the power of the judiciary and violated separation of powers by independently amending judgments to reflect compliance with DOC's interpretation of statutory authority; and (3) the trial court's order merely requires DOC to record the sentence in its official agency records as the sentence appears on the face of the judgment instead of granting specific performance to illegal plea bargains.

5. Constitutional Law; Sentencing— due process rights—unilateral modification of judgments

The trial court did not err by concluding that the North Carolina Department of Correction's (DOC) policy of unilaterally modifying judgments did not violate plaintiff inmates' due process rights, because: (1) the State did not have the authority to offer benefits to plaintiffs in violation of state law, and plaintiffs were never entitled to such benefits; and (2) even though plaintiffs are entitled to return to court in order to regain the position they held before the sentencing courts' errors, plaintiffs may not seek to enforce a plea bargain that violates North Carolina General Statutes nor do they have a protected interest in such an agreement.

6. Sentencing— unilateral modification—prospective or retrospective relief

Although plaintiff inmates contend the trial court erred by providing prospective rather than retrospective relief to plaintiff inmates seeking declaratory and injunctive relief from acts committed by officials at the North Carolina Department of Correction (DOC) including unilaterally modifying judgments to conform to state statutes even if it was in violation of an inmate's plea agreement, the trial court's order directs DOC to provide appropriate relief to all affected inmates, present and future.

Appeal by defendants from order entered 11 July 2000 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Appeal by plaintiffs, intervenor, and proposed intervenors from order entered 5 May 2000 by Judge W. Osmond Smith, III, and order entered 11 July 2000 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 27 August 2001.

North Carolina Prisoner Legal Services, Inc., by Winifred H. Dillon, for plaintiff, intervenor, and proposed intervenor appellants-appellees.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for defendant appellants-appellees.

TIMMONS-GOODSON, Judge.

On 14 June 1996, Camilia Michelle Hamilton, Timothy Wayne Hayes, and Claude Richard Huggins (collectively "plaintiffs") filed a class action complaint in Wake County Superior Court seeking declaratory and injunctive relief from certain acts committed by officials at the North Carolina Department of Correction ("DOC"). At the time the complaint was filed, plaintiffs were inmates incarcerated at various facilities administered by DOC. The complaint named as defendants in their official capacities Franklin Freeman, the North Carolina Secretary of the DOC, and Hazel Keith, DOC's Manager of Combined Records ("defendants").

The pertinent factual and procedural events of this appeal are as follows: On 4 May 1993, Camilia Hamilton ("Hamilton") entered into a plea bargain with the State, in which she agreed to plead guilty to armed robbery in exchange for the State's recommendation that she receive a fourteen-year sentence as a Committed Youthful Offender ("CYO"). At the time, CYOs were eligible for parole consideration immediately upon entering DOC's custody. *See* N.C. Gen. Stat. § 148-49.15(a) (1983). The trial court approved the plea bargain and sentenced Hamilton accordingly. When Hamilton entered DOC's custody, however, DOC determined that Hamilton did not qualify for CYO status under North Carolina General Statutes and refused to consider her for immediate parole.

DOC also allegedly modified the sentences of Timothy Hayes ("Hayes") and Claude Huggins ("Huggins"). Both Hayes and Huggins entered into plea agreements with the State, whereby the trial court sentenced Hayes and Huggins to concurrent terms of imprisonment. Hayes and Huggins were statutorily ineligible for concurrent sentences, however, and upon entering DOC's custody, DOC informed them that their sentences would run consecutively rather than concurrently.

Plaintiffs filed suit against DOC, requesting class action status for their claims in order to include all North Carolina inmates whose sen-

tences had been modified by DOC. In their complaint, plaintiffs alleged defendants violated plaintiffs' constitutional rights by denying inmates the benefit of their plea agreements as reflected in the sentencing courts' judgments. Specifically, plaintiffs objected to DOC's policy of unilaterally modifying judgments in order to reflect compliance with statutory law, a practice resulting in lengthier sentences for plaintiffs. Plaintiffs argued DOC's actions in failing to accurately honor and record the sentences issued by the trial courts amounted to impermissible re-sentencing of plaintiffs in violation of due process rights and separation of powers.

Several years passed as plaintiffs and defendants attempted to resolve their dispute through mediation. In the meanwhile, DOC issued a directive on 12 April 2000 to its Information Resources, Management Information, and Combined Records sections, instructing them to identify and provide notice to those inmates sentenced to concurrent terms for offenses which by statute require consecutive terms. The resulting notice to the affected inmates stated in part that, "DOC records have been made to show that [the inmate's] sentence is to be served consecutive to (at the end of) any other existing sentence(s) even though the plea agreement or the judgment and commitment may show that the sentence is to run concurrent." The notice further advised inmates that they were potentially "entitled to go back into court and receive some relief" and urged inmates to seek counsel for appropriate action.

On 5 May 2000, the trial court denied plaintiffs' motions to intervene, to amend the complaint, and for class certification. Plaintiffs thereafter filed a motion for summary judgment, and defendants filed a motion to dismiss. Jerry Lee Ward ("Ward"), another inmate in the custody of DOC, also filed a motion to intervene as a party plaintiff. Like Hayes and Huggins, the trial court had sentenced Ward to concurrent terms of imprisonment, a judgment subsequently altered by DOC to reflect consecutive sentences. Accordingly, Ward sought permissive intervention in the action, as well as intervention as of right.

The three motions were heard 11 July 2000 by the trial court, which denied defendants' motion to dismiss and granted Ward's motion to intervene. The trial court also denied plaintiffs' claims for relief, except the request for a declaration regarding the propriety of DOC's practices, which the trial court granted. Accordingly, the court declared "that the Department of Correction has no authority to

record a defendant-inmate's clearly erroneous sentence in a manner which makes the sentence conform to state statute." The trial court therefore ordered that the

> Department of Correction, when it receives a judgment and commitment form from a superior court which specifically orders a concurrent sentence for a criminal offense for which state law requires a consecutive sentence, will record the sentence in its official agency records as the sentence appears on the face of judgment. Thereafter, in a reasonable time the Department of Correction will notify in writing the sentencing judge, the district attorney, the inmate on whom the sentence was imposed, and the inmate's trial counsel, if any, that because the sentence and judgment do not accord with state law, the judgment must be vacated. The notice provided by the Department of Correction will be specific to the judgment in question and must inform those notified that, pursuant to *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), the sentence violates state law and the affected inmate is entitled to return to court for purposes of withdrawing the plea entered and either standing trial on the charge(s) or trying to negotiate a new plea which does not violate state law.

Defendants now appeal from the 11 July 2000 order, and plaintiffs, intervenor, and proposed intervenors appeal from both the 11 July 2000 order and the 5 May 2000 order.

Defendants present the following issues for review: whether the trial court erred in (1) granting Ward's motion to intervene; (2) asserting jurisdiction; (3) denying defendants' motion to dismiss; (4) granting declaratory relief to plaintiffs; and (5) ordering defendants to give plaintiffs specific performance of plea bargains. Plaintiffs, intervenor, and proposed intervenors argue the trial court erred in (1) denying plaintiffs' motion for class certification; (2) denying the proposed intervenors' motion to intervene; (3) failing to find due process violations; and (4) failing to grant appropriate relief. We address the above-stated issues in turn.

I. Defendants' Appeal

[1] Defendants argue the trial court erred in granting Ward's motion to intervene. Defendants contend that Ward's motion was untimely, and that he lacked sufficient interest in the case for intervention as a matter of right, as well as sufficient commonality with the other plaintiffs for permissive intervention. We disagree.

North Carolina General Statutes section 1A-1, Rule 24, governs intervention by parties in an action. It states, in pertinent part, as follows:

> (a) *Intervention of right.*—Upon timely application anyone shall be permitted to intervene in an action:
>
> (1) When a statute confers an unconditional right to intervene; or
>
> (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.
>
> (b) *Permissive intervention.*—Upon timely application anyone may be permitted to intervene in an action.
>
> (1) When a statute confers a conditional right to intervene; or
>
> (2) When an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

N.C. Gen. Stat. § 1A-1, Rule 24 (a)-(b) (1999). In considering whether a motion to intervene is timely, the trial court considers "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances." *Proctor v. City of Raleigh Bd. of Adjust.*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999). Whether a motion to intervene is timely is a matter within the sound discretion of the trial court and will be overturned only upon a showing of abuse of discretion. *See State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985). A motion to intervene is rarely denied as untimely prior to the entry of judgment, and may be considered timely even after judgment is rendered if "extraordinary and unusual circumstances" exist. *Id.*; *see also Proctor*, 133 N.C. App. at 184, 514 S.E.2d at 747 (concluding that proposed intervenors' motion was timely after entry of judgment).

In the instant case, the trial court did not abuse its discretion in determining that Ward's motion to intervene was timely. Ward made his motion prior to any hearing on the merits of this action, and prior to the entry of final judgment. Defendants have not shown any unfairness or prejudice resulting from the trial court's order granting Ward's motion. Like the other plaintiffs, Ward is an inmate in the custody of DOC whose sentence, as entered by the trial court, was subsequently modified by DOC. Moreover, Ward filed his motion to intervene on 22 June 2000, less than two months after the trial court denied plaintiffs' motion for class certification. Had the trial court granted plaintiffs' motion for class certification, Ward need not have intervened in the action to protect his interests. Thus, the reason for delay in the motion to intervene was reasonable and legitimate, evidencing no neglect on Ward's part.

We also conclude the trial court properly allowed Ward to intervene in the action. Although it is unclear whether the trial court granted Ward's motion to intervene as a matter of right or by permission, we note that the trial court's discretion in regard to permissive intervention is not reviewable by this Court absent a showing of abuse. *See* N.C. Gen. Stat. § 1A-1, Rule 24(b)(2); *Ellis v. Ellis*, 38 N.C. App. 81, 84, 247 S.E.2d 274, 277 (1978). As an inmate whose sentence was unilaterally modified by DOC, Ward's claim against DOC contained sufficient legal commonality with the claims presented by plaintiffs to permit his intervention. Thus, the trial court did not abuse its discretion in granting Ward's motion to intervene, and we therefore overrule defendants' first assignment of error.

[2] In their second assignment of error, defendants argue the trial court lacked jurisdiction over the instant case. Defendants claim that plaintiffs did not possess proper standing to pursue their claims, and further, that plaintiffs presented no active claim and controversy to the court. We cannot agree.

When standing is challenged, the trial court must determine whether an actual controversy existed at the time the pleading requesting declaratory relief was filed. *See Simeon v. Hardin*, 339 N.C. 358, 369, 451 S.E.2d 858, 866 (1994); *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986). Once jurisdiction attaches, it is generally "not . . . ousted by subsequent events." *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978) (holding that judge's retirement neither divested the Judicial Standards Commission of jurisdiction nor rendered the question of his removal moot), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979).

At the time plaintiffs filed their complaint in this case, they were in DOC custody serving sentences never ordered by any trial court. In their complaint, plaintiffs alleged they had suffered and continued to suffer harm of a constitutional dimension due to DOC's practices. Accordingly, plaintiffs alleged injuries suffered as a result of DOC's policy of unilaterally modifying the sentences of the trial courts and, therefore, an actual controversy existed between plaintiffs and defendants at the time they filed their complaint. Consequently, because plaintiffs possessed standing when the complaint was filed, and because their standing was unaffected by subsequent events, the trial court correctly concluded that plaintiffs had standing to pursue their claims. *See Simeon*, 339 N.C. at 369, 451 S.E.2d at 866 (concluding that plaintiffs had standing to challenge district attorney's calendaring authority, even though their criminal cases were no longer pending at the time their claims were heard).

Defendants also contend that, because the original three plaintiffs, Hamilton, Hayes and Huggins, had been granted some form of relief at the time the trial court entered judgment, their claims against DOC were moot, effectively nullifying the action. Defendants also argue that the mootness doctrine precludes this Court's review of the merits of plaintiffs' case.

As stated herein, the trial court properly granted Ward's motion to intervene. Thus, Ward was a legitimate party to the action presenting an active claim and controversy to the court. Furthermore, we disagree with defendants' assertion and plaintiffs' concession that, because Hamilton, Hayes, and Huggins were granted certain relief prior to the trial court's review of the instant case, their claims against DOC were moot. Plaintiffs' complaint alleged that defendants' practice of unilaterally modifying judgments violated plaintiffs' due process rights. Plaintiffs therefore demanded that they receive the benefit of their original plea bargains with the State. Although Hamilton, Hayes and Huggins received some relief after instituting the present action, they did not receive specific performance of their original plea agreements, which was the relief sought in their complaint. Thus, Hamilton, Hayes and Huggins presented an active claim and controversy to the trial court; namely, whether they, along with the other plaintiffs, were entitled to specific performance of their original plea bargains. The trial court's conclusion, which we now review, that plaintiffs were not entitled to specific performance of their original plea bargains, does not render the former proceedings moot. We therefore overrule defendants' second assignment of error.

[3] By their third assignment of error, defendants contend the trial court erred in denying defendants' motion to dismiss. Defendants argue that, because plaintiffs' claims were moot and Ward's motion to intervene was untimely, defendants were entitled to dismissal of plaintiffs' case. Given our resolution of the foregoing issues, we overrule defendants' third assignment of error.

[4] Defendants next argue the trial court erred in ordering DOC to give legal effect to judgments by the trial courts that contravene statutory law. Defendants contend that such orders are illegal, and that DOC is therefore not obligated to honor them. We disagree.

"The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division . . . ." N.C. Gen. Stat. § 7A-271(a) (1999). It is well established that a judgment of a Superior Court must be honored unless the judgment is void. *See Worthington v. Wooten*, 242 N.C. 88, 92, 86 S.E.2d 767, 770 (1955). Where a court has authority to hear and determine the questions in dispute and has control over the parties to the controversy, a judgment issued by the court is not void, even if contrary to law. *See Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294, *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987). Such a judgment is voidable, but not void *ab initio*, and is binding until vacated or corrected. *See id.* Defendants do not argue that the trial courts that originally sentenced plaintiffs lacked jurisdiction. Because the sentencing courts had authority over the disputes and control over the parties, the resulting judgments were not void and must be honored as received by DOC.

Furthermore, we note that "[t]he legislative, executive, and supreme judicial powers of the State government [are] . . . separate and distinct from each other." N.C. Const. art. I, § 6. The Department of Correction is a part of the executive branch of North Carolina. *See* N.C. Gen. Stat. § 143B-260 (1999). By independently amending judgments to reflect compliance with DOC's interpretation of statutory authority, DOC has usurped the power of the judiciary, thereby violating separation of powers. *See Thomas v. N.C. Dept. of Human Resources*, 124 N.C. App. 698, 706-10, 478 S.E.2d 816, 821-23 (1996) (holding that the North Carolina Department of Human Resources violated separation of powers by engaging in statutory interpretation and ignoring appellate court judgments), *affirmed per curiam*, 346 N.C. 268, 485 S.E.2d 295 (1997).

Finally, we disagree with defendants' contention that the trial court's order directly contradicts our Supreme Court's decision in *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998). While we agree that *Wall* is instructive, it is not dispositive of the issues raised in the present case.

In *Wall*, the defendant entered into a plea bargain with the State, whereby the State agreed to consolidate the defendant's two cases and recommend a twenty-five-year sentence. The trial court approved the defendant's plea agreement and sentenced the defendant accordingly. Although the defendant, defense counsel, and the assistant district attorney agreed that the defendant's sentence would be served concurrently, the plea agreement did not specify concurrent or consecutive terms, nor did the resulting judgment provide for a concurrent or consecutive sentence. DOC thereafter recorded the defendant's sentence as providing consecutive terms of imprisonment. Upon inquiry by the defendant, DOC informed him that, under North Carolina General Statutes, he was obligated to serve consecutive terms. The defendant filed a motion for appropriate relief with the trial court, which found that, based on his plea bargain with the State, the defendant was entitled to serve concurrent rather than consecutive sentences. Our Supreme Court subsequently granted DOC's petition for writ of certiorari in order to review the trial court's action.

Upon reviewing the relevant criminal statutes governing the defendant's case, the Court concluded that the defendant was statutorily obligated to serve consecutive sentences, and that the trial court did not have authority to order otherwise. The Court therefore vacated the trial court's order. The Court continued, however:

> In the instant case, defendant's plea of guilty was consideration given for the prosecutor's promise. He was entitled to receive the benefit of his bargain. However, defendant is not entitled to specific performance in this case because such action would violate the laws of this state. Nevertheless, defendant may avail himself of other remedies. He may withdraw his guilty plea and proceed to trial on the criminal charges. He may also withdraw his plea and attempt to negotiate another plea agreement that does not violate [the relevant statute].

Wall, 348 N.C. at 676, 502 S.E.2d at 588.

In the instant case, defendants argue the trial court's order impermissibly provides for specific performance of illegal plea bargains in contravention of *Wall*. We disagree with defendants' application of *Wall* to the issues raised in the present appeal. The facts of *Wall* differ from the facts presented by the instant case in several key respects. In contrast to the instant case, neither the plea agreement nor the judgment in *Wall* specified that the defendant's sentence should run concurrently. Thus, in *Wall*, it appears that DOC did not intentionally disregard any plea agreements, but rather, in the face of a silent judgment, entered the defendant's sentence according to statutory dictates. The *Wall* Court did not have to decide, nor did it address, the central question posed to the trial court in the instant appeal, namely, whether DOC may deliberately modify judgments that appear to violate North Carolina General Statutes.

We further disagree with defendants' interpretation of the term "specific performance." The *Wall* Court concluded that the defendant was not entitled to specific performance of his original plea bargain because the agreement violated North Carolina statutes. In other words, the defendant was not entitled to serve concurrent terms as envisioned by the plea bargain, but was allowed to return to court in order to obtain appropriate relief. Defendants now argue the trial court's order directing DOC to accurately record sentences as they appear on the face of the judgments amounts to an order directing DOC to grant specific performance to inmates' plea bargains. We disagree with defendants' interpretation of the trial court's order. The order merely requires DOC to "record the sentence in its official agency records as the sentence appears on the face of the judgment," a judgment which the sentencing court "*must* [thereafter] *vacate*[]" (emphasis added). The order never grants specific performance to illegal plea bargains; indeed, it specifically states that judgments giving effect to such must be vacated. We conclude the trial court's order complies with the dictates of *Wall*. Accordingly, we hold the trial court did not err in ordering DOC to record sentences as they appear on the face of the judgments, and we therefore overrule defendants' remaining assignments of error.

II. Plaintiffs' Appeal

[5] Plaintiffs argue the trial court erred in concluding that defendants' policy of unilaterally modifying judgments did not violate plaintiffs' due process rights. Defendants contend that plaintiffs cannot maintain a protected liberty interest in a judicial mistake. On this point, we agree with defendants. Although it is true that a state's uni-

lateral breach of a plea agreement may constitute a violation of due process rights, *see, e.g., Santobello v. New York*, 404 U.S. 257, 262, 30 L. Ed. 2d 427, 433 (1971), the plea agreements and judgments enforcing such agreements at issue in the instant case violate North Carolina statutes and must be vacated. *See Wall*, 348 N.C. at 676, 502 S.E.2d at 588. The State did not have the authority to offer benefits to plaintiffs in violation of state law, and plaintiffs were never entitled to such benefits. Plaintiffs are entitled to return to court, in order to regain the position they held before the sentencing courts' errors. *See id.* Plaintiffs may not, however, seek to enforce a plea bargain that violates North Carolina General Statutes, nor do they have a protected liberty interest in such an agreement. The trial court did not err, therefore, in failing to find that defendants' actions violated plaintiffs' due process rights.

[6] Plaintiffs further argue the trial court erred in providing prospective rather than retrospective relief to plaintiffs. Plaintiffs contend that, because several of the verbs utilized in the decretal portion of the order take the simple form of the future tense, such language directs only future compliance by DOC and does not encompass present plaintiffs. We disagree with plaintiffs' interpretation of the order.

The trial court's order declares that "the Department of Correction has no authority to record a defendant-inmate's clearly erroneous sentence in a manner which makes the sentence conform to state statute" and that "[a] defendant-inmate's sentence must be recorded in his combined record as specifically stated in the judgment and commitment." Although the trial court's order states that the DOC "*will* record" sentences and "*will* notify" affected inmates, we hold that the order, when read in conjunction with the above-stated declarations, directs DOC to provide appropriate relief to *all* affected inmates, present and future.

Based on our resolution of the foregoing issues, we need not determine whether the trial court erred in denying plaintiffs' motion for class action certification and proposed intervenors' motion for intervention. We therefore affirm the 11 July 2000 order of the trial court.

Affirmed.

Chief Judge EAGLES and Judge THOMAS concur.

IN THE MATTER OF: THE APPEAL OF BRIARFIELD FARMS FROM THE DECISION OF THE ALAMANCE COUNTY BOARD OF EQUALIZATION AND REVIEW

No. COA00-1408

(Filed 20 November 2001)

1. Taxation— ad valorem—burden before Commission—role of Court of Appeals

The burden is on the taxpayer to prove entitlement to an exemption in cases before the Tax Commission. The Court of Appeals must decide all relevant questions of law de novo, and review the findings, conclusions, and decision to determine if they are affected by error or are unsupported by competent, material and substantial evidence in view of the entire record.

2. Taxation— ad valorem—farm use exemption—activity requirement

The Tax Commission had before it substantial evidence to conclude that petitioner met the activity requirement for retaining its farm-use ad valorem tax exemption for 1998 where the farm was in transition from a dairy and breeding operation to the cultivation of ground crops and the County argued that the only crops grown in 1998 were planted to reseed the farm rather than for commercial sale or consisted of reseeded hay, which was not planted. The hay was an agricultural product ultimately marketed for profit while the other crops were part of the processes and steps necessary and incident to the completion of products from the farm. The Commission had before it substantial evidence that petitioners were engaged in agriculture as that term has previously been defined; the fact that there was evidence to the contrary is not a sufficient ground to overturn the Tax Commission's determination.

3. Taxation— ad valorem—farm use exemption—acreage and income requirements

The Tax Commission had substantial evidence before it to conclude that petitioner met the acreage and income requirements to retain its farm-use ad valorem tax exemption under N.C.G.S. § 105-277.3 where it clearly met the acreage requirement and met the $1,000 minimum in 1998 with $1,100 from the sale of hay. The County's contention that each ten-acre tract in active production must produce $1,000 (for a minimum of $19,500 for

petitioner) is not supported by case law and would render many farms unable to meet the requirement. This does not appear to be a result intended by the Legislature.

4. Taxation— Tax Commission—framing of issue—de novo review

The Tax Commission did not err in its framing of an ad valorem tax issue where the issue before the County Board of Equilization and Review was whether petitioner could continue its special use as a dairy farm and the Tax Commission stated the issue as whether the taxpayer's land was part of a farm unit actively engaged in the commercial production of or the growing of crops, plants, or animals under a sound management program. The County is barred from discussing information not in the record or transcript, the Tax Commission's hearing is de novo and not limited by the decision of a county board of equalization and review, the County failed to timely object before the Tax Commission, and it was the County which framed the issue by calling the exemption a dairy farm special use.

5. Taxation— ad valorem—farm use exemption—change in operation—notice to county

Petitioner's failure to notify the County of the transition from dairy and breeding operations to the cultivation of ground crops did not bar its eligibility for the farm use exemption. Both the dairy and breeding operations and its cultivation of ground crops qualified petitioner as an agricultural land farm-use property; even so, the only penalty under N.C.G.S. § 105-277.5 for failure to notify is monetary and does not strip the landowner of his right to the classification.

6. Taxation— Tax Commission proceeding—County's failure to present evidence

The Tax Commission did not improperly base its decision on the fact that the County presented no evidence where there was no evidence that the Tax Commission based its decision on that fact. The Commission based its decision on the evidence presented and did not place an improper burden on the County.

Appeal by respondent from final decision entered 29 August 2000 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 19 September 2001.

David I. Smith for Alamance County respondent appellant.

Tuggle, Duggins & Meschan, P.A., by William G. Burgin, III and Amanda L. Fields, for taxpayer appellee.

McCULLOUGH, Judge.

Briarfield Farms (Briarfield) is a 390-acre tract of land in Alamance County, North Carolina, which has been owned by the Needham family for several generations. The Needhams used Briarfield as a dairy farm for almost fifty years; during that time, the farm also produced a small amount of wheat, corn and hay. Briarfield was managed for many years by Mrs. Ophelia Needham, while her son Bill provided the major labor. The Needhams filed the appropriate paperwork with the Alamance County Board of Assessors (Assessors) and successfully had their farm classified as farm-use property for *ad valorem* tax purposes, pursuant to N.C. Gen. Stat. § 105-277.3(a)(1) (1999).

At its height, Briarfield had between 200 and 225 cows on 390 acres of land. In 1991, Mrs. Needham died, and her son Bill took over the farm's operations. The deterioration of market conditions caused the Needham family to scale down their dairy operation in the early 1990s. The farm was reduced to about 100 cows, and the farm transitioned from a dairy operation to a breeding operation in which the heifers were sold to other dairy farms or to beef farms. Bill Needham tried this format until 1998, when he decided to bring in his nephew, Shawn Needham, to facilitate Briarfield's changeover from dairy and breeding operations to cultivation of ground crops. By spring 1998, Bill Needham had sold all the remaining cows, and he and his nephew Shawn began actively implementing a plan to grow crops on the land. Shawn Needham took over Briarfield's management in the summer of 1998 and worked thirty to forty hours per week. During 1998, he cleared approximately 220 acres of land and cultivated hay, wheat, and soybeans. He also harvested several hundred bales of hay and sold them commercially for over $1,000.00.

In 1998, the Assessors audited Briarfield for the first time since the farm had ceased its dairy operation. The Assessors determined that Briarfield was no longer a farm-use property and informed the Needhams of their conclusion in writing. By giving the Needhams notice, the Assessors gave the Needhams an opportunity to disprove their determination that Briarfield no longer met the statutory farm-

use status. When the Needhams failed to respond within the allotted time, the Assessors revoked Briarfield's farm-use status. Alamance County (the County) then billed Briarfield at the 1998 market value *ad valorem* rates and imposed the deferred tax differential between the use value and the market value.

On 13 January 1999, the Needhams appealed to the Alamance County Board of Equalization and Review, which upheld the Assessors' determination that Briarfield did not meet the requirements of farm-use status. On 1 July 1999, the Needhams requested a hearing before the North Carolina Property Tax Commission (Tax Commission), sitting as the State Board of Equalization and Review. The Tax Commission denied the County's motion to dismiss, and granted the Needhams' request for a hearing; the hearing took place on 29 and 30 June 2000.

At the Tax Commission hearing, Briarfield called two witnesses: Bill and Shawn Needham. They presented evidence, including an aerial photograph of the acreage, tax returns for 1995, 1996, and 1997, a letter from the Alamance County Assessor notifying the owners that Briarfield's farm-use status was no longer in effect, some relevant statutory provisions, and a Court of Appeals case for the Tax Commission's consideration. The owners then rested.

Alamance County moved to dismiss the Needhams' appeal, arguing that the Needhams failed to provide sufficient evidence to overcome the Assessors' determination that the farm no longer qualified for farm-use treatment. This motion was denied, and the County rested without presenting any evidence. The County renewed its motion to dismiss, which was again denied. The Tax Commission deliberated and voted, 3-2, to reverse the Alamance County Board of Equalization and Review, thereby conferring upon Briarfield its former farm-use status for tax year 1998. The County appealed.

On appeal, the County argues that the Tax Commission erred by (I) finding that Briarfield qualified as agricultural land within the meaning of N.C. Gen. Stat. § 105-277.2(1) for the tax year 1998; (II) changing the way the issue of Briarfield's status determination was framed; (III) determining that Briarfield's failure to notify the County of its status change did not deprive it of farm-use status; and (IV) basing its final decision on the fact that the County did not put on evidence. For the reasons set forth, we disagree with the County's arguments and affirm the decision of the Tax Commission.

[1] In cases before the Tax Commission, "[a]s a general rule the burden is on the taxpayer to prove entitlement to an exemption." *In re Appeal of Atlantic Coast Conference*, 112 N.C. App. 1, 4, 434 S.E.2d 865, 867 (1993), *aff'd*, 336 N.C. 69, 441 S.E.2d 550 (1994). When cases are before this Court, we "must decide all relevant questions of law *de novo*, and review the findings, conclusions and decision to determine if they are affected by error or are unsupported 'by competent, material and substantial evidence in view of the entire record.' " *In re Appeal of Parsons*, 123 N.C. App. 32, 38-39, 472 S.E.2d 182, 187 (1996) (quoting *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 393, 424 S.E.2d 212, 218, *disc. review denied*, 333 N.C. 538, 429 S.E.2d 561 (1993) (quoting N.C. Gen. Stat. § 105-345.2)). *See also In re Appeal of Southeastern Bapt. Theol. Seminary, Inc.*, 135 N.C. App. 247, 254, 520 S.E.2d 302, 306-07 (1999); *MAO/Pines Assoc. v. New Hanover County Bd. of Equalization*, 116 N.C. App. 551, 556, 449 S.E.2d 196, 199-200 (1994); and N.C. Gen. Stat. § 105-345.2 (1999). Substantial evidence is defined as " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Thompson v. Board of Education*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (quoting *Comr. of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)). With this standard of review in mind, we turn to the County's arguments.

I. Briarfield's Qualification as "Agricultural Land" under N.C. Gen. Stat. § 105-277.2(1) (1999)

[2] In 1973, North Carolina enacted legislation "which permitted preferential assessment of property used for agricultural, forest and horticultural purposes." *In re Appeal of Whiteside Estates, Inc.*, 136 N.C. App. 360, 364, 525 S.E.2d 196, 198, *cert. denied*, 351 N.C. 473, 543 S.E.2d 511 (2000). This legislation is found in N.C. Gen. Stat. §§ 105-277.2 through -277.7 (1999). *See W.R. Company v. Property Tax Comm.*, 48 N.C. App. 245, 257, 269 S.E.2d 636, 643 (1980), *disc. review denied*, 301 N.C. 727, 276 S.E.2d 287 (1981). Under these statutory provisions, "[t]he owner of agricultural, forest or horticultural lands may apply to have the lands appraised at their present-use value, a value lower than the market value of the property." *Whiteside*, 136 N.C. App. at 364, 525 S.E.2d at 198.

The first step in such an appraisal is to determine how the land in question should be treated. N.C. Gen. Stat. § 105-277.2(1) sets forth definitions of land for taxation purposes. Agricultural land is defined as follows:

(1) Agricultural land.—Land that is a part of a farm unit that is actively engaged in the commercial production or growing of crops, plants, or animals under a sound management program. Agricultural land includes woodland and wasteland that is a part of the farm unit, but the woodland and wasteland included in the unit shall be appraised under the use-value schedules as woodland or wasteland. A farm unit may consist of more than one tract of agricultural land, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(1), and each tract must be under a sound management program.

N.C. Gen. Stat. § 105-277.2(1) (1999).

N.C. Gen. Stat. § 105-277.3(a)(1) states that certain types of property are "special classes of property" subject to special taxation. Agricultural land is classified as follows:

(1) Agricultural land.—Individually owned agricultural land consisting of one or more tracts, one of which consists of at least 10 acres that are in actual production and that, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have produced an average gross income of at least one thousand dollars ($1,000). Gross income includes income from the sale of the agricultural products produced from the land and any payments received under a governmental soil conservation or land retirement program. Land in actual production includes land under improvements used in the commercial production or growing of crops, plants, or animals.

To qualify for agricultural land present-use (in this case, farm-use) value classification, the Needhams, as taxpayers, had to show that (1) Briarfield was actively engaged in the commercial production or growing of crops, plants or animals during tax year 1998; (2) Briarfield was operated under a sound management program during tax year 1998; and (3) the land comprising Briarfield Farms met the applicable size and income requirements during the three years preceding tax year 1998. *See* N.C. Gen. Stat. § 105-277.2(1) and N.C. Gen. Stat. § 105-277.3(a)(1).

(1) Activity

The taxpayers contend that Briarfield met its burden under N.C. Gen. Stat. § 105-277.2 for the tax year 1998 because, though it was in

transition from dairy and breeding operations to the cultivation of ground crops, there was substantial evidence that it was actively engaged in commercial production or growing of crops, plants or animals. The taxpayers correctly point out that

> [t]raditionally, agriculture has been broadly defined as "the science or art of cultivating the soil and its fruits, especially in large areas or fields, and the rearing, feeding, and management of livestock thereon, including every process and step necessary and incident to the completion of products therefrom for consumption or market and the *incidental* turning of them to account." This traditional definition has been extended to encompass the storage and marketing of agricultural products.

Development Associates v. Board of Adjustment, 48 N.C. App. 541, 546-47, 269 S.E.2d 700, 703 (1980), *disc. review denied*, 301 N.C. 719, 274 S.E.2d 227 (1981) (citations omitted).

Both Bill and Shawn Needham testified that during 1998, Briarfield produced hay, wheat and soybeans. Though Shawn Needham sold only part of the hay in 1998, the sale netted about $1,100.00. Shawn Needham also stored the farm's 1998 wheat crop and sold it in 1999 in order to hold the crop until market prices were more favorable.

The County, on the other hand, argues that Briarfield did not meet its statutory burden because by 1998 nearly four years had elapsed since Briarfield had operated as a dairy farm, and Briarfield's 1998 activities did not rise to a level which warranted a tax exemption. The County argues that Briarfield's 1998 income was strictly from the sale of hay, and the hay was essentially baled grass, not a commercial crop. To bolster its argument, the County pointed to Shawn Needham's testimony that the hay was not "planted"; rather, it was "a reproductive thing" that only required reseeding to be produced. The County further noted that Briarfield's other crops were also planted to "reseed" the farm, rather than for commercial sale.

Though the County's arguments are based in fact, they are not sufficient to overturn the Tax Commission's conclusion that Briarfield was entitled to a farm-use tax exemption for the tax year 1998. The Tax Commission had substantial evidence that the Needhams were engaged in agriculture, as that term has previously been defined by our decision in *Development Associates*. The hay was an agricultural product that was ultimately marketed for profit,

and the other crops were part of the processes and steps "necessary and incident to the completion of products" from the farm.

Keeping in mind that our review of the Tax Commission's decision is limited to determining whether it was supported by substantial evidence, we conclude that the Tax Commission did not err in concluding that Briarfield was engaged in the commercial production or growing of crops, plants or animals during the tax year 1998. The fact that there is evidence to the contrary is not a sufficient ground to overturn the Tax Commission's determination; thus, we will not do so.

(2) Sound Management

[3] A sound management program is defined by statute as

> [a] program of production designed to obtain the greatest net return from the land consistent with its conservation and long-term improvement.

N.C. Gen. Stat. § 105-277.2(6).

Briarfield contends it was under sound management by Shawn Needham in 1998 because he made a smooth transition from dairy and breeding operations to the cultivation of ground crops. Additionally, Shawn Needham's testimony indicates that he strategically left some of the farm's fields fallow to retain the soil's integrity, retained some of the 1998 wheat crop for sale at a better price in 1999, and did other things to keep Briarfield viable during its transition period. There is also evidence in the record that Shawn Needham did not bear the burden of managing Briarfield alone during the tax year 1998. Shawn's uncle Bill, who had extensive farming experience, actively managed Briarfield from January to July 1998. Shawn Needham had previous experience working at Briarfield for his grandparents years earlier. He testified that he routinely sought advice from his uncle and local farmers about which crops to plant. Finally, Shawn Needham testified that he worked at Briarfield about forty hours per week and had help from his wife and some friends who volunteered to assist him with the daily operation of the farm. Based on this evidence, it is clear that Shawn Needham was not a "weekend or hobby farmer or speculator who does not maintain [the] lands in a 'sound management program.' " *W.R. Company*, 48 N.C. App. at 257, 269 S.E.2d at 643. There was ample evidence in the record that Shawn Needham worked extensively at Briarfield and was actively involved in its present and future plans.

Nonetheless, the County argues that Shawn Needham was not a sound manager because he did not have agricultural science training and did not use the County Extension Office for farming information. The County also points out that, despite its vast acreage, Briarfield's only 1998 income came from the sale of some hay for just over $1,000.00. The County noted that the farm had 195 cleared acres, so the $1,000.00 revenue meant that each acre produced about five dollars of income. The County concluded that these figures cannot be the result of sound management. Additionally, the County placed great emphasis on the fact that Briarfield does not financially support any people, though it is described as a "family farm."

We do not find the County's arguments persuasive. Though Shawn Needham had no previous experience in operating a farm, was not trained in agricultural science, and did not consult the County Extension Office for farming matters, these facts alone do not prove that Briarfield was not under a sound management program. The Tax Commission considered the fact that Shawn Needham had been familiar with the farm from the time his grandparents ran it. Additionally, the fact that neither Bill nor Shawn Needham was trained in agricultural science is of no moment, because there is no statutory requirement that one must have formal training in order to provide sound management. Rather, Shawn Needham's own testimony revealed that he consulted with both his uncle and local farmers to make decisions regarding Briarfield. Based on the foregoing, the Tax Commission had substantial evidence to conclude that Briarfield was under a sound management program, and its conclusion will not be disturbed on appeal.

(3) Size and Income Requirements

[3] Briarfield argues it was entitled to the farm-use tax exemption because it met the size and income requirements contained in N.C. Gen. Stat. § 105-277.3(a)(1). N.C. Gen. Stat. § 105-277.3(a)(1) requires agricultural land to consist of one or more tracts,

> one of which consists of at least 10 acres that are in actual production and that, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have produced an average gross income of at least one thousand dollars ($1,000). Gross income includes income from the sale of the agricultural products produced from the land . . . . Land in actual production includes land under improvements used in the commercial production or growing of crops, plants, or animals.

Thus, there are two statutory requirements: acreage and income. Briarfield clearly met the acreage requirement; it was a single unitary farm which covered a total of 390 acres, with 220 acres used for grazing cows and growing hay and wheat from 1995-1997, and 195 cleared acres in 1998.

With regard to the income requirement, Briarfield and the County vary greatly on their interpretation of the statute. The County argues that each ten-acre tract of land in active production must produce an annual income of $1,000.00, based on the plural nature of the word "have" in the statute. Thus, the County used the evidence of 195 cleared acres in 1998 to argue that Briarfield should have had a 1998 income of $19,500.00 in order to merit a farm-use tax exemption. Briarfield, on the other hand, argues that the entire property should gross at least an average of $1,000.00 per year, because portions of the statute deal with singular wording such as "one or more," "one of which," and "at least."

After careful consideration of both Briarfield's and the County's positions, we conclude that Briarfield's interpretation of N.C. Gen. Stat. § 105-277.3(a)(1) is correct. When interpreting a statutory provision, "[t]he legislature is presumed to have intended a purpose for each sentence and word in a particular statute, and a statute is not to be construed in a way which makes any portion of it ineffective or redundant." *Peace River Electric Cooperative v. Ward Transformer Co.*, 116 N.C. App. 493, 502, 449 S.E.2d 202, 209 (1994), *disc. review denied*, 339 N.C. 739, 454 S.E.2d 655 (1995), (quoting *State v. White*, 101 N.C. App. 593, 605, 401 S.E.2d 106, 113 (citation omitted), *appeal dismissed, disc. review denied*, 329 N.C. 275, 407 S.E.2d 852 (1991)). The County's interpretation of N.C. Gen. Stat. § 105-277.3(a)(1) is not supported by case law. No provision of the statute mentions dividing land into ten-acre tracts and requiring each tract to produce an annual gross income of $1,000.00. If such a method was envisioned, many farms would be unable to meet the statutory income requirement; this does not appear to be a result intended by the Legislature. Testimony from both Bill and Shawn Needham indicated that the sale of hay alone in 1998 garnered $1,100.00, an amount sufficient to meet the $1,000.00 statutory threshold. Evidence in the record also indicates that, in the three years prior to 1998, the farm's income was well above the $1,000.00 minimum. Thus, we conclude the Tax Commission had substantial evidence before it to conclude that Briarfield met the acreage and income requirements necessary to retain its farm-use tax exemption.

II. Framing of the Issue

[4] By its second assignment of error, the County argues that the Tax Commission erred in its framing of the issue because it changed the focus of the case, as compared to how the case was examined by the Alamance County Board of Equalization and Review. We disagree.

The Tax Commission stated the issue as follows:

> Is Taxpayer's agricultural land part of a farm unit that is actively engaged in the commercial production or growing of crops, plants or animals under a sound management program?

By contrast, the issue before the County Board of Equalization and Review was whether Briarfield could continue its special use as a dairy farm. The County found against Briarfield on statutory grounds because the Needhams failed to notify the County that the use of the farmland had changed from dairy and breeding operations to the cultivation of ground crops.

The County maintains that the Tax Commission did not consider this aspect of the case, and instead erroneously found Briarfield was "in transition" and overturned the County's assessment. The County believes that finding was incorrect because Briarfield had technically been "in transition" for four years, and all positive moves toward the cultivation of ground crops were done after the County took away Briarfield's farm-use tax exemption. Finally, the County notes that the Tax Commission is required to rely on the standards of the local assessors, rather than on the standards of an independent appraiser or on new evidence. *See In re Allred*, 351 N.C. 1, 519 S.E.2d 52 (1999); and *In re Southern Railway*, 313 N.C. 177, 328 S.E.2d 235 (1985).

Briarfield maintains the Tax Commission properly framed the issues in the case because it comported with the issue framed in the notification letter from the Alamance County Tax Assessor, William J. Grizzle, which told the Needhams their farm-use tax exemption was revoked and gave them an opportunity to disprove the Assessors' conclusion. Moreover, Briarfield correctly points out that there is no mention in either the record or the transcript of how the County framed the issue. Indeed, the County never explained its one-sentence determination that Briarfield was no longer entitled to the farm-use tax exemption.

We conclude that the County cannot prevail on this assignment of error for several reasons. First, the County is barred from discussing

or mentioning information that is not in the record or transcript. See N.C.R. App. P. 9 (1999). Additionally, the Tax Commission's hearing is a trial *de novo* and is not limited by the decision of a county board of equalization and review. *See In re Appeal of K-Mart Corp.*, 319 N.C. 378, 380, 354 S.E.2d 468, 469 (1987) (stating that "although the decision by the county board to grant or deny an exemption is a discretionary one, it is reviewable by the Property Tax Commission"). *Id.* (citation omitted). Third, even if the issue was improperly framed, the County failed to timely object before the Tax Commission and has "waived any affirmative defenses it might have had by its failure to raise them before the Tax Commission . . . ." *In re Forestry Foundation*, 35 N.C. App. 414, 425, 242 S.E.2d 492, 499 (1978), *aff'd*, 296 N.C. 330, 250 S.E.2d 236 (1979). Lastly, it was the County who improperly framed the issue by calling the exemption a "dairy farm special use." The proper issue was whether Briarfield met the definition of "agricultural land" found in N.C. Gen. Stat. § 105-277.3(a)(1). The County's second assignment of error is hereby overruled.

III. Briarfield's Failure to Notify County of Status Change

[5] The County next contends that Briarfield's failure to notify it of the transition from dairy and breeding operations to the cultivation of ground crops now bars its eligibility for the farm-use tax exemption. We disagree.

Under N.C. Gen. Stat. § 105-277.5 (1999),

> [n]ot later than the close of the listing period following a change which could disqualify all or a part of a tract of land receiving the benefit of this classification, the property owner shall furnish the assessor with complete information regarding such change. *Any property owner who fails to notify the assessor of changes as aforesaid regarding land receiving the benefit of this classification shall be subject to a penalty of ten percent (10%) of the total amount of the deferred taxes and interest thereon for each listing period for which the failure to report continues.*

Id. (emphasis added).

By its very terms, N.C. Gen. Stat. § 105-277.5 imposes monetary fines when a property owner fails to notify the County Assessor of changes in the land's classification. However, the statute does not strip an offending landowner of his right to a classification that the land otherwise meets. In actuality, both Briarfield's dairy and breed-

ing operations and its cultivation of ground crops qualify it as agricultural land farm-use property. As such, the farm's status never changed, and there was no need to notify the County Assessor of a status change. Even if Briarfield was under a duty to notify, the only penalty for its failure to do so was monetary in nature. Briarfield's failure to notify the County Assessor was not a valid ground for the County to rely upon in revoking Briarfield's farm-use tax exemption status; thus, this assignment of error is overruled.

IV. Basis of Tax Commission's Decision

[6] Lastly, the County maintains that the Tax Commission improperly based its decision on the fact that the County presented no evidence and, in so doing, placed an improper burden of proof upon the County when the burden was the taxpayers' to carry. We disagree.

While it is true the County did not put on any evidence of its own and instead relied on its cross-examination of Bill and Shawn Needham, there is no evidence in the record that the Tax Commission based its decision on that fact. The Tax Commission's decision detailed the evidence upon which it ultimately based its determination. Though the Tax Commission noted that the County did not provide rebuttal evidence to discredit or contradict the Needhams, it clearly noted that any evidence the County presented would have been rebuttal evidence, not affirmative evidence. This realization indicates that the Tax Commission did not place an improper burden on the County.

While the County also argues that Briarfield failed to carry its burden of showing competent, material and substantial evidence that the Assessors improperly revoked its farm-use tax exemption, we do not find this argument persuasive. After careful examination of the record and proceedings below, we conclude that the Tax Commission properly based its decision on the evidence presented.

The decision of the North Carolina Property Tax Commission is hereby affirmed in its entirety.

Affirmed.

Judges WYNN and BRYANT concur.

IN RE APPEAL OF GREENS OF PINE GLEN LTD. PART.

[147 N.C. App. 221 (2001)]

IN THE MATTER OF APPEAL OF: THE GREENS OF PINE GLEN LTD. PARTNERSHIP FROM THE DECISION OF THE DURHAM COUNTY BOARD OF EQUALIZATION AND REVIEW REGARDING THE VALUATION OF CERTAIN REAL PROPERTY FOR TAX YEAR 1997

No. COA00-1218

(Filed 20 November 2001)

Taxation— ad valorem—property valuation—income approach

The Property Tax Commission erred by affirming Durham County's ad valorem tax valuation of a taxpayer's property as though it were not encumbered by 26 U.S.C. § 42 restrictions for low-rent housing, because: (1) the property was constructed under section 42 for the express purpose of providing low-income, reduced-rent housing, and was operating as its proper and efficient use; (2) section 42 restrictions are not a personal encumbrance, but are part of a federal program which is administered by the state and which the United States Congress has determined to be in the public interest; (3) the federal rent restrictions applicable to the taxpayer are a part of the market for section 42 housing, and the property must be valued according to this market; and (4) the income approach must be given greatest weight for determining the value since it is the most reliable method for assessing investment property such as apartments.

Appeal by taxpayer from a final decision entered 19 June 2000 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 12 September 2001.

Durham County Attorney S. C. Kitchen, by Assistant County Attorneys Kimberly M. Grantham and Curtis O. Massey, for appellee Durham County.

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker and Jason J. Kaus, for appellant The Greens of Pine Glen, Limited Partnership.

James B. Blackburn, III, amicus curiae for the North Carolina Association of County Commissioners.

Moore & Van Allen, PLLC, by Susan Ellinger, Charles H. Mercer, Jr. and Marc C. Tucker, amicus curiae for the North Carolina Low Income Housing Coalition; William D. Rowe, amicus curiae for the North Carolina Justice and Community Development Center.

HUNTER, Judge.

Taxpayer, The Greens of Pine Glen, Limited Partnership ("GPG"), appeals a final decision of the Property Tax Commission ("Commission") affirming appellee Durham County's ("the County") *ad valorem* tax valuation of GPG's property. We reverse the decision of the Commission and remand.

GPG is a 168-unit apartment complex constructed in Durham, North Carolina in 1996. The complex was built pursuant to a federal program which encourages the building of rent-restricted housing for low-income families. Pursuant to this program, set forth in the Internal Revenue Code at 26 U.S.C. § 42 ("section 42"), GPG's developer received ten years' worth of federal tax credits which assisted in financing the construction of the housing. In return, the developer agreed to restrict the pool of eligible tenants to low-income families for thirty years, and to limit rents to rates that are approximately twenty-five to thirty percent less than prevailing market rates for thirty years. The restrictions on the property are enforced by recorded restrictive covenants.

In April 1997, the County delivered to GPG a property tax appraisal which valued the property at $5,941,692.00. The County arrived at the value by using the income method of appraisal, which took into account the market impact of the section 42 use and rent restrictions on the property. On 9 May 1997, the County delivered to GPG a revised appraisal which increased the appraised value of the property to $7,488,350.00. The County arrived at the May 1997 appraisal using solely the replacement cost method of valuation, not the income method. The May 1997 appraisal did not take into account the section 42 restrictions on the property.

The County sent a third appraisal to GPG in 1998 when it determined that it had erred in calculating the square footage of the GPG apartments in its May 1997 appraisal. As a result, the County decreased the appraised value of the property to $7,250,050.00. Again, the County's third appraisal was based solely on the replacement cost of the GPG property and did not take into account the section 42 restrictions on the property.

GPG appealed the County's May 1997 assessment to the Durham County Board of Equalization and Review. The County Board refused to revise the assessment, and on 10 October 1997, GPG filed an appeal with the Commission. In a three to two decision, the

Commission affirmed the County's May 1997 assessment on 19 June 2000. Two commissioners dissented, concluding that the section 42 restrictions must be taken into account in appraising the property's tax value. GPG appeals.

GPG argues on appeal that the Commission erred in affirming the County's valuation of the property as though not encumbered by section 42 restrictions; that the Commission's decision essentially authorizes the County to improperly tax GPG's section 42 federal tax credits which are intangible property; and that the Commission erred in affirming the County's May 1997 valuation, which the County concedes was based upon an incorrect measurement of the property. For reasons stated herein, we reverse the Commission's decision and remand for a redetermination of the value of GPG's property which takes into account the section 42 restrictions on the property.

The standard of appellate review for property valuations is set forth in N.C. Gen. Stat. § 105-345.2(b) (1999). This statute provides that we "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C. Gen. Stat. § 105-345.2(b). This Court has the authority to reverse, remand, modify, or declare void any Commission decision which is:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Id. We must "review the decision of the Commission analyzing the 'whole record' to determine whether the decision has a rational basis in evidence." *In re Appeal of Owens*, 144 N.C. App. 349, 351-52, 547 S.E.2d 827, 828 (2001).

"It is presumed that *ad valorem* tax assessments are correct and that the tax assessors acted in good faith in reaching a valid decision." *Id.* at 352, 547 S.E.2d at 829. However, the presumption is rebutted where a taxpayer can "show that an illegal or arbitrary

method of valuation was used, and that the assessed value substantially exceeds the properties [sic] fair market value." *Id.* (citing *In re Appeal of AMP, Inc.*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975)) (emphasis omitted).

According to this State's uniform assessment standards, "all property, real and personal, shall be assessed for taxation at its true value or use value as determined under [N.C. Gen. Stat. § 105-283 (1999)]." N.C. Gen. Stat. § 105-284(a) (1999). The term "true value" is defined in N.C. Gen. Stat. § 105-283 (1999) as "market value":

> [T]hat is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283. Significantly, N.C. Gen. Stat. § 105-317 (1999) requires that in determining the true value of property or a building, the appraiser *must* take into account its "uses; past income; probable future income; and any other factors that may affect its value." N.C. Gen. Stat. § 105-317(a)(1).

It is generally accepted that there are three methods of appraisal for determining market value: (1) comparable sales; (2) cost; and (3) income. *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115, *appeal dismissed and disc. review denied*, 331 N.C. 553, 418 S.E.2d 664 (1992). However, the courts of this State have routinely held that " 'the income approach is the most reliable method in reaching the market value of investment property.' " *In re Appeal of Owens*, 132 N.C. App. 281, 287, 511 S.E.2d 319, 323 (1999) (quoting *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 474, 458 S.E.2d 921, 924, *affirmed*, 342 N.C. 890, 467 S.E.2d 242 (1996)). That approach is based upon the theory that something is worth what it will earn. *Id.*

On the other hand, "[t]he cost approach is better suited for valuing specialty property or newly developed property; when applied to other property, the cost approach receives more criticism than praise." *Belk-Broome*, 119 N.C. App. at 474, 458 S.E.2d at 924. The cost approach is most often used "when no other method will yield a realistic value. The modern appraisal practice is to use cost approach as a secondary approach 'because cost may not effectively reflect market conditions.' " *Id.* (citation omitted).

The County argues, and the Commission agreed, that the cost approach was the appropriate method of valuation for GPG and that the section 42 restrictions must not be considered. In support of this argument, the County relies upon *In re Pine Raleigh Corp.*, 258 N.C. 398, 128 S.E.2d 855 (1963), and *In re Appeal of Greensboro Office Partnership*, 72 N.C. App. 635, 325 S.E.2d 24, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). In *Pine Raleigh*, the taxpayer appealed the county's appraisal, arguing that the appraisal did not take into account a lease which encumbered the subject property. *Pine Raleigh*, 258 N.C. at 399-400, 128 S.E.2d at 856. The lease, which was to last for a period of thirty years, fixed the rental income the taxpayer could receive. *Id.* at 399, 128 S.E.2d at 856. The court determined that in assessing the property's past income and probable future income under N.C. Gen. Stat. § 105-295 (now § 105-317), the assessor need not necessarily rely solely on actual income, but could also consider "income which could be obtained by the proper and efficient use of the property." *Id.* at 403, 128 S.E.2d at 859.

The court stated that "[t]o hold otherwise would be to penalize the competent and diligent and to reward the incompetent or indolent." *Id.* The court determined that net rental income is a factor that should be considered in determining value. *Id.* It is only where "the income actually received is less than the fair earning capacity of the property, [that] the earning capacity should be substituted as a factor rather than the actual earnings." *Id.* This Court in *Greensboro* simply relied on this holding of *Pine Raleigh* in affirming the Commission's determination that it would not consider the fact the subject property was encumbered by a lease for below-market rents. *Greensboro*, 72 N.C. App. at 640, 325 S.E.2d at 26-27.

These cases are distinguishable from the present case. GPG, which was constructed under section 42 for the express purpose of providing low-income, reduced-rent housing, is operating at its "proper and efficient use" as section 42 property. Such property is distinguishable from property where the owner personally elects to enter into a lease with another party, such lease being a unique encumbrance to that specific property. The court in *Pine Raleigh* specifically stated that one runs the risk of rewarding the "incompetent or indolent" for a bad business decision if one accounts for such personal encumbrances. As noted by the dissenting commissioners, section 42 restrictions are not a " 'personal encumbrance' " but "are part of a Federal program which is administered by the State of North

Carolina and which the United States Congress has determined to be in the public interest."

Rather, the instant case is more analagous to the situation presented to this Court in *Belk-Broome*, 119 N.C. App. 470, 458 S.E.2d 921, decided subsequent to *Pine Raleigh* and *Greensboro*. In that case, the taxpayer, a Belk department store, challenged a final decision of the Commission which upheld the county's *ad valorem* tax appraisal of the Belk property using the cost method of valuation. *Id.* at 471, 458 S.E.2d at 922. The county valued the property at $10.4 million, while Belk asserted the correct value was $6 million, and that the correct appraisal method was the income approach. *Id.*

Belk was one of three anchor department stores at Valley Hills Mall in Hickory, North Carolina. *Id.* Developers seeking to develop such a mall must secure the presence of anchor department stores such as Belk, which are necessary to draw customers, and thereby draw stores to rent space in the "in-line" portion of the mall. *Id.* at 475, 458 S.E.2d at 925. Therefore, developers are willing to make monetary concessions, such as lower rental rates or purchase prices, to anchor stores in order to attract them to the mall. *Id.* at 475-76, 458 S.E.2d at 925. The monetary concessions are set forth in an "operating agreement" between the anchor store and the mall's developer which defines each parties' rights and obligations. *Id.* at 476, 458 S.E.2d at 925. Significantly, most operating agreements restrict the anchor store from operating as anything other than a department store and from selling the property to anything other than an acceptable anchor department store. *Id.*

In upholding the county's assessment of the Belk property, the Commission in *Belk-Broome* relied solely on the cost approach. *Id.* We reversed the Commission, finding that such reliance was error. *Id.* In relying on the cost approach, the Commission in *Belk-Broome* used a similar analysis to the Commission in the case *sub judice*. There, the Commission viewed the operating agreement between Belk and the mall developer as an encumbrance on the property that distorted Belk's appraisal which had taken into account the restrictions placed on Belk. *Id.* The Commission used a " 'bundle of rights' " analogy to determine that the operating agreement between Belk and the mall took away some of Belk's rights from the bundle of fee simple ownership. *Id.* Thus, the Commission concluded that Belk's appraiser, which valued the property taking the restrictions into account, only valued a partial interest in the property. *Id.*

The Commission in that case concluded that the county correctly appraised the property based upon the " 'entire bundle of rights' " regardless of whether Belk had chosen to bargain some of those rights away in an operating agreement. *Id.* at 477, 458 S.E.2d at 925. It stated that " 'all appraisals of property for property tax purposes must determine the value of the entire bundle of rights. This is true whether or not the owner has bargained away some of his rights.' " *Id.* The Commission noted that just as the property owner in *Greensboro* had bargained away some rights, Belk was also operating short of a full bundle of rights, but must nevertheless be appraised based upon " 'the entire bundle of rights.' " *Id.*

This Court rejected the Commission's analysis. We further stated that the Commission's reliance on *Greensboro* was a "misinterpretation of the law." *Id.* at 477, 458 S.E.2d at 926. We noted that *Greensboro* "stands for the proposition that the value of property must be based on the market, not good or bad business transactions." *Id.* at 477-78, 458 S.E.2d at 926. We stated that in *Greensboro*, the lease "was a personal encumbrance unique to that property, whereas the operating agreement [in *Belk-Broome*] is a market standard." *Id.* at 478, 458 S.E.2d at 926. While we noted that "[p]lacing a lower value on this property solely because it is an anchor store may appear illogical, . . . this unequal treatment is a part of the market that must be considered." *Id.*

As in *Belk-Broome*, the Commission in the case *sub judice* used a "bundle of rights" analysis in holding that the section 42 restrictions on GPG should not be considered because it "would result in a value of only a partial interest in the subject property[] . . . represent[ing] only a part of the bundle of rights in the subject property." It further concluded that in this State, "a property tax appraisal applies to the whole bundle of rights, or the fee simple interest in the property." The Commission relied heavily on the testimony of the County's appraiser, Mr. Johnson, who opined that the tax value of the property must reflect "the full fee simple interest in the subject property" which consists of "the value of the property as if unencumbered by any contract or restriction." The Commission concluded that taking into account the rent restrictions placed on section 42 property would "not reflect the value of the full fee simple interest in the subject property."

This conclusion is not consistent with our decision in *Belk-Broome*. Regardless of the fact the Commission in that case concluded the anchor stores were not being valued based upon their

entire bundle of rights, we held that the operating agreement was an "integral part" of the market for a store such as Belk, and that the property "*must be valued according to that market.*" *Id.* at 478, 458 S.E.2d at 926 (emphasis added).

Likewise, the federal rent restrictions applicable to GPG are a part of the market for section 42 housing such as GPG, and the property must be valued according to this market. As noted in *Belk-Broome*, while it may appear illogical to place a lower value on GPG solely because of the section 42 requirements, such unequal treatment is undoubtedly a part of the market that must be considered. As we stated in *Belk-Broome*, "[t]he County and Commission must take the property as it finds it. It is not the Commission's place to equalize property values." *Id.* at 480, 458 S.E.2d at 927.

Moreover, unlike the situation in *Greensboro*, section 42 low-rent housing is not a "personal encumbrance unique to" GPG. Indeed, the Commission's decision acknowledges the presence of other section 42 complexes located in Durham County. The restrictions applicable to GPG and other section 42 properties in Durham County are more akin to the uniform restrictions placed on anchor department stores in *Belk-Broome* than the lone unfavorable lease at issue in *Greensboro*. Low-rent housing built according to the established requirements and mandates of section 42 are no less of a market standard than anchor department stores operating pursuant to operating agreements with mall developers.

We concluded in *Belk-Broome* that "[a]n important factor in determining the property's market value [as defined in N.C. Gen. Stat. § 105-283] is its highest and best use." *Id.* at 473, 458 S.E.2d at 923. This Court stated:

> The Belk property must be valued at its highest and best use, which . . . is its present use as an anchor department store. Therefore, the County, and the Commission, are required to use a valuation methodology that reflects what willing buyers in the market for anchor department stores will pay for the subject property.

Id. at 474, 458 S.E.2d at 923-24. We further noted that in order to assess market value, "the County must 'consider *at least* [the property's] . . . past income; probable future income; and any other factors that may affect its value.' " *Id.* at 474, 458 S.E.2d at 924 (quoting N.C. Gen. Stat. § 105-317(a)(2) (1999)) (emphasis added).

We likewise hold that in assessing the value of GPG, the County and the Commission are required to use a valuation methodology that reflects what willing buyers in the market for rent-restricted, low-incoming housing complexes would pay for the subject property. The language of N.C. Gen. Stat. § 105-284(a) is clear that a property's true value is its "market value," or the price at which the property would change hands on the market. N.C. Gen. Stat. § 105-317 is equally clear in stating that a determination of market value requires consideration be given to the uses of the property, the income generated by the property, the probable future income of the property, and any other factors that affect the market value of the property. The fact that GPG apartments are restricted to limiting rents to twenty-five to thirty percent below prevailing market rates for thirty years unquestionably affects the market value of the property, as well as the use of the property and the current and future probable income of the property.

It is clear from the Commission's decision that the County and the Commission failed to consider factors that N.C. Gen. Stat. § 105-317 requires be considered. The Commission instead relied upon the same "bundle of rights" theory rejected in *Belk-Broome* that the property's true value is equal to its full fee simple interest as if unencumbered. The failure to consider these factors was error, resulting in our conclusion that the County's assessment and the Commission's decision were based on an illegal method of valuation, thereby rebutting the presumption that the County's assessment was correct. *See In re Southern Railway*, 313 N.C. 177, 181, 328 S.E.2d 235, 239 (1985) ("[a]n illegal appraisal method is one which will not result in 'true value' as that term is used in [N.C. Gen. Stat. § 105-283]").

To the extent the Commission determined the income method should not be used because it would not reflect the value of the full fee simple interest in the property, its decision is contrary to *Belk-Broome*. We concluded in *Belk-Broome* that the income approach should be the primary method for determining the value of the anchor stores. *Belk-Broome*, 119 N.C. App. at 474, 458 S.E.2d at 924. We noted, however, "that while the income approach is preferential, a combination of approaches may be used because of the inherent weaknesses in each approach. We do not foreclose using such a combination of approaches here so long as the income approach is given greatest weight." *Id.* We likewise hold that on remand, the County must determine the value of GPG using the income method or a com-

bination of methods which account for the market effect of the section 42 restrictions. As noted by the dissenting Commissioners, both of the County's experts testified that the income method is the most reliable method for assessing investment property such as apartments.

We further hold that the County's May 1997 appraisal substantially overvalued GPG's fair market value, given that it failed to account for the market effect of the section 42 restrictions. The County's April 1997 appraisal of GPG's property performed under the income approach and which accounted for the section 42 restrictions valued GPG's property at $5,941,692.00. The May 1997 assessment valued the property at $7,488,350.00, an increase in value of over $1.5 million.

We need not address GPG's additional arguments, including that the Commission erred in affirming the May 1997 appraisal because the County conceded it was based upon a miscalculation of approximately five percent of GPG's square footage. However, even assuming *arguendo* the miscalculation did not result in a substantial increase in the valuation (the difference between the May 1997 and the 1998 valuations amounted to $238,300.00), the Commission should not affirm an appraisal when aware that it is based upon erroneous calculations.

The decision of the Commission is reversed and this matter is remanded to the Commission. The Commission may either hold a new hearing at which it must redetermine the value of the GPG property, or further remand to the County for a redetermination of value. In either event, the Commission or the County must use a method or combination of methods which take into account the market standard for property restricted by the requirements of section 42.

Reversed and remanded.

Judges WYNN and TYSON concur.

MICHAEL WEINMAN ASSOCIATES GENERAL PARTNERSHIP, PLAINTIFF v. TOWN OF HUNTERSVILLE, NORTH CAROLINA, DEFENDANT

No. COA00-1257

(Filed 20 November 2001)

Zoning— conditional use—commercial property—statutory vested right

Once defendant town approved a highway commercial conditional district zoning classification for plaintiff landowner's property in the exercise of its extraterritorial zoning jurisdiction and in effect approved a site specific development plan for the property, plaintiff had a vested right under N.C.G.S. § 160A-385.1 and the town's zoning ordinance to develop the property in accordance with this zoning classification for three years. Therefore, an ordinance rezoning the property from commercial to residential was null and void.

Appeal by plaintiff from judgment entered 24 August 2000 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 September 2001.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by Roy H. Michaux, Jr. and John H. Carmichael for plaintiff-appellant.

Buckley, McMullen & Buie, P.A., by Charles R. Buckley III; and Parham, Helms, Harris, Blythe & Morton, by Robert B. Blythe, for defendant-appellee.

WALKER, Judge.

Plaintiff initiated this action on 13 September 1999 seeking a declaratory judgment ordering that a zoning ordinance adopted by defendant be declared null and void. Following discovery, both parties moved for summary judgment. After a hearing, the trial court granted defendant's motion.

The facts of this case are not in dispute. In April 1988, plaintiff acquired a 168.098-acre parcel of land (property) located at the intersection of Beatties Ford Road and Neck Road in Mecklenburg County (County). At that time, the County maintained zoning jurisdiction over the property and it was zoned "rural." On 17 January 1991, plaintiff petitioned the County Planning Commission to re-zone the property as an R-9 Planned Unit Development (PUD), a conditional use

zoning district. Along with its petition, plaintiff included a technical data plan which outlined a site specific development proposal for the property. This plan proposed the property be used for several development projects including single family and multi-family housing, a neighborhood school and a retail shopping center. On 17 June 1991, the County approved plaintiff's re-zoning petition.

In 1997, defendant adopted an ordinance extending its extraterritorial zoning jurisdiction (ETJ) to certain areas, including plaintiff's property. In preparation of the transfer in zoning authority, plaintiff engaged a planning consultant, Bob Young (Young), to ensure that the zoning classification placed on its property conformed as nearly as possible to the County's PUD zoning. Young subsequently met with defendant's Planning Director, Ann Hammond (Hammond), to discuss the zoning classification to be placed on plaintiff's property. Following this meeting, Hammond agreed to recommend to defendant's Planning Board that the property be divided and zoned as three separate parallel conditional zoning districts. Each district incorporated the development conditions included in the site specific development proposal plaintiff originally submitted to the County in 1991. Defendant's Planning Board then integrated the three parallel conditional zoning districts into a comprehensive zoning petition (Petition No. 97-19) which proposed to reclassify all areas brought in under defendant's ETJ ordinance. On 4 November 1997, after notice and a public hearing, defendant approved Petition No. 97-19.

In August 1998, plaintiff contracted with the Charlotte-Mecklenburg Board of Education to sell the portion of the property which was proposed to be used as a school site. One month later, plaintiff entered into a contract with Niblock Development Corp. (who subsequently assigned the contract to Niblock-Ridgeline, LLC) to sell the portion which was proposed for single family and multi-family housing. Consequently, plaintiff retained only 8.65 acres—the portion which it had originally proposed for a retail shopping center (8.65 acres or commercial site). Under Petition No. 97-19, defendant zoned this commercial site as Highway Commercial Conditional District (Highway Commercial (CD)), a parallel conditional zoning district.

However, in response to community concerns that the area was losing its "rural character," defendant's Planning Board initiated a petition (Petition No. 99-08) "down-zoning" the commercial site to Neighborhood Residential. This neighborhood residential classification would not permit the location of a retail shopping center on the

8.65 acres. *See* Town of Huntersville Zoning Ordinance Art. 3.2.3 (2001). At a 22 June 1999 hearing held by defendant pursuant to Petition No. 99-08, Hammond, in reply to a commissioner's question, stated that there were "certain conditions in the original county planned unit development plan that . . . [defendant] continue[d] to respect." Also, evidence was presented at this hearing that these conditions included the location of the commercial site relative to Beatties Ford Road and Neck Road, a limit on any commercial construction to 70,000 square feet, a 100 feet minimum setback from Beatties Ford Road, and street access points. Nevertheless, on 19 July 1999, defendant approved Petition No. 99-08.

Plaintiff contends that defendant's action of re-zoning the commercial site should be declared null and void because it had a vested right to develop the 8.65 acres in accordance with its Highway Commercial (CD) zoning classification. This Court has recognized that a vested right in a particular land use is established through one of two means. *See Browning-Ferris Industries v. Guilford County Bd. of Adj.*, 126 N.C. App. 168, 171, 484 S.E.2d 411, 414 (1997). One means is through compliance with the applicable statutes. *See Id.*; N.C. Gen. Stat. § 153A-344.1 (1999) (counties); N.C. Gen. Stat. § 160A-385.1 (1999) (cities and towns). The second means is to qualify by virtue of satisfying common law requirements. *See Town of Hillsborough v. Smith*, 276 N.C. 48, 54, 170 S.E.2d 904, 909 (1969); N.C. Gen. Stat. § 153A-344.1(f)(2) (1999) (counties); N.C. Gen. Stat. § 160A-385.1(f)(2) (1999) (cities and towns). In this case, plaintiff argues it has a vested right by statute and by common law.

We begin our analysis of the criteria for the establishment of a statutory vested right by reviewing the law surrounding the development of the vested right doctrine and use it as a foundation for our discussion. Under our Constitution, the State and its local governing bodies are empowered to enact regulations restricting property owners use of their property. N.C. Const. art. II, § 1; *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969). This power to enact land-use restrictions includes the power to amend or repeal previously enacted restrictions. *See McKinney v. High Point*, 239 N.C. 232, 237, 79 S.E.2d 730, 734 (1954). Consequently, no property owner has a *per se* vested right in a particular land-use regulation such that the regulation could remain "forever in force, inviolate and unchanged." *Id.* Competing with the State's constitutional authority over land-use are the property owners' constitutional entitlement to due process of law which forbids the State or its local governing

bodies from arbitrarily or capriciously restricting owners' rights to use their property for lawful purposes. U.S. Const. amend. XIV, § 1; N.C. Const. art. I, § 19; *In re Ellis*, 277 N.C. 419, 424, 178 S.E.2d 77, 80 (1970).

At common law, the vested rights doctrine evolved as a balancing mechanism between these two competing constitutional interests. *See Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 274 (1986) (citation omitted). The doctrine recognizes that where property owners have reasonably made a substantial expenditure of money, time, labor or energy in a good faith reliance of a government approved land-use, they have a vested right. *See Browning-Ferrris*, 126 N.C. App. at 171, 484 S.E.2d at 414; *and Russell v. Guilford County*, 100 N.C. App. 541, 543, 397 S.E.2d 335, 337 (1990). This vested right attaches to and runs with the property permitting the owner to make use of it in accordance with the government approved land-use. *See Warner v. W & O, Inc.*, 263 N.C. 37, 43, 138 S.E.2d 782, 786-87 (1964).

Despite the compromising nature of common law vested rights, controversy remains with respect to the doctrine's specific requirements. *See* David W. Owens, *Legislative Zoning Decisions: Legal Aspects* 118 (1999). In addition, the growth in the practice of conditional use zoning following our Supreme Court's decision in *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988), fostered the need to provide more certainty and stability to the land-use planning process.

In response, our General Assembly created an alternative statutory means of establishing a vested right. *See* N.C. Gen. Stat. §§ 160A-385 *et seq.* (cities and towns) (1999); N.C. Gen. Stat. §§ 153A-344 *et seq.* (counties) (1999). This statutory vested right incorporates the same balance of constitutional interests present in the common law doctrine.

> The General Assembly finds and declares that it is necessary and desirable, as a matter of public policy, to provide for the establishment of certain vested rights in order to ensure reasonable certainty, stability, and fairness in the land-use planning process, secure the reasonable expectations of landowners, and foster cooperation between the public and private sectors in the area of land-use planning. Furthermore, the General Assembly recognizes that city approval of land-use development typically follows

> significant landowner investment in site evaluation, planning, development costs, consultant fees and related expenses.
>
> The ability of a landowner to obtain a vested right after city approval of a site specific development plan or a phased development plan will preserve the prerogatives and authority of local elected officials with respect to land-use matters. There will be ample opportunities for public participation and the public interest will be served. These provisions will strike an appropriate balance between private expectations and the public interest, while scrupulously protecting the public health, safety, and welfare.

N.C. Gen. Stat. § 160A-385.1(a) (1999).

Accordingly, property owners secure a statutory vested right with the "valid approval, or conditional approval, of a site specific development plan or a phased development plan, following notice and public hearing by the city with jurisdiction over the property." N.C. Gen. Stat. § 160A-385.1(c) (1999). Once established, the vested right entitles the landowner to "undertake and complete the development and use of said property under the terms and conditions of the site specific development plan or the phased development plan including any amendments thereto." *Id.* Moreover, the right continues despite any "[a]mendments, modifications, supplements, repeal or other changes" to the zoning regulations. N.C. Gen. Stat. § 160A-385(b) (1999). The vested right lasts for a statutory minimum of two years but may be extended at the city's discretion up to a maximum of five years. N.C. Gen. Stat. § 160A-385.1(d)(1) and (2) (1999).

With this background in mind, we turn to plaintiff's contention that it has a statutory vested right to develop the commercial site in accordance with its former Highway Commercial (CD) classification. Critical to our analysis is whether defendant approved a site specific development plan when it brought plaintiff's property within its ETJ. N.C. Gen. Stat. § 160A-385.1(b)(5) defines a site specific development plan as:

> a plan which has been submitted to a city by a landowner describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property. Such plan may be in the form of, but not limited to, any of the following plans or approvals: A planned unit development plan, a subdivision plat, a preliminary or general development plan, a conditional or special use permit, a conditional or special use district zoning plan, or

> any other land-use approval designation as may be utilized by a city.

N.C. Gen. Stat. § 160A-385.1(b)(5) (1999). Pursuant to this statutory definition, each local governing body individually determines through its zoning ordinance what is considered a site specific development plan within its jurisdiction. *See Id.*

Our review of defendant's zoning ordinance reveals five different items, each of which constitutes within its jurisdiction a site specific development plan for purposes of N.C. Gen. Stat. § 160A-385.1: "(a) a parallel conditional use district; (b) a special use permit; (c) any overlay district for which a site specific development plan is required; (d) a conditional district; or (e) an approved cluster development plan." Town of Huntersville Zoning Ordinance, art. 2.2.2 (a)-(e) (2001). The ordinance further states that once one of these items is approved, a vested right is established which "shall remain in force for three years from date of approval (unless otherwise specified)." *Id.* Both parties agree that Highway Commercial (CD) is a parallel conditional use district and that when defendant approved Petition No. 97-19, this zoning classification was affixed to the commercial site.

However, defendant argues that in order to establish a statutory vested right, plaintiff must have petitioned for a re-zoning of its property and submitted either a "site specific development plan" or a "phased development plan." Additionally, defendant contends that its 4 November 1997 action was not an "amendment, modification, supplement, repeal or other change[]" to its zoning map, thereby precluding plaintiff from establishing a vested right pursuant to its zoning ordinance. We disagree.

The essential requirements for the establishment of a statutory vested right are set out in the subsection of N.C. Gen. Stat. § 160A-385.1 entitled "Establishment of vested right." N.C. Gen. Stat. § 160A-385.1(c) (1999). The requirements include: (1) approval (or conditional approval) by the appropriate governing body of either a site specific or phased development plan; (2) public notice; and (3) an open hearing. *Id.* Here, the public hearing notice filed in connection with Petition No. 97-19 identified the general Highway Commercial zoning classification. The notice further indicated that a "(CD)" designation is "[used] with a general zoning district to modify development conditions according to *an approved conditional site plan*." (emphasis added). Therefore, we conclude that once defendant approved Petition No. 97-19 and in turn the Highway Commercial

(CD) zoning classification for the 8.65 acres, the essential requirements for establishing a statutory vested right had been met.

Moreover, to adopt the interpretation the defendant urges we give the statute would be inconsistent with the concept of conditional use zoning. In *Chrismon*, our Supreme Court upheld the practice of conditional use zoning provided, "the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest." *Chrismon*, 322 N.C. at 617, 370 S.E.2d at 583. In reaching its holding, the Court recognized that the true benefit of conditional use zoning lies in the flexibility the practice furnishes to local governing bodies:

> Conditional use zoning anticipates that when the rezoning of certain property within the general zoning framework . . . would constitute an unacceptably drastic change, such a rezoning could still be accomplished through the addition of certain conditions or use limitations. Specifically, conditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning.

Id. at 618, 370 S.E.2d at 583-84 (citation omitted). In accordance with this concept of conditional use zoning, our General Assembly created a mechanism by which a property owner can be assured that once a conditional use plan is approved, it will not be disturbed for a reasonable period of time.[1] This mechanism is the statutory vested right.

Our review of the record reveals that prior to defendant's approval of Petition No. 97-19, defendant's Planning Director Hammond met with plaintiff's Planning Consultant Young to develop a zoning classification for the entire 168.098 acres. After this meeting, Hammond agreed to recommend that plaintiff's property be zoned as closely as possible to the zoning classification which had existed under the County's jurisdiction. Defendant's ordinance provides that a Highway Commercial (CD) classification is "a parallel conditional use district" and that said district is a "site specific development plan" for purposes of N.C. Gen. Stat. § 160A-385.1. Further, defendant admits that this zoning classification affixed to the 8.65 acres carried

1. We note that N.C. Gen. Stat. § 160A-385.1 was adopted effective in 1991 following *Chrismon*.

with it "conditions similar to the prior zoning under Mecklenburg County."

Accordingly, we conclude that once defendant adopted Petition No. 97-19 affixing a Highway Commercial (CD) zoning classification to the 8.65 acres, it approved a conditional use plan and a statutory vested right attached. This right entitled plaintiff to make use of the property according to the conditions of the Highway Commercial (CD) zoning classification for a period of three years. To interpret defendant's zoning ordinance and N.C. Gen Stat. § 160A-385.1(c) as defendant urges would only serve to undermine the "certainty, stability and fairness in the land-use planning process" the vested right doctrine seeks to create. N.C. Gen. Stat. § 160A-385.1(a).

However, our decision does not preclude defendant from enforcing provisions in its ordinance and building code with regards to such items as building specifications, location of utilities, street layout and other details that defendant's permitting process may require.

Because we conclude plaintiff has a statutory vested right we do not address the issue of whether it also has a common law vested right.

In summary, the trial court's granting of summary judgment in favor of defendant is reversed. The case is remanded to the trial court for entry of summary judgment in favor of plaintiff and to address plaintiff's request that its vested right be extended beyond 4 November 2000.

Reversed and remanded.

Judges McGEE and HUDSON concur.

BIEMANN AND ROWELL COMPANY v. THE DONOHOE COMPANIES, INC., D/B/A DONOHOE CONSTRUCTION COMPANY

No. COA00-1177

(Filed 20 November 2001)

1. Construction Claims— delays—allocation of responsibility by architect—action between contractors

The trial court did not err when sitting without a jury on a construction claim between the heating contractor (plaintiff) and the general contractor (defendant) by holding that the architect's failure to assign any direct liability for delay to defendant served as an implicit determination that defendant was not directly responsible to plaintiff for delays in plaintiff's performance. Article 15 of the general conditions of the project vested authority in the architect to determine responsibility for delay among the prime contractors, and plaintiff did not meet its burden of establishing that the architect's failure to allocate liability to defendant was dishonest or a mistake.

2. Construction Claims— delays—action between contractors—causation required

An injured contractor may not recover delay damages by merely demonstrating that such damages were within the contemplation of the parties at the time the contract was entered. Although there was evidence here that defendant may have contributed to the overall project delay, plaintiff failed to show how delays specifically caused by defendant impacted plaintiff's work performance.

3. Damages— construction claim—measurement—total cost method—failure to show practicability

A prime contractor in a construction action against another prime contractor failed to prove that it sustained damages that can be ascertained and measured with reasonable certainty where plaintiff failed to establish practicability, the first of four criteria for the total cost method of determining losses, and failed to properly establish responsibility for its additional costs, since it did not isolate the nature and extent of specific delays and connect them to an act or omission by defendant.

4. Construction Claims— action between contractors—delays—notice

The trial court, sitting without a jury on a construction claim between prime contractors, did not err by finding that plaintiff failed to provide defendant with timely notice of its claims. It was necessary for the architect, the arbiter of disputes between the prime contractors, to be notified when one contractor caused delay to another. Discussions at weekly foremen's meetings and monthly progress meetings with the architect and owner did not constitute sufficient notice. Plaintiff never gave written or verbal notice of potential claims at these meetings and never gave notice that it was suffering potential harm; moreover, plaintiff accepted final payment, which constituted a waiver of all claims.

Appeal by plaintiff from judgment entered 5 June 2000 by Judge Ben F. Tennille in Guilford County Superior Court. Heard in the Court of Appeals 20 August 2001.

Erwin and Bernhardt, P.A., by Fenton T. Erwin, Jr., for plaintiff-appellant.

Safran Law Offices, by Perry R. Safran, for defendant-appellee.

THOMAS, Judge.

This breach of contract case between prime contractors is based on a claim of delay in the construction of the University of North Carolina Neuropsychiatric Hospital on the Chapel Hill campus. Plaintiff, Biemann and Rowell Company, was the heating and ventilating contractor, while defendant, The Donohoe Companies, Inc., D/B/A Donohoe Construction Company, was the general contractor.

In a bench trial, the trial court entered judgment in favor of defendant on all of plaintiff's claims. Plaintiff appeals, advancing the following four arguments: (1) the trial court erred in its determination of the architect's role in apportioning liability among the prime contractors; (2) it is not necessary to prove that defendant proximately caused injury to plaintiff; (3) the evidence establishes that plaintiff incurred damages for which defendant is liable; and (4) defendant's actual knowledge of potential claims against it was sufficient notice. For the reasons herein, we affirm the decision of the trial court.

On or about 1 July 1992, plaintiff and defendant entered into separate contracts with the State of North Carolina, through the University of North Carolina at Chapel Hill (owner), to build the multi-million dollar Neuropsychiatric Hospital. The parties operated under a multiple-prime contract pursuant to N.C. Gen. Stat. § 143-128, which requires that separate contracts be awarded for the major branches of work when a public building project's expected costs exceed $500,000. N.C. Gen. Stat. § 143-128 (1999). Each separate contractor is directly liable to the State of North Carolina and to the other contractors. N.C. Gen. Stat. § 143-128(b) (1999). Accordingly, a prime contractor may be sued by another prime contractor for economic loss resulting from the first prime contractor's failure to fully perform its duties under the terms of the separate contracts. *See Bolton v. T.A. Loving Co.*, 94 N.C. App. 392, 397, 380 S.E.2d 796, 800, *disc. review denied* 325 N.C. 545, 385 S.E.2d 496 (1989).

As the general contractor, defendant was assigned the role of project expediter. While the owner hired a schedule coordinator to develop the progress schedule of the contractors, under Article 14(j) of the general conditions of the separate contracts defendant remained responsible for "maintain[ing] the progress schedule, making monthly adjustments, updates, corrections, etc., that are necessary, keeping all Contractors and the [architect] fully informed."

The original critical path method progress schedule provided for completion of the project within 1004 days. Delays, ultimately totaling 369 days, occurred throughout the project. They were at least partially attributable to poor weather, logistical problems due to the number of contractors working within the limited area of the site, a structural defect which caused the building to settle, and revisions made by the owner to the sixth floor plans during the course of the project. As a result, the contractors were frequently forced to complete work out of the anticipated sequence.

To accelerate completion of the project, it was the understanding of the contractors, architect, and schedule coordinator that defendant would "dry-in" the building by installing a moisture seal at the fifth floor level. Normally, work is restricted until the roof is built because lower levels would otherwise be exposed to moisture accumulation in inclement weather. This temporary building seal was intended to allow work to take place at the lower levels before the roof was installed. None of those involved who testified had previously seen a building seal, however, or knew of an agreement among

the parties as to what specifically would be done to create one. Defendant never installed the building seal.

Letters and summaries written by HKS Architects (architect) indicate that defendant was failing to complete work according to the project schedule and to fulfill its duties as project expediter. Neither the architect nor the owner, however, ever assigned any direct liability for delay to defendant. Meeting minutes and observation reports, which list delays of plaintiff's activities, indicate that plaintiff also contributed to overall project delay. Substantial completion of the project occurred on 15 May 1996, and the owner took beneficial occupancy on that date.

Plaintiff maintains that defendant's failure to install the building seal, as well as defendant's failure to supervise and properly schedule its subcontractors, caused delays to plaintiff's work and as a consequence plaintiff suffered economic loss. Plaintiff did not notify defendant of its claims against them until October of 1996. By that time, plaintiff had released 78 of its 80 subcontractors.

Initially, we note that a trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though there may be evidence that would support findings to the contrary. *State v. Coronel*, 145 N.C. App. 237, 250, 550 S.E.2d 561, 510 (2001). However, conclusions of law reached by the trial court are reviewable de novo. *Mann Contractors v. Flair with Goldsmith Consultants—II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999).

I.

[1] Plaintiff first assigns as error the trial court's determination of the architect's role in apportioning liability for delays among prime contractors. The trial court held that the architect's failure to allocate liability to defendant for delays in the performance of plaintiff's work constituted an implicit determination that defendant was not directly responsible. Plaintiff contends that, under the prime contractors' separate contracts, the architect is not authorized to decide disputes among the prime contractors. Rather, plaintiff argues, it is only the court that is authorized to determine the proper allocation of delay damages among the prime contractors. We disagree.

Multiple prime contractors co-exist in a delicate state of symbiosis, in which the quality of a contractor's work often depends on the quality of the work of another contractor, and the delay of one con-

tractor results in the delay of other contractors' work. *See Bolton*, 94 N.C. App. 392, 402, 380 S.E.2d 796, 803. This Court in *Bolton* held that, under the contract in that case, the architect determined responsibility for delay among the prime contractors. *Id.* When an architect is vested with the authority to render judgment on a contractor's performance, the determination is prima facie correct, and the other parties have the burden of proving fraud or mistake. *Id.* (quoting *Barnes Constr. Co. v. Washington Township*, 134 Ind. App. 461, 466, 184 N.E.2d 763, 764-65 (1962)).

The contract provisions here are similar to those in *Bolton*. Article 15(c) of the general conditions of the project contract provides that when one prime contractor's work depends on the work of another prime contractor, "defects which may affect that work shall be reported to the Designer [architect] in order that prompt inspection may be made and the defects corrected." Article 15(c) goes on to provide that the architect "shall be the judge as to the quality of work and shall settle all disputes on the matter between the Contractors." Article 15, therefore, vests authority in the architect to determine responsibility for delay among the prime contractors. Furthermore, Article 23(c) defines the project architect as:

> the judge as to the division of responsibility between the Contractor(s). . . and shall apportion the amount of liquidated damages to be paid by each of them, according to delay caused by any or all of them.

It is plain under Article 23(c) that the architect determines each prime contractor's liability to the owner for delay. While Article 23 does not give the architect authority to decide delay disputes among the prime contractors, the architect's decision under this article would be relevant to a contractor's claim.

Based on *Bolton* and the foregoing contract provisions, we hold that the contractors in the present case vested authority in the architect to decide disputes between the contractors. The trial court correctly found that "the Architect's failure to assign any direct liability for delay to Donohoe served as an implicit determination that Donohoe was not directly responsible to Biemann for delays in Biemann's performance of its work." Plaintiff did not meet its burden of establishing that the architect's failure to allocate liability to defendant was dishonest or a mistake and we reject this assignment of error.

II.

[2] Plaintiff argues by the second assignment of error that it is not necessary to prove that defendant proximately caused injury to plaintiff. The contention is that under *Bolton*, an injured contractor may recover delay damages by merely demonstrating that such damages were within the contemplation of the parties at the time the contract was entered. We disagree.

A prime contractor has a duty to the other prime contractors for the full performance of all duties and obligations due under the terms of the separate contracts and in accordance with the plans and specifications. N.C. Gen. Stat. § 143-128. *Bolton* did not dispense with the causation element necessary to maintain this statutory cause of action for breach of contractual duties. *See Bolton*, 94 N.C. App. at 406-07, 380 S.E.2d 805-06. Rather, this Court in *Bolton* held that in order to recover *special* damages, the plaintiff must not only prove the elements of a breach of contract claim, but also that the requested damages were contemplated at the time of contracting. *Id.* Plaintiff's reliance on *Bolton* is mistaken. To recover damages, plaintiff must show that the contract was breached by defendant and that the breach caused plaintiff's damages.

Although there is evidence here that defendant may have contributed to overall project delay, plaintiff failed to show how delays specifically caused by defendant impacted plaintiff's work performance. Central to plaintiff's argument is defendant's failure to install the temporary building seal. The installation of the temporary seal, however, first appeared as an activity on the critical path in April of 1994, long after the project began experiencing delays. Plaintiff, moreover, merely presented a chart of instances of delay allegedly attributable to plaintiff, and relied on anecdotal testimony about the delays. Finally, plaintiff failed to take into account delays attributable to other causes. We accordingly dismiss plaintiff's second assignment of error.

III.

[3] Plaintiff next assigns as error the trial court's holding that plaintiff failed to prove that it sustained damages for which defendant was liable. A plaintiff has an obligation to prove such facts as will furnish a basis for the calculation of damages. *See Esteel Co. v. Goodman*, 82 N.C. App. 692, 698, 348 S.E.2d 153, 157 (1986), *disc. review denied* 318 N.C. 693, 351 S.E.2d 745 (1987). For the breach of an executory

contract, a plaintiff may recover only such damages as can be ascertained and measured with reasonable certainty. *See Tillis v. Calvine Cotton Mills, Inc.*, 251 N.C. 359, 366, 111 S.E.2d 606, 612 (1959). Moreover, where both parties contribute to the delay, neither can recover damages, unless there is proof of clear apportionment of the delay and expense attributable to each party. *See Blinderman Constr. Co. v. United States*, 695 F.2d. 552, 559 (Fed. Cir. 1982) (quoting *Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 702, 714-15 (1944)).

Rather than using a direct or actual cost method of quantifying actual losses incurred resulting from defendant's actions, plaintiff relied on the modified total cost method, a variation of the total cost method, to prove delay damages. Under the total cost method, a contractor seeks the difference between its total costs incurred in performance of the contract and its bid price. *See Youngdale & Sons Const. Co., Inc. v. United States*, 27 Fed. Cl. 516, 541 (1993). This method is condoned only where no other way to compute damages is feasible, "because it blandly *assumes*—that every penny [sic] of the plaintiff's costs are *prima facie* reasonable, that the bid was accurately and reasonably computed, and that the plaintiff is not responsible for any increases in cost." *Id.* (citing *Urban Plumbing & Heating Co. v. United States*, 408 F.2d. 382, 394 (Ct. Cl. 1969), *cert. denied* 398 U.S. 958, 26 L.Ed. 2d 542 (1970)); *F.H. McGraw & Co. v. United States*, 130 F. Supp. 394, 400 (Ct. Cl. 1955).

Plaintiff must satisfy the conjunctive four-part test for recovery under the total cost method: (i) the impracticability of proving actual losses directly; (ii) the reasonableness of its bid; (iii) the reasonableness of its actual costs; and (iv) the lack of responsibility for the added costs. *Id.* (citing *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991)); *Boyajian v. United States*, 423 F.2d 1231, 1243 (Ct. Cl. 1970). The modified total cost method is the total cost method with adjustments for any deficiencies in plaintiff's proof in satisfying the four requirements. The modified approach assumes the elements of a total cost claim have been established, but permits the court to modify the test so that the amount plaintiff would have received under the total cost method is only the starting point from which the court will adjust the amount downward to reflect the plaintiff's inability to satisfy the test. *Youngdale*, 27 Fed. Cl. at 541 (citing *Servidone*, 931 F.2d at 862).

The trial court determined that plaintiff failed to establish impracticability, the first of the four criteria for using the total cost

method in determining losses. Plaintiff kept a daily log book of labor overrun throughout the project but made no attempt to tie the extra labor costs to any specific delay. In addition, plaintiff failed to establish that its bid was reasonable. Plaintiff's employees testified that the bid was "aggressive," and plaintiff produced no other bids for the heating and ventilation work for comparison. Plaintiff also failed to properly establish responsibility for its additional costs, since it did not isolate the nature and extent of specific delays and connect them to an act or omission by defendant. Instead, plaintiff allocated only a narrow set of costs to itself, and then attributed the remainder of the cost overrun entirely to defendant. Plaintiff failed to prove that it sustained damages that can be ascertained and measured with reasonable certainty and consequently we reject this assignment of error.

IV.

[4] Plaintiff lastly assigns as error the trial court's decision that plaintiff's action is barred because plaintiff failed to give timely notice to defendant of its claims. Specifically, plaintiff contends that the trial court erred in finding an express contractual obligation to provide notice of a delay to the architect, and that defendant's actual knowledge of its potential liability to co-prime contractors was sufficient notice. We disagree.

As arbiter of disputes between the prime contractors, it is necessary for the architect to be notified when one contractor causes delay to another. Article 23(d) and (e) under the general conditions of the project contract provides that a contractor who is delayed by another contractor is to request an extension of time in writing to the architect and owner within twenty days following the cause of the delay. We hold that plaintiff had a contractual duty to provide notice of delay caused by defendant.

We also reject plaintiff's contention that discussions at weekly foreman's meetings and monthly progress meetings with the architect and owner constitute sufficient notice. While these meetings may have provided constructive notice, plaintiff never gave written or verbal notice of potential claims at these meetings, nor did plaintiff ever give notice that it was suffering economic harm. In addition, without ever having given notice of its claims, plaintiff accepted final payment in May of 1996. According to Article 32(c), "[t]he making and acceptance of final payment shall constitute a waiver of all claims by the Contractor."

Failure to provide proper notice, moreover, was a breach of plaintiff's duty to mitigate damages, and prejudiced defendant by not providing an opportunity to cure. "[I]t is a sound principle of law that one who is injured in his person or property by the wrongful or negligent act of another is required to protect himself from loss, if he can do so with reasonable exertion or at trifling expense; and ordinarily, he will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided." *Durham Constr. Co. v. Wright*, 189 N.C. 456, 459, 127 S.E. 580, 582 (1925). We uphold the trial court's decision that plaintiff failed to provide defendant with timely notice of its claims.

Accordingly, the decision of the trial court is affirmed.

AFFIRMED.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. ANTOINNE LAMONT MORRIS

No. COA00-1224

(Filed 20 November 2001)

Kidnapping— second degree—variance between charge and proof

A defendant's motion to dismiss a second degree kidnapping charge should have been granted where the indictment stated that defendant kidnapped the victim for the purpose of facilitating a felony but did not mention facilitating flight following the commission of a felony, and the State asserted only kidnapping to facilitate second degree rape at trial. The evidence showed that the victim was confined in an apartment living room, knocked unconscious, awoke to find her clothes removed and defendant on top of her, was knocked unconscious again, and awoke locked in a storage closet outside. All of the elements of rape were completed before defendant removed the victim to the storage closet and there was no evidence that defendant removed the victim to the storage closet for the purpose of raping her there. The continuous transaction doctrine does not apply because the two acts were not inseparable or concurrent. While defendant's actions

made his flight easier and may have supported a conviction of second degree kidnapping for the purpose of facilitating flight, the State failed to carry its burden of proving that defendant's action facilitated defendant's commission of the rape.

Judge WALKER dissenting.

Appeal by defendant from judgment entered 8 June 2000 by Judge Timothy S. Kincaid in Superior Court, Mecklenburg County. Heard in the Court of Appeals 12 September 2001.

Attorney General Roy Cooper, by Assistant Attorney General Jennie Wilhelm Mau, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

McGEE, Judge.

Antoinne Lamont Morris (defendant) was indicted for second degree rape and second degree kidnapping on 15 September 1997. A jury found defendant guilty of both charges. Defendant was sentenced on 8 June 2000 to consecutive terms of 100 to 129 months in prison for the second degree rape charge, and twenty-nine to forty-four months in prison for the second degree kidnapping charge. Defendant appeals.

Evidence presented by the State at trial tended to show that the victim saw defendant in the cafeteria between 11:00 a.m. and 12:00 noon at West Mecklenburg High School in Charlotte, North Carolina on 18 August 1997, the first day of school. The victim recognized defendant because she had attended summer school with him and also had previously dated his cousin. Defendant asked the victim if she would follow him to a friend's house because he thought something was wrong with his car, and she agreed.

At the apartment, defendant went upstairs and when he came back down, the victim asked him for a drink of water. He went into the kitchen and fixed her some water, then returned upstairs. Defendant called the victim to come upstairs, and he began to rub her shoulders and breasts. The victim was uncomfortable, walked downstairs, and told defendant she was about to leave. Defendant pushed her away from the door. When she attempted to leave a second time, defendant punched her in the face, and she blacked out. When the victim awoke, defendant was on top of her. She was not wearing her

shorts or underwear. She screamed for defendant to get off and began hitting and scratching him. Defendant hit her in the face again, and she lost consciousness. She awoke the next morning around 6:00 a.m. in the storage closet outside the apartment. She was wearing only a tank top and felt sore all over her body. She tried to yell but her tongue was stuck to the bottom of her mouth. She managed to kick open the door and crawl to a neighbor's apartment. The neighbors found her hysterical and difficult to understand. They found clothes for her to wear and called the police.

Charlotte-Mecklenburg Police Officer R.L. Matthews responded to the call. Officer Matthews found the victim difficult to understand. She appeared to be in a drugged state, but she did not smell of alcohol. The victim was transported to Carolinas Medical Center where she was examined by Tina Haning, a registered nurse, who prepared a sexual assault kit. She was also examined by Dr. Douglas Swanson. The victim gave a statement to the police which was substantially similar to the information she gave to both the nurse and doctor. The police prepared a photographic lineup and presented it to the victim the next day in the hospital. She immediately identified defendant as the perpetrator.

Lenora Barbour, a Crime Scene Search technician, searched the apartment where the alleged incident occurred and found a white plastic trash bag in the laundry area containing a pair of underwear, a pair of shorts, a soiled sanitary napkin, a possibly blood-stained towel, and a used condom.

At trial, defendant admitted he had lied to the police in an earlier interview when he stated he had not been with the victim on 18 August 1997, had not taken her to his friend's house, and had not engaged in sexual intercourse with her, either consensually or forcibly. Defendant testified at trial that he had asked the victim to come to his friend's house; they engaged in consensual sexual intercourse; he stopped having sex with the victim when he realized she was having her menstrual cycle; when he left the apartment, he left her alone in his friend's bedroom; and he did not place her into the storage closet. He testified he had earlier lied to the police because he was seventeen at the time, scared, and he did not trust the police, nor feel they would believe his story. Defendant's mother testified she saw her son late in the afternoon of 18 August 1997, but she did not see any scratches on his neck. Defendant's friend, Anthony Thame, corroborated defendant's testimony that defendant picked up Thame about 2:15 p.m. after school on 18 August 1997.

Defendant first argues the trial court erred in denying defendant's motion to dismiss the charge of second degree kidnapping because the evidence was insufficient for the jury to find each element of the crime charged in the indictment beyond a reasonable doubt; specifically, the evidence was insufficient to show defendant confined or restrained the victim for the purpose of facilitating the rape. We agree.

"It has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890, 894, *cert. denied*, 444 U.S. 874, 62 L. Ed. 2d 102 (1979). An "indictment will not support a conviction for a crime unless all the elements of the crime are accurately and clearly alleged in the indictment." *State v. Brooks*, 138 N.C. App. 185, 192, 530 S.E.2d 849, 854 (2000). A motion to dismiss based on a fatal variance in the indictment "is based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. In other words, the proof does not fit the allegation." *State v. Gibson*, 169 N.C. 318, 322, 85 S.E. 7, 9 (1915).

Kidnapping is defined in N.C. Gen. Stat. § 14-39(a) (1999):

> Any person who 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 . . . shall be guilty of kidnapping 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[.]

The indictment for second degree kidnapping stated defendant kidnapped the victim "for the purpose of facilitating the commission of a felony." The indictment made no mention of facilitating defendant's flight following the commission of a felony. At trial, the State again asserted only that the kidnapping facilitated the felony of second degree rape.

In *Faircloth*, the defendant forced the victim from a parking lot with a knife, drove her to a secluded area, robbed her, and raped her. The police arrived and arrested him before he could attempt an

escape. The defendant was indicted for and convicted of second degree kidnapping for the purpose of facilitating flight. However, our Supreme Court held the evidence showed a kidnapping for the purpose of facilitating rape, not facilitating the flight following the rape. The Court therefore reversed the trial court's judgment. *Faircloth*, 297 N.C. at 108, 253 S.E.2d at 895.

Similarly, in *Brooks*, the defendant was indicted for and convicted of kidnapping for the purpose of facilitating assault with a deadly weapon inflicting serious injury. Our Court held that "in order for the State to prove kidnapping as alleged in the indictment, the evidence at trial must have shown that defendant kidnapped [the victim] *before* he shot her." *Brooks*, 138 N.C. App. at 192, 530 S.E.2d at 854. We found no such evidence was presented at the trial. Our Court found defendant confined and restrained the victim only after he shot her. The defendant successfully argued under these facts the "only theory of kidnapping available to the State was that it was done 'to facilitate [defendant's] flight' following the commission of a felony." *Brooks* at 190, 530 S.E.2d at 853. However, the defendant was not indicted for this charge. Consequently, our Court reversed defendant's kidnapping conviction.

In the case before us, the evidence presented shows the victim was confined in the apartment living room, she was knocked unconscious, she awoke once to find defendant on top of her and her clothes removed, she was knocked unconscious again, and when she awoke a second time, she was locked in the storage closet outside. The evidence presented could possibly show defendant kidnapped the victim for the purpose of facilitating the flight from the commission of a felony; however, this crime was not charged. There is no evidence defendant removed the victim to the storage closet for the purpose of raping her there. All of the physical evidence of a rape was found inside the apartment. While there was testimony that the victim kicked her way out of the storage closet, there was no evidence of a struggle or a rape inside the storage closet.

The State argues the evidence is sufficient to show the kidnapping facilitated the rape under the continuous transaction doctrine. The continuous transaction doctrine has been applied where the defendant has committed a murder and within a short period surrounding the murder also committed arson, an armed robbery, a sex offense, a rape, or a kidnapping. *See State v. Campbell*, 332 N.C. 116, 120, 418 S.E.2d 476, 478 (1992) (holding the doctrine of continuous transaction applies to murder/arson cases); *State v. Olson*, 330 N.C.

557, 566, 411 S.E.2d 592, 597 (1992) (armed robbery and murder); *State v. Thomas*, 329 N.C. 423, 434, 407 S.E.2d 141, 149 (1991) (applying continuous doctrine to felony murder and sexual offense where court held whether victim was alive or dead when sexual offense occurred is immaterial because "the sexual act was committed during a continuous transaction that began when the victim was alive."); *State v. Trull*, 349 N.C. 428, 449, 509 S.E.2d 178, 192 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999) ("All that is required to support convictions for a felony offense [rape] and related felony murder 'is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction.' "). Our Supreme Court has defined the doctrine stating a "killing is committed in the perpetration or attempted perpetration of another felony when there is no break in the chain of events between the felony and the act causing death, so that the felony and homicide are part of the same series of events, forming one continuous transaction." *State v. Wooten*, 295 N.C. 378, 385-86, 245 S.E.2d 699, 704 (1978).

Our Courts have also held in order to elevate a sexual offense or rape charge to first degree sexual offense or first degree rape, a defendant must use a weapon or cause serious bodily injury as part of a continuous transaction involving the sex offense or rape. *See State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986). Also, the threat of a deadly weapon and a taking of personal property from someone must be part of a continuous transaction in order to constitute armed robbery. *See State v. McDonald*, 130 N.C. App. 263, 502 S.E.2d 409 (1998).

However, our Courts have not applied the continuous transaction doctrine to instances involving rape and kidnapping like the situation we have before us. While these two acts occurred close in time, they were not inseparable or concurrent actions. All of the elements of the rape were completed before defendant removed the victim to the storage closet.

The State also relies on *State v. Kyle*, 333 N.C. 687, 694, 430 S.E.2d 412, 415-16 (1993), in arguing that "to facilitate" means "to make easier." Therefore, any act which makes the commission of the felony easier will support a conviction of facilitating the felony. In *Kyle*, the kidnapping made the eventual murder easier because it prevented the victim from escaping. While we agree with this theory of the State's argument and its definition of "to facilitate," the facts in the case before us do not support this theory. While there is little

question defendant's actions made his flight from the scene easier and was an attempt to cover up his act, the removal of the victim to the storage closet in no way made defendant's rape of her easier, as all the elements of rape were completed before the removal. Again, defendant's actions possibly would support a conviction of second degree kidnapping for the purpose of facilitating his flight from the commission of a rape; however, the State has failed to carry its burden in proving defendant's actions facilitated defendant's commission of the actual rape. As the evidence does not support the charge stated in the indictment, defendant's motion to dismiss the second degree kidnapping charge should have been granted, and we are required to reverse his conviction for second degree kidnapping.

We need not address defendant's remaining assignments of error.

Defendant's conviction for second degree kidnapping is reversed.

Judge HUDSON concurs.

Judge WALKER dissents.

WALKER, Judge, dissenting.

I respectfully dissent from the majority opinion which reverses defendant's conviction for second degree kidnapping.

I am unable to reconcile the facts of this case with those of our Supreme Court's decision in *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). In *Hall*, the defendant was convicted of armed robbery, kidnapping and assault. The kidnapping portion of the indictment charged that the defendant had moved the victim to facilitate the commission of the felony of armed robbery. The evidence showed that the defendant and a co-defendant, who was armed with a pistol, robbed a service station where the victim worked as a night attendant. After emptying the cash register and removing $40 from the victim, the defendant forced the victim into his car, drove him nearly five miles and left him on the side of the interstate highway. *Id.* at 79-80, 286 S.E.2d at 554-55.

Defendant argued that the crime of armed robbery was complete when his co-defendant pointed the pistol at the victim and attempted

to take his property; therefore, any movement of the victim was for the purpose of facilitating flight and not to facilitate the commission of the armed robbery. The Court rejected this argument refusing to find a bright line distinction between the various motives listed in the kidnapping statute:

> The purposes specified in G.S. 14-39(a) are not mutually exclusive. A single kidnapping may be for the dual purposes of using the victim as a hostage or shield and for facilitating flight, or for the purposes of facilitating the commission of a felony and doing serious bodily harm to the victim. So long as the evidence proves the purpose charged in the indictment, the fact that it also shows the kidnapping was effectuated for another purpose enumerated in G.S. 14-39(a) is immaterial and may be disregarded.

Id. at 82, 286 S.E.2d at 555.

Here, the evidence shows that defendant, during the course of the rape, twice rendered the victim unconscious and moved her to the storage closet. When the victim awoke the next morning, she was wearing only a tank top. However, the defendant contends that all of the elements of rape were complete prior to his movement of the victim to the storage closet. In so doing, he attempts to make the same bright line distinction between "facilitating the commission of any felony" and "facilitating flight" that was specifically rejected in *Hall*. "[T]he fact that all of the essential elements of a crime have arisen does not mean the crime is no longer being committed. That the crime was 'complete' does not mean it was completed." *Id.* at 82-83, 286 S.E.2d at 556 (citation omitted). Thus, the jury could have concluded that defendant's acts constituted one continuous transaction such that the crime of rape, although complete in the apartment, was not completed until the victim was removed to the storage closet. Indeed, the logical extension of defendant's argument leads to a conclusion that a defendant could never be convicted of kidnapping under a facilitating the commission of a rape theory if the "movement, confinement, or restraint" of the victim occurs after the sexual act. I respectfully decline to make such a bright line distinction.

MILDRED MILES AND BETTY WHITMAN v. BOBBY GRAY MARTIN, CHARLENE B. MARTIN AND SALEM RETIREMENT SERVICES, LLC

No. COA00-1332

(Filed 20 November 2001)

1. Appeal and Error— appealability—discovery order—interlocutory order—substantial right

Although defendant's appeal from the trial court's order granting plaintiffs' motion to compel production of client/investor documents as part of discovery is an appeal from an interlocutory order, defendant has an immediate right to appeal because the discovery order affects a substantial right based on the assertion of the attorney-client privilege.

2. Discovery— motion to compel production—attorney-client privilege

The trial court did not abuse its discretion in a fraud, negligent misrepresentation, civil conspiracy, breach of fiduciary duty, unfair and deceptive trade practices, breach of contract, and negligence action by granting plaintiff investors' motion to compel production of client/investor documents as part of discovery even though defendant, a licensed attorney, contends the documents were potentially attorney-client privileged, because: (1) no attorney-client relationship automatically attached between defendant and plaintiff investors simply because defendant has a license to practice law in the state of North Carolina and is a member of the North Carolina State Bar; (2) defendant has not shown any objective indicia of the existence of the privilege, and defendant specifically denied having any fiduciary duties to plaintiffs; and (3) defendant's investment company was set up with his wife, who is not a lawyer, meaning the company was not a professional business authorized to practice law as defendant claims.

3. Constitutional Law— due process—opportunity to be heard

The trial court did not abuse its discretion in a fraud, negligent misrepresentation, civil conspiracy, breach of fiduciary duty, unfair and deceptive trade practices, breach of contract, and negligence action by allegedly denying defendants an opportunity to be heard in violation of their due process rights on a motion to compel production of client/investor documents as part of dis-

covery, because N.C.G.S. §1A-1, Rule 26(b) allows the type of discovery the motion to compel addressed, and there is no requirement of notice or an opportunity to be heard.

Appeal by defendant from judgment entered 8 August 2000 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 18 September 2001.

Womble, Carlyle, Sandridge & Rice, by Philip J. Mohr for plaintiffs-appellees.

Randolph M. James, P.C., by Randolph M. James and David E. Shives for defendant-appellant.

THOMAS, Judge.

Defendant Bobby Gray Martin appeals from an order granting plaintiffs' motion to compel production of client/investor documents as part of discovery. All four of his assignments of error have as a basis the claim of attorney-client privilege.

Plaintiffs' allegations are as follows: Mildred Miles and Betty Whitman, plaintiffs, are elderly sisters who are both widows. On 8 March 1995, they responded to an advertisement by defendant Salem Retirement Services, L.L.C. (Salem) for safe, secure investments designed especially for elderly individuals. Defendants Bobby Gray Martin (B.G. Martin) and Charlene Martin, husband and wife, had established Salem in 1994. B.G. Martin is also an attorney and licensed to practice law in North Carolina.

Plaintiffs met with B.G. Martin and explained that they were interested in investing their life savings. B.G. Martin advocated a particular investment which plaintiffs allege he described as low-risk, sound, safe, conservative and guaranteed. He advised plaintiffs they would receive a 12-14% annual return on their investment and that they could get the money back at any time. Plaintiffs made further inquiry and B.G. Martin continued to assure them the investment was safe and secure, with virtually no risk.

Based on B.G. Martin's recommendations, each of the plaintiffs gave him $35,000, which was then invested by Salem in high-risk mortgages on apartment buildings in New York City. For the next six to eight months, plaintiffs received monthly income payments matching the 12-14% return B.G. Martin had promised. Thereafter, however, the payments ceased.

Plaintiffs contacted B.G. Martin regarding the non-payment, but he assured them their money was coming soon. In May 1996, plaintiffs learned Martha Lawrence (Lawrence), the mortgagor, had defaulted on both mortgages and that she was offering them title to the property in lieu of a foreclosure sale. Plaintiffs asked B.G. Martin for advice. He advised them to decline Lawrence's offer.

In 1997, plaintiffs received notice that Lawrence had not paid the insurance on the property. Then, they learned they could be held responsible for maintenance, repairs, taxes and other expenses. B.G. Martin again reassured plaintiffs, however, and advised them not to pay any of the insurance, taxes or other expenses.

In 1998, plaintiffs were served with a summons and complaint for back taxes owed on the property. Again, B.G. Martin counseled plaintiffs not to respond to the complaint and that he had everything under control.

Plaintiffs never received any additional income or return of their initial investments and had to come out of retirement and begin new jobs. Miles, in fact, was forced to sell her home. Plaintiffs filed a complaint against defendants on 6 August 1999. They alleged: (1) fraud and/or negligent misrepresentation; (2) constructive fraud; (3) civil conspiracy; (4) breach of fiduciary duty; (5) unfair and deceptive trade practices; (6) breach of contract and aggravated breach of contract; and (7) negligence. They did not allege legal malpractice.

In defendants' answer, they moved for dismissal and alleged the following affirmative defenses: (a) contributory negligence; (b) motion for a more definite statement because the fraud claim was not pled with particularity; (c) intervening negligence; (d) assumption of risk; (e) violation of the statute of frauds; (f) absence of reliance; (g) integration clauses which bar plaintiffs' recovery; and (h) violation of the statute of limitations. They also denied any fault or wrongdoing.

During the discovery phase of the case, plaintiffs claimed that defendants refused to provide full and complete responses to their first set of interrogatories and first request for production of documents. The parties were eventually able to agree to a consent order which stated if defendants did not provide full and complete responses by 29 March 2000, defendants would be subject to Rule 37 sanctions. Defendants responded only in part and did not provide all

of the requested documents by the deadline. Defendants failed to respond to a second set of interrogatories and production of documents. Plaintiffs then filed another motion to compel.

The trial court granted plaintiffs' motion to compel defendants' responses to plaintiffs' first and second set of interrogatories and first and second request for production of documents. Defendants' deadline was 5 June 2000 at 5 p.m. Plaintiffs' motion for sanctions was denied.

On 12 June 2000, plaintiffs filed new motions for sanctions and to compel defendants' responses to plaintiffs' second set of interrogatories and second request for documents. Defendants, in their response, stated they had submitted multiple volumes of documents by 23 June 2000. Defendants also motioned for a protective order prohibiting plaintiffs from violating Local Rule 4.8 by filing a motion to compel without prior consultation with opposing counsel.

Plaintiffs' motions came on for hearing on 24 July 2000. The parties stipulated that the only remaining unsettled issue was whether an attorney-client privilege attached to B.G. Martin's client/investor files pertaining to individuals other than plaintiffs. In an order filed 8 August 2000, the trial court allowed plaintiffs' motion to compel, finding that "no attorney-client relationship existed between B.G. Martin and his clients/investors; and therefore . . . B.G. Martin [is ordered] to produce all of B.G. Martin's clients'/investors' files situated similarly to the plaintiffs[.]" The trial court further denied the request for sanctions and attorney fees due to the circumstances of the dispute, including B.G. Martin's concern for the privacy and rights of his other clients/investors. B.G. Martin appeals the order granting the motion to compel.

[1] Before we consider B.G. Martin's arguments, we note the trial court's order would not normally be immediately appealable because it would be considered interlocutory. *State ex rel. Employment Security Commission v. IATSE Local 574*, 114 N.C. App. 662, 663, 442 S.E.2d 339, 340 (1994). A ruling is interlocutory if it does not determine the issues but directs some further proceeding preliminary to a final decree. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). However, an interlocutory order may be heard in appellate courts if it affects a substantial right. *See* N.C. Gen. Stat. § 1-277(a) (1999).

In *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E.2d 67 (1964), our Supreme Court held that a discovery order affected a substantial right and was immediately appealable where the physician-patient privilege was asserted. In the case at bar, B.G. Martin asserts an attorney-client privilege. We find no distinction between the privileges as related to substantial rights and accordingly hold that this interlocutory order affects a substantial right and is appropriately before us.

[2] For our purposes, we combine B.G. Martin's four assignments of error. He argues the trial court committed reversible error on the grounds that the order compels him to produce potentially attorney-client privileged documents: (1) without the opportunity for clients/investors to be heard, in violation of the federal and state constitutions; (2) without the opportunity for B.G. Martin to be heard, in violation of the federal and state constitutions; (3) in violation of the attorney-client privilege; and (4) without a record sufficient to determine whether the attorney-client privilege applied. As all of his arguments are based on the privilege, we first consider whether such a privilege existed.

> The attorney-client privilege exists if:
>
> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney was professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 291 (1981). It is plaintiffs' contention that the attorney-client relationship never existed between B.G. Martin and his investors.

B.G. Martin has a license to practice law in the state of North Carolina and is a member of the North Carolina State Bar. However, simply having a license to practice law does not allow the attorney-client privilege to automatically attach. In *Multimedia Publ'g. of North Carolina, Inc., v. Henderson County*, 136 N.C. App. 567, 525 S.E.2d 786, *rev. denied*, 351 N.C. 474, 543 S.E.2d 492 (2000), this Court held the party asserting the privilege "can only meet its burden by providing some *objective* indicia that the exception is applicable

under the circumstances. Mere assertions by [a party] or its attorneys in pleading will not suffice." *Id.* at 576, 525 S.E.2d at 792. (Emphasis in original).

In the case at bar, B.G. Martin has not shown any objective indicia of the existence of the privilege. In fact, he argued the opposite. In his answer, B.G. Martin specifically denied having any fiduciary duties to plaintiffs. The trial court's order here applied only to the files of those "situated similarly to the plaintiffs," and thus would not apply to those whose relationship with B.G. Martin is in a different category, such as a legitimate attorney-client one. B.G. Martin did not show evidence of a retainer paid, nor a contract showing an attorney-client relationship between himself and plaintiffs or between himself and any other investors. It was not until the third motion to compel that B.G. Martin even asserted an attorney-client privilege. In fact, there was no affidavit or testimony claiming such a relationship existed.

We also note B.G. Martin set up Salem with his wife, Charlene Martin, who is not a lawyer. If B.G. Martin were operating Salem as a professional business authorized to practice law, which he claims he does, he would be in violation of several North Carolina State Bar Rules of Professional Conduct if he shared profits with Charlene or, if Charlene owned any interest in Salem. *See* Rules of Professional Conduct 5.4 and 5.5.

B.G. Martin further claims neither he nor his clients had an opportunity to be heard. In discovery, relevant and material information is reachable to narrow and sharpen the basic issues for trial as long as it is not privileged. *American Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 251 S.E.2d 885, *rev. denied*, 297 N.C. 304, 254 S.E.2d 921 (1979). Our General Statutes provide:

> *Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.* It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for

objection that the examining party has knowledge of the information as to which discovery is sought.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (1999) (Emphasis added). As we have already determined that there is no attorney-client privilege, we must now determine whether there is any other privilege.

We note B.G. Martin did not claim any other privilege and, even if he did, his argument would still fail. There is clearly no physician-patient or husband-wife privilege. An accountant-client privilege is not recognized in North Carolina. *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684, *cert. denied*, 439 U.S. 830, 58 L. Ed. 2d 124 (1978).

[3] Further, discovery orders are within the trial court's discretion and will not be upset on appeal without a showing of abuse of discretion. *Hudson v. Hudson*, 34 N.C. App. 144, 237 S.E.2d 479, *rev. denied*, 293 N.C. 589, 239 S.E.2d 264 (1977). B.G. Martin argues the abuse occurred because his (and his clients') opportunity to be heard was denied in violation of the due process clauses in the state and federal constitutions.

Rule 26(b) allows the type of discovery the motion to compel addressed. There is no requirement of notice or an opportunity to be heard. The test of relevancy set out in Rule 26(b)(1) is much less stringent than the standard of relevancy found in N.C. Gen. Stat. § 8C-1, Rule 401. For discovery purposes, information need only be "reasonably calculated to lead to the discovery of admissible evidence[.]" N.C. Gen. Stat. § 1A-1, Rule 26. In the absence of privilege, the remedy is a protective order under Rule 26(c), which would also be determined in the trial court's discretion. *See* N.C. Gen. Stat. § 1A-1, Rule 26(c) (1999). Here, defendants' motion for a protective order was denied by the trial court.

Further, as to B.G. Martin, our Supreme Court has held that Rule 26(b) is not unconstitutional on the grounds that it deprives a party of property without due process of the law. *Marks v. Thompson*, 282 N.C. 174, 192 S.E.2d 311 (1972). *See also* Fed. R.C.P. 26; *Helms v. Richmond-Petersburg Turnpike Authority*, 52 F.R.D. 530. (E.D.Va. 1971). Thus, his argument fails.

Because B.G. Martin is unable to show that an attorney-client privilege existed and that the trial court abused its discretion, we reject his four assignments of error and affirm the trial court.

AFFIRMED.

Judges GREENE and CAMPBELL concur.

WILLIAM A. CRIDER, JR., PLAINTIFF v. THE JONES ISLAND CLUB, INC., DEFENDANT

WILLIAM A. CRIDER, JR., PLAINTIFF v. THE JONES ISLAND CLUB, INC., A NORTH CAROLINA CORPORATION, DEFENDANT

ANN CRIDER, WILLIAM CRIDER, III, VIRGINIA CRIDER MOCK AND CYNTHIA CRIDER JARRELL, PLAINTIFFS v. THE JONES ISLAND CLUB, INC., DEFENDANT

No. COA00-1429

(Filed 20 November 2001)

1. Real Property— Timber and Hunting Agreement—interpretation—issue of fact

The trial court erred by granting summary judgment for defendant on the interpretation of a clause in a Timber and Hunting Agreement where it was unclear from the Agreement as to how to apply the provisions as to guests and restrictions. These ambiguities create an issue of material fact for the jury and thus allow consideration of extrinsic evidence.

2. Real Property— Timber and Hunting Agreement—inability to acquire permits

The trial court erred by granting summary judgment for defendant on the interpretation of a Timber and Hunting Agreement regarding timber rights where the court found that it would be futile for plaintiff to attempt to obtain the necessary permits to cut timber, but the Agreement does not contain a futility provision. Whether plaintiff exercised reasonable efforts to obtain the necessary permits or whether the timber could be harvested in an economically and environmentally feasible manner prior to the expiration date of the timber provision is a question of fact.

Appeal by plaintiffs from an amended memorandum and judgment dated 1 April 1999 by Judge Dennis J. Winner and from an order of summary judgment filed 18 September 2000 by Judge Benjamin G.

Alford in Pamlico County Superior Court. Heard in the Court of Appeals 9 October 2001.

Ward and Smith, P.A., by John M. Martin, for plaintiff-appellants.

Daughtry, Woodard, Lawrence & Starling, L.L.P., by Luther D. Starling, Jr. and Kelly Daughtry, for defendant-appellee.

GREENE, Judge.

William A. Crider, Jr. (Crider), Ann Crider (Ann), William Crider, III (William), Virginia Crider Mock (Virginia), and Cynthia Crider Jarrell (Cynthia) (collectively, Plaintiffs) appeal a judgment dated 1 April 1999 granting summary judgment in favor of The Jones Island Club, Inc. (Defendant) on the issue of Plaintiffs' hunting rights. Plaintiffs also appeal a judgment filed 18 September 2000 granting summary judgment in favor of Defendant on the issue of Crider's timber rights.

Crider was the sole general partner of CT Associates, Limited (CT Associates), a Georgia limited partnership. In 1984, CT Associates purchased "tracts of land located in the Pamlico Sound known as Jones Island or Governor's Island" (the Property). Crider, an avid hunter and "outdoorsman," primarily purchased the Property to provide his family and himself with an unrestricted place to hunt, subject only to the rules and regulations of the state of North Carolina.

In 1985, L. Stephen Wright (Wright), a director and officer of The Jones Island Company (the Company),[1] began negotiations with Crider to purchase the Property. As a result of the negotiations, Crider sold the Property to the Company. On 3 September 1985, Crider, on behalf of CT Associates, and Wright, on behalf of the Company, entered into a Timber and Hunting Agreement (the Agreement) as a condition to and as consideration for the sale of the Property. The Agreement provided, in pertinent part:

> 1. Timber Rights. CT [Associates] reserves for itself, its successors and assigns, for a period of ten (10) years following the date hereof, the right to, and easements for ingress and egress necessary to, harvest and remove any and all merchantable tim-

1 The Company was Defendant's predecessor in interest.

ber and pulpwood located on the Property, subject, however, to the following conditions:

. . . .

(e) It is understood that CT [Associates] has as of the date hereof been unable to obtain the necessary permits to harvest the timber and pulpwood from Tracts 20, 21, 22, 33, 34, 35 & 36 . . . . CT [Associates] shall have ten (10) years from the date said permits are issued to harvest said pulpwood and timber, but in any event, said pulpwood and timber must be harvested on or before August 1, 2005. CT [Associates] shall exercise reasonable efforts to secure the necessary permits, and [the Company] will at the request of CT [Associates] cooperate in the efforts of CT [Associates] to secure the same. [(1(e))].

2. Hunting. [Crider,] his spouse, children and guests (not to exceed 4 at any one time) may hunt on any or all of the Property at any time and from time to time without restriction, payment or charge of any kind; provided however they shall obey all nondiscriminatory rules and regulations generally applicable to all persons hunting on the Property.

. . . .

4. Successors. This Agreement shall inure to the benefit of and be binding upon the parties hereto, their heirs, representatives, successors and assigns.

In 1986, the Company, proceeding with its plan to develop a hunting club on the Property, formed the Old South Rod and Gun Club Owner's Association (the Association). The Association's primary responsibility was to develop hunting club rules. One of the rules developed by the Association was the "Designated Member Rule" (the DM Rule) which provided "[e]ach membership or unit (33 total) will be entitled to designate one person on March 1 and/or September 1 of each year, in writing to the Manager, who will become the 'Designated Member' for that membership." The designated member had to be present for the membership to be used in any way, including hunting, fishing, and lodging. With regard to duck hunting, the DM Rule specifically provided that each designated member was entitled to one "blind-site" per draw. The drawings for blinds were held daily at 11:30 a.m. and 7:00 p.m. during duck hunting season.

On 27 March 1985, Crider filed an application with the Division of Coastal Management (DCM) to obtain "CAMA" permits to construct logging roads and remove timber from the Property. DCM informed Crider his application would be denied. Crider requested his application be placed in a hold posture instead of DCM denying it. Subsequently, Crider's application for "CAMA" permits was placed on hold. In January 1986, DCM informed Crider that "a permit was not going to be issued because of numerous environmental problems." In February 1987, Crider's application for "CAMA" permits was placed in DCM's inactive file. Despite Crider's efforts to obtain "CAMA" permits, DCM refused to issue the permits because of problems with wetland issues. After continuing efforts through 1989, Crider's attorney informed Crider that in his opinion, "further attempts to procure the necessary permits to log would be extremely expensive and probably futile." There were, however, other alternatives available to Crider for harvesting, removing, and marketing the timber, but those alternatives were either economically or environmentally unfeasible. On 5 August 1992, CT Associates transferred its timber rights to Crider and his heirs. Between 1990 and 1995, Crider and his attorney continued to monitor environmental regulations to ascertain any possible change in the status of Crider's application, and Crider's application for "CAMA" permits remains in a hold status with DCM.

Sometime during the mid-1990's, the Association notified Crider it "was taking the position that [Crider's] hunting rights were restricted." First, Crider could have a total of only four people hunt on the Property at one time; and second, Crider and his family were entitled to use only one duck blind per visit. By letter dated 10 February 1997, Louis M. Wade, Jr., President of Defendant, informed Crider his timber rights had expired and "any attempts by either [Crider] or anyone on [his] behalf to cut timber located on [Defendant's] property [would] be considered as an unlawful entry."

On 21 July 1997, Crider filed a complaint seeking a judgment declaring: he had the sole right to cut timber on the Property until 2005; he and his family were not restricted by the DM Rule or the one-duck-blind-per-day rule; and each member of his family was entitled to four guests at one time. In an answer and counterclaim filed 1 October 1997, Defendant denied the allegations of Plaintiff's complaint and counterclaimed for: a judgment declaring Defendant had the sole and exclusive right to cut and harvest timber on the Property; a judgment declaring Crider and his family members did

not have hunting rights individually as contended by Crider; and a trial by jury on all issues of fact. Defendant and Crider filed cross-motions for summary judgment on 18 and 19 August 1998.[2] In an order dated 1 April 1999, the trial court concluded: the agreement was unambiguous with regard to the hunting rights; Crider's hunting parties could not be limited to four people; the DM rule and one-blind-per-day rule were applicable to Crider; and at no time could Crider have more than one draw or utilize more than one duck blind. In June 1999, Ann, William, Virginia, and Cynthia (collectively, Crider's family) filed a complaint seeking a declaratory judgment to determine their hunting rights pursuant to the Agreement. In a consent order filed 13 December 1999, the parties agreed to allow Crider's family to intervene and be joined as parties in the original action filed by Crider. The consent order also provided that the 1 April 1999 order was binding on the intervening parties.

On 3 August 2000, Plaintiffs moved the trial court for partial summary judgment on the issue of whether Crider's timber rights expired on 3 September 1995. In an order filed 18 September 2000, the trial court awarded Defendant summary judgment on the issue of Crider's timber rights, finding that further efforts by Crider to obtain the necessary permits to cut timber would be "futile."

The issues are whether: (I) the hunting rights provision is ambiguous and therefore a question of fact for the jury; and (II) the trial court erred in writing a futility provision into the terms of Crider's timber rights thereby terminating those rights.

If the language of a contract "is clear and only one reasonable interpretation exists, the courts must enforce the contract as written" and cannot, under the guise of interpretation, "rewrite the contract or impose [terms] on the parties not bargained for and found" within the contract. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978). If the contract is ambiguous, however, inter-

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2. The parties stipulated, with respect to both the hunting and timber rights, the questions involved were "questions of law and not of fact." This stipulation, however, is not binding on this Court, as this Court's review of a trial court's grant of summary judgment "addresses the trial court's conclusions as to whether, viewing the evidence in the light most favorable to the non-moving party, (1) there is no genuine issue of material fact, and (2) the moving party is entitled to judgment as a matter of law." *Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co.*, 124 N.C. App. 232, 239, 477 S.E.2d 59, 64 (1996), *disc. review denied*, 348 N.C. 497, 510 S.E.2d 383 (1998). Thus, we determine *de novo* whether there are any genuine issues of fact. *See id.*

pretation is a question of fact, *Barrett Kays & Assoc., P.A. v. Colonial Bldg. Co., Inc. of Raleigh*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998), and resort to extrinsic evidence is necessary, *Holshouser v. Shaner Hotel Grp. Props. One*, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23, *disc. review denied*, 351 N.C. 104, 540 S.E.2d 362 (1999), *aff'd per curiam*, 351 N.C. 330, 524 S.E.2d 568 (2000). "An ambiguity exists in a contract if the 'language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.' "[3] *Barrett*, 129 N.C. App. at 528, 500 S.E.2d at 111 (citations omitted). Thus, if there is any uncertainty as to what the agreement is between the parties, a contract is ambiguous. *Id.* This Court's "review of a trial court's determination of whether a contract is ambiguous is *de novo*." *Id.*

I

Hunting rights

[1] Plaintiffs argue the trial court erred in determining the hunting rights clause was unambiguous. We agree.

In this case, an ambiguity exists with respect to Plaintiffs' hunting rights because it is unclear from the Agreement as to how to apply the words of the hunting rights provision. Specifically, the Agreement is unclear whether each individual member of Crider's family is limited to four guests at one time or whether only four people, including Crider, his family, and their guests, are allowed to hunt on the Property at one time. Additionally, the Agreement states Plaintiffs would be allowed to hunt on the Property without restriction, but then subjects these "unrestricted" hunting rights to "nondiscriminatory rules and regulations," without specifying what is meant by "nondiscriminatory rules" and whether these rules apply to hunting conduct or to hunting rights. These ambiguities create an issue of material fact for the jury and thus allow consideration of extrinsic evidence. Accordingly, the trial court erred in granting summary judgment in favor of Defendant on Plaintiffs' hunting rights. *See Holshouser*, 134 N.C. App. at 398-99, 518 S.E.2d at 24 (summary judgment is inappropriate where issues of material fact exist).

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3. We note some cases distinguish between latent and patent ambiguities in construing contracts and determining whether to admit extrinsic evidence. More recent cases, however, have not used this distinction and instead generally rely on whether an ambiguity exists in determining whether to admit extrinsic evidence. *See* 11 Samuel Williston, *A Treatise on the Law of Contracts* § 33:40, at 816-18 (Richard A. Lord ed., 4th ed. 1999).

II

Timber rights

[2] Plaintiffs next argue the trial court erred in concluding Crider had no rights to the timber located on the tracts described in 1(e) of the Agreement. We agree.

In this case, the trial court found it would be futile for Crider to attempt to obtain the necessary permits to cut timber. The Agreement, however, does not contain a provision that Crider shall have rights to harvest the timber until his efforts to obtain the necessary permits would be futile; thus, the trial court erred in imposing a futility requirement on Crider's timber rights under the Agreement. Whether Crider exercised reasonable efforts to obtain the necessary permits or whether the timber could be harvested in an economically and environmentally feasible manner prior to 1 August 2005 without the permits is a question of fact. *See Smith v. Currie*, 40 N.C. App. 739, 742-43, 253 S.E.2d 645, 647 (whether a party exercised "reasonable efforts" is ordinarily a question of fact as it is "the type of question that depends for its resolution on a consideration of the subjective intentions and motivation of the actor," and therefore inappropriate for summary judgment), *disc. review denied*, 297 N.C. 612, 257 S.E.2d 219 (1979). Accordingly, as the trial court erred in granting summary judgment for Defendant on Crider's timber rights, this case is remanded for a jury to determine whether Crider's timber rights terminated prior to 1 August 2005.

Reversed and remanded.

Judges HUNTER and THOMAS concur.

RUBY DEATON PHARR, PLAINTIFF v. JOYCE W. BECK, DEFENDANT

No. COA01-3

(Filed 20 November 2001)

1. Alienation of Affections— postseparation conduct— corroboration

An alienation of affections claim must be based on preseparation conduct and postseparation conduct is admissible only to

the extent it corroborates preseparation activities resulting in the alienation of affection.

2. Alienation of Affections— malicious acts—sufficiency of evidence

The trial court did not err in an alienation of affections case by denying defendant's motion for directed verdict and judgment notwithstanding the verdict based on substantial evidence of defendant's malicious acts producing a loss of affection for plaintiff by plaintiff's husband, because: (1) the preseparation evidence reveals that defendant engaged in intentional conduct that affected plaintiff's marital relationship, and this conduct was the effective cause of plaintiff's husband losing love and affection for plaintiff; and (2) evidence of the postseparation sexual intercourse between defendant and plaintiff's husband corroborates the preseparation relationship between the parties.

Appeal by defendant from judgment filed 18 August 2000 by Judge Raymond A. Warren in Burke County Superior Court. Heard in the Court of Appeals 16 October 2001.

Potter & McCarl, P.A., by Lucy R. McCarl, for plaintiff-appellee.

The Law Firm of J. Richardson Rudisill, Jr., by John M. Lewis, for defendant-appellant.

GREENE, Judge.

Joyce W. Beck (Defendant) appeals a judgment filed 18 August 2000 pursuant to a jury verdict awarding damages to Ruby Deaton Pharr (Plaintiff) in the amount of $86,250.00 for Defendant's alienation of the affection of Plaintiff's husband Walter Pharr (Pharr) and $15,000.00 for criminal conversation with Pharr. Defendant's assignments of error, however, only relate to the alienation of affection claim.

On 11 September 1998, Plaintiff filed a complaint against Defendant for alienation of affection and criminal conversation. The evidence at trial, construed in the light most favorable to Plaintiff, *Meacham v. Bd. of Educ.*, 59 N.C. App. 381, 383, 297 S.E.2d 192, 194 (1982) (delineating standard of review for directed verdict motion), established Plaintiff and Pharr were married for approximately ten years when Defendant and Pharr became acquainted in the early 1990's. Defendant, who worked at the same company as Pharr and

shared Pharr's passion for running, had approached and asked Pharr if he would like to run and train with her. By June of 1992, Pharr ran almost daily, oftentimes with Defendant. Plaintiff supported Pharr's hobby and liked to accompany him when he competed in races.

In 1993, after competing in a race, Pharr suffered a heart attack. Defendant, who was with him at the time, notified Plaintiff and then drove her to the hospital. At the hospital, Defendant followed Plaintiff into the intensive care unit and held Pharr's hand. When Pharr was subsequently transferred to a different hospital, he insisted Plaintiff let Defendant know. Pharr's hospital stay lasted two weeks, and during that time Defendant visited Pharr on both weekends, bringing him a gift on one occasion. This was one of several gifts Defendant gave Pharr over the course of time.

Despite a doctor's warning not to run again for a while, Pharr resumed his running routine with Defendant just two days after his release from the hospital. Pharr stopped telling Plaintiff where he would be running and also discouraged Plaintiff from attending his races. Sometime later in 1993, Plaintiff felt the relationship between Pharr and Defendant was getting out of hand. Pharr seemed to spend more time alone with Defendant than he did with Plaintiff, and when Pharr was at home, he would constantly talk about Defendant. Plaintiff also worried about the looks Defendant gave Pharr, which to Plaintiff indicated more than friendship. Plaintiff confronted Pharr about his relationship with Defendant, and Pharr, after an initial display of indignation, promised to spend less time with Defendant.

Nevertheless, Pharr and Defendant continued running together and, beginning in 1996, Pharr and Defendant ate lunch together on a regular basis. In April 1996, Pharr told Plaintiff he was unhappy and wanted to move out. Pharr, however, continued to live with Plaintiff until 8 June 1996, when Pharr and Plaintiff separated. During the six-week period Pharr remained in the marital home (just prior to his separation from Plaintiff), Plaintiff discovered Defendant had given Pharr a phone card along with a piece of paper containing Defendant's telephone number and instructions on how to call her long distance while Pharr and Plaintiff were on vacation. With Defendant's permission, Pharr also began using Defendant's post office box. The month prior to Pharr's separation from Plaintiff, Pharr spent many evenings remodeling Defendant's home, which also became his home sometime after the separation.

Deborah Coffee (Coffee), a nurse whom Plaintiff had employed to care for her parents, testified she had seen Defendant and Pharr running together on numerous occasions before 8 June 1996 and that they "looked affectionate at times." She had also observed them "hugged up" on one occasion prior to the date of separation. Lester Beck (Beck), who was married to Defendant during the period covered by his testimony, testified that, in April 1994, he came home unexpectedly to find the back door locked. When Defendant opened the door for him, he saw Pharr coming from the bedroom area where Beck later noticed two mixed drinks on the night stand. Pharr apologized to Beck and Defendant offered to move out of the home. Defendant admitted to having had sexual intercourse with Pharr in December 1996, some six months after Pharr and Plaintiff separated.

Defendant moved for a directed verdict at the close of Plaintiff's evidence and at the close of all the evidence and for a judgment notwithstanding the verdict after return of a jury verdict in Plaintiff's favor. The trial court denied the motions and entered a judgment in the amount of $101,250.00.

The issues are whether: (I) evidence of post-separation activities between Pharr and Defendant is relevant to Plaintiff's alienation of affection claim; and (II) there is substantial evidence Defendant's malicious acts produced a loss of Pharr's affection for Plaintiff.

A claim for alienation of affection requires proof of three elements: (1) there was a marriage with love and affection existing between the husband and wife; (2) that love and affection was alienated;[1] and (3) the malicious acts of the defendant produced the loss of that love and affection. *Gray v. Hoover*, 94 N.C. App. 724, 727, 381 S.E.2d 472, 473, *disc. review denied*, 325 N.C. 545, 385 S.E.2d 498 (1989). Defendant, in her brief to this Court, admits Plaintiff presented substantial evidence of the first two elements of the tort of alienation of affection but argues Plaintiff failed to present sufficient evidence that "Defendant committed 'malicious conduct' which caused the alienation of affections of Plaintiff's spouse." Accordingly, we address only the sufficiency of the evidence with respect to the third element, which has two parts: malice and proximate cause.

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1. Alienation occurs if a spouse's affection for the other spouse is destroyed or diminished. *Darnell v. Rupplin*, 91 N.C. App. 349, 350, 371 S.E.2d 743, 744 (1988).

Malicious act

A malicious act, in the context of an alienation of affection claim, has been loosely defined to include any intentional conduct[2] that "would probably affect the marital relationship." 1 Suzanne Reynolds, *Lee's North Carolina Family Law* § 5.46(A), at 395 (5th ed. 1993) [hereinafter 1 Reynolds]; *see Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E.2d 434, 436 (1980) ("unjustifiable conduct causing the injury complained of"); *see also Sebastian v. Kluttz*, 6 N.C. App. 201, 206, 170 S.E.2d 104, 106 (1969) ("a reckless indifference to the rights of others"). Malice is conclusively presumed upon a showing the defendant has engaged in sexual intercourse with the alienated spouse. *Bishop v. Glazener*, 245 N.C. 592, 596, 96 S.E.2d 870, 873 (1957); 41 Am. Jur. 2d *Husband and Wife* § 466 (1968).

Proximate cause

A defendant's malicious conduct also must have proximately caused the alienation of the spouse's love and affection for the plaintiff spouse. It is not necessary that the defendant's conduct be the sole cause of the loss of love and affection because the proximate cause element is satisfied if the conduct is "the controlling or effective cause." *Heist*, 46 N.C. App. at 523, 265 S.E.2d at 436. A person, however, "is not liable for merely becoming the object of the affections that are alienated from a spouse." *Peake v. Shirley*, 109 N.C. App. 591, 594, 427 S.E.2d 885, 887 (1993). Liability arises only if there is some "active participation, initiative or encouragement on the part of the defendant." *Id.* The alienated spouse's consent to or even initiation of the conduct that led to the loss of affection provides no defense to a plaintiff's claim.[3] 1 Reynolds, at 399.

I

[1] In this case, Defendant argues the merits of the alienation of affection claim must be evaluated based solely on the events occur-

2. "There is no liability for alienation of affection if the defendant is ignorant of the existence of the marriage." David A. Logan & Wayne A. Logan, *North Carolina Torts* § 20.30[4], at 444 (1996). A Defendant's ignorance of the existence of the marriage is in the nature of an affirmative defense and must be pled and proven by the defendant. *See* N.C.G.S. § 1A-1, Rule 8(c) (1999).

3. This aspect of the law has given rise to substantial criticism of the tort because it regards the alienated spouse as an object to be stolen away and completely negates the free will and individual mind of that spouse. Any abrogation of this tort, however, is for our Supreme Court or the General Assembly. *See Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (our Supreme Court can abolish common law torts); *Anderson v. Assimos*, 146 N.C. App. 339, 344, 553 S.E.2d 63, 67 (2001) (General Assembly can abolish common law torts).

ring prior to 8 June 1996, the date Pharr and Plaintiff separated. Plaintiff, on the other hand, contends her claim is properly founded on events occurring at any time prior to the spouses' divorce, including that period of time after the spouses separate. There is authority for Plaintiff's position, and it is based on the rationale "that even though the spouses are living apart, there is always a chance of reconciliation." 1 Homer H. Clark, *The Law of Domestic Relations in the United States* § 12.2, at 656-57 (2d ed. 1987). This principle, however, is incompatible with our current alimony entitlement statute that defines "marital misconduct" as including only those "acts that occur during the marriage and prior to or on the date of separation," N.C.G.S. § 50-16.1A(3) (1999), and simply permits consideration of "incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to [the] date of separation," N.C.G.S. § 50-16.3A(b)(1) (1999). It would therefore be inconsistent to permit a spouse to recover damages in an alienation of affection claim against a third party for post-separation conduct while prohibiting consideration of a spouse's post-separation conduct in an alimony claim. Accordingly, an alienation of affection claim must be based on pre-separation conduct, and post-separation conduct is admissible only to the extent it corroborates pre-separation activities resulting in the alienation of affection.[4]

II

[2] Our review of the pre-separation evidence in this case reveals substantial evidence Defendant engaged in intentional conduct that probably affected Pharr's marital relationship with Plaintiff and that this conduct was the effective cause of Pharr's loss of love and affection for Plaintiff. *See Allen v. Roberts Constr. Co.*, 138 N.C. App. 557, 567, 532 S.E.2d 534, 541 (directed verdict motions must be overruled if there exists substantial evidence in support of claim), *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000); *see also Heist*, 46 N.C. App. at 526, 265 S.E.2d at 438 (same test to be applied to directed verdict and judgment notwithstanding the verdict motions). Prior to 8 June 1996, Defendant knew Pharr was married to Plaintiff; she met with Pharr regularly; she held Pharr's hand in Plaintiff's presence when Pharr was in intensive care; she came to the hospital on weekends; she gave him several presents; she gave Pharr flirtatious looks; she invited Pharr to her home and offered to move out when Beck

4. Although not raised in this case, we note that the same principles would apply in a criminal conversation case.

found her there with Pharr; Beck saw Pharr coming out of Defendant's bedroom, where mixed drinks were later found; she gave Pharr a calling card and instructions on how to call her while Pharr was vacationing with Plaintiff; she let Pharr use her post office box; and she asked Pharr to help her remodel the house in which they subsequently lived together. Evidence of the post-separation sexual intercourse between Defendant and Pharr corroborates the pre-separation relationship between these parties. Thus, the trial court correctly denied Defendant's motions for directed verdict and judgment notwithstanding the verdict. The judgment for Plaintiff in the amount of $101,250.00 must therefore be sustained.[5]

No error.

Judges HUNTER and THOMAS concur.

STATE OF NORTH CAROLINA v. GEORGE EDWIN LEWIS

No. COA00-1235

(Filed 20 November 2001)

1. Arrest— impaired driving—opportunity to contact witnesses and communicate with counsel

The trial court did not err by denying a motion to dismiss a charge of driving while impaired for failure to afford defendant the opportunity to contact witnesses and communicate with counsel where, although there was conflicting evidence, the trial court found that defendant was informed of his rights by a trooper and the magistrate and that defendant was given the opportunity to exercise those rights but failed to do so. N.C.G.S. § 15A-501.

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5. Because claims for alienation of affection and criminal conversation "are so connected and intertwined," *Gray v. Hoover*, 94 N.C. App. 724, 731, 381 S.E.2d 472, 476 (1989), there should be only one issue of damages submitted to the jury. When a damages issue is submitted to the jury on alienation of affection and a separate damages issue submitted on criminal conversation, a plaintiff is entitled to recover only the larger of the two verdicts. This issue was not raised on appeal, either by assignment of error or in the briefs, and accordingly, we are without authority to mandate modification of the judgment. *See* N.C.R. App. P. 10(a); N.C.R. App. P. 28(a). We likewise refuse to address the appropriateness of a Rule 60(b) motion to address this issue, as such a matter is reserved for the trial court on remand. *See* N.C.G.S. § 1A-1, Rule 60(b) (1999).

2. Constitutional Law— right to remain silent—testimony concerning silence—no prejudice

The trial court did not commit prejudicial error in an impaired driving prosecution by admitting testimony of defendant's failure to answer questions after he had been given his Miranda warnings. While a defendant's exercise of his constitutionally protected right to remain silent may not be used against him at trial, such a constitutional error will not warrant a new trial where it was harmless beyond a reasonable doubt.

3. Judges— testimony by magistrate—condition of impaired driving defendant—no prejudice

There was no prejudicial error in an impaired driving prosecution where a magistrate was allowed to give her opinion as to defendant's impairment. Testimony by a judicial official giving an opinion about the condition of a person who appeared before that official is disapproved; however, there was no prejudicial error in this case because the magistrate's testimony was cumulative and only tended to corroborate the officers.

4. Criminal Law— prosecutor's argument—objection sustained—no prejudice

The defendant in an impaired driving prosecution was not prejudiced by a prosecutor's argument where defendant objected, the judge sustained the objection, and the judge gave a curative instruction.

Appeal by defendant from judgment entered 30 July 1999 by Judge L. Oliver Noble, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 18 September 2001.

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

Sean P. Devereux, P.A., by Sean P. Devereux, for defendant-appellant.

WALKER, Judge.

Defendant appeals his conviction for driving while impaired. The State's evidence tended to show the following. On 7 February 1998, defendant, a Miami, Florida police officer, was traveling north on N.C. 19/23 in Buncombe County when he was stopped by Officer

Barry Jarrett of the North Carolina Department of Motor Vehicles. Officer Jarrett had observed the defendant speeding and almost striking Officer Jarrett's vehicle.

After stopping the defendant, Officer Jarrett observed that the defendant's eyes were bloodshot, his face was flushed, he had an odor of alcohol about him, his speech was slurred and he had difficulty keeping his balance. Defendant told Officer Jarrett that he had consumed a couple of beers over dinner. Officer Jarrett attempted to administer an alcosensor test but it failed to produce any results. Based on his observations, Officer Jarrett placed the defendant under arrest for driving while impaired.

Trooper Timothy Jackson arrived at the scene, took the defendant into custody and transported him to the detention center. Trooper Jackson observed that the defendant was red faced, had red, glassy eyes, slurred speech, and had an odor of alcohol about him. At the detention center, the defendant's wallet and other personal effects were turned over to the jailer and he was taken to a room to be administered a breathalyzer test. Trooper Jackson read the defendant his rights, including "the right to call an attorney and select a witness to view for you the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of your rights." At 12:20 a.m., the defendant signed the form acknowledging that he had been advised of these rights.

Defendant did not attempt to make any telephone calls until twenty-nine minutes had elapsed. He then attempted to call the Fraternal Order of Police in Florida or the Police Internal Affairs Office in Miami. All of his attempts were unsuccessful. A police officer in the detention center gave him the telephone number of the North Carolina Chapter of the Fraternal Order of Police but he was unable to make contact. During this time, the defendant requested his wallet which he said contained local telephone numbers of family and friends whom he wished to call. However, his wallet and personal effects were not returned until he was released.

When the defendant was offered the breathalyzer test, he refused to take it. He was then given his *Miranda* warnings but he refused to answer any further questions. Trooper Jackson took the defendant before Magistrate Jan Alexander for a determination of conditions of pre-trial release. She advised the defendant of his rights including the right to communicate with counsel, family, and friends; however, the defendant did not ask the magistrate for his wallet.

Defendant posted bond and was released later that morning. Magistrate Alexander testified at the trial as to the defendant's appearance and his impairment.

Defendant's evidence tended to show that his wallet and personal effects were taken when he was brought into the detention center. He was placed in a holding cell; however, he was not given his wallet which contained the local telephone numbers he needed to call people to come to the detention center to post his bond and view his condition.

[1] Defendant first assigns as error the denial of his motion to dismiss for failure to afford him the opportunity to contact witnesses and communicate with counsel, family, and friends. A defendant in this State must be informed of his right to communicate with counsel, family, and friends pursuant to N.C. Gen. Stat. § 15A-501 (1999) which states in part:

> Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer:
>
> . . .
>
> (5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so.

A magistrate has the duty to inform a defendant of this statutory right. *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988); N.C. Gen. Stat. § 15A-511(b). If the defendant is denied this right, the charges are subject to being dismissed. *Knoll*, 322 N.C. at 545, 369 S.E.2d at 564. Our Supreme Court has held that "[t]he right to communicate with counsel and friends necessarily includes the right of access to them." *State v. Hill*, 277 N.C. 547, 552, 178 S.E.2d 462, 466 (1971).

When a defendant alleges he has been denied his right to communicate with counsel, family, and friends, the trial court must conduct a hearing on defendant's motion to dismiss and make findings and conclusions. On appeal, the standard of review is whether there is competent evidence to support the findings and the conclusions. *State v. Cumberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982). "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *Id.*

Approximately three months prior to trial, defendant moved to dismiss the charges based on *Knoll*, *supra* (*Knoll* motion). After a hearing, the trial court made the following findings in part:

> 3. . . .[Trooper Jackson] advised [defendant] of his rights regarding an intoxilyzer test. The defendant acknowledged that he understood the rights and did not invoke his rights.
>
> 4. That the officer waited—told him that he had thirty minutes from the time his rights were read to have an attorney present. The defendant waited twenty-nine minutes before wanting to make a phone call. And then he tried to call Miami, but he couldn't even function during that dialing the phone.
>
> 5. . . .[T]he defendant refused to take the test, that is, the intoxilyzer test.
>
> 6. The defendant tried to dial long distance by dialing a seven-digit number without even dialing the area code ahead of it.
>
> 7. Furthermore, he advised that he had a wallet that had been taken from him and that there were phone numbers in it and he needed the wallet to get numbers to call Miami and/or some local relatives; that his proximity to the wallet was some fifteen to twenty feet away where the wallet had been secured. He primarily—he stated he primarily wanted the wallet to get the phone number to dial the Fraternal Order of Police in Miami, Florida.
>
> . . .
>
> 9. That Magistrate Alexander advised the defendant that he had the right to communicate with counsel and friends . . . .
>
> . . .
>
> 14. And it is further noted that the bail bondsman [sic] are present in and around the premises of the Buncombe County Detention Center all night long. . . .

Based on its findings, the trial court concluded in part the following:

> [T]he defendant was informed of his right to communicate with counsel and friends . . .; that he failed to communicate properly in determining—in securing his pre-trial release conditions and that—and that he failed to exercise his own rights to require—to acquire the attendance of a sober and responsible adult to be released to.

At the hearing on the *Knoll* motion, the defendant stipulated that Magistrate Alexander informed him of his right to communicate with counsel, family, and friends. Defendant testified that he was given a telephone and he attempted to make calls. Although there was conflicting evidence, the trial court found the defendant was informed of his rights by Trooper Jackson and Magistrate Alexander. Further, it found that the defendant was given the opportunity to exercise those rights but he failed to do so. The findings of the trial court support its conclusions. Thus, the trial court did not err in denying the motion to dismiss.

[2] Defendant also contends the trial court erred in admitting testimony of his failure to answer questions after he had been given his *Miranda* warnings. During his testimony, Trooper Jackson testified that the defendant refused to perform any field sobriety tests and the defendant refused to answer questions after being given his *Miranda* warnings. Defendant did not object to this testimony until cross-examination when he made a motion to dismiss based on the "flagrant violation of his rights under the 5th Amendment." Defendant argues that this testimony violates his constitutional right to remain silent and was therefore prejudicial to him.

While a defendant's exercise of his constitutionally protected right to remain silent may not be used against him at trial, "such a constitutional error will not warrant a new trial where it was harmless beyond a reasonable doubt." *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994). N.C. Gen. Stat. § 15A-1443(b). The trial court did not err in denying the motion to dismiss the charges based on this testimony.

[3] Defendant next contends the trial court erred in allowing Magistrate Alexander to give her opinion of the defendant's impairment thus violating her role as a judicial official. At the trial, Magistrate Alexander testified regarding her observations of the defendant at the pre-trial release hearing. Defendant did not object until she was asked her opinion as to whether the defendant was impaired.

North Carolina Rules of Evidence, N.C. Gen. Stat. § 8C-1, Rule 601(a) states, "Every person is competent to be a witness except as otherwise provided in these rules." Rule 605 states, "The judge presiding at the trial may not testify in that trial as a witness." N.C. Gen. Stat. § 8C-1, Rule 605. Thus, a judicial official is only incompetent to

testify in certain situations. "It is generally accepted that a judge is competent to testify as to some aspects of a proceeding previously held before him." *State v. Simpson*, 314 N.C. 359, 372, 334 S.E.2d 53, 61 (1985). Although judges are competent to testify, there is a fear of unfair prejudice. Thus, it is within the trial court's discretion to allow or not allow a judicial official to testify. *Id. See also*, N.C. Gen. Stat. § 8C-1, Rule 403.

Defendant only cited Rule 403 of the North Carolina Rules of Evidence and Article I, Section 6 of our State Constitution as authority for his contention of error in admitting Magistrate Alexander's testimony of defendant's impairment.

Although a judicial official should exercise discretion when testifying, we disapprove of such testimony when it gives an opinion as to a person's condition who had previously appeared before that judicial official. However, in the context of this case, we conclude there was no prejudicial error. Officer Jarrett and Trooper Jackson had already testified that the defendant was appreciably impaired. Magistrate Alexander's testimony was cumulative and only tended to corroborate the officers.

[4] Finally, defendant claims that he was prejudiced by the prosecutor's comments during closing arguments and thus the charges should have been dismissed, or in the alternative, a mistrial ordered. The granting or denying of a motion for mistrial is in the sound discretion of the trial judge. *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995).

Here, the closing arguments were not recorded; however, the record shows that the defendant objected to the prosecutor's argument and the judge sustained the objection and gave a curative instruction. "When defense counsel objects, and the objection is sustained, and curative instructions are given to the jury, defendant has no grounds for exception on appeal. 'Jurors are presumed to follow a trial judge's instructions.' " *State v. Fletcher*, 125 N.C. App. 505, 511, 481 S.E.2d 418, 423, *disc. rev. denied*, 346 N.C. 285, 487 S.E.2d 560, *cert. denied*, 522 U.S. 957, 139 L. Ed. 2d 299 (1997) (*quoting State v. Taylor*, 340 N.C. 52, 64, 455 S.E.2d 859, 866 (1995)).

In summary, the defendant has failed to establish prejudicial error in any of his assignments of error.

No error.

Judges MARTIN and TYSON concur.

SAUL GUY LISS, PLAINTIFF v. SEAMARK FOODS AND WILLIE R. ETHERIDGE SEAFOOD COMPANY, INC., DEFENDANTS

No. COA00-1306

(Filed 20 November 2001)

Pleadings— name of defendant—amendment—relation back

The trial court erred in a negligence and breach of warranty claim by not allowing plaintiff's amendment of the summons and complaint to relate back to the original filing date where the original complaint and summons listed "Seamark Foods" as defendant and the amendment was to "Seamark Enterprises, Inc." This was not a case of substituting a corporation for an individual, of adding a new party by adding defendants in their official capacity, or of adding a third-party defendant not named in the original complaint. These were not separate and distinct entities; Seamark Enterprises was doing business under the name Seamark Foods, the same attorneys have been involved from the beginning, the original summons was served on the president of "Seamark Enterprises, Inc.," and defendant will suffer no prejudice from the amendment. Plaintiff did not add or substitute a new defendant to the action, but merely corrected a misnomer. Liss v. Seamark Foods.

Appeal by plaintiff from judgment entered 14 August 2000 by Judge Robert Hobgood in Orange County Superior Court. Heard in the Court of Appeals 17 September 2001.

Judith K. Guibert and Warren A. Hampton for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by Jason D. Newton, for defendant-appellee.

EAGLES, Chief Judge.

Saul Guy Liss ("plaintiff") moved to amend the complaint in his negligence and breach of warranty action to correct the name of

"Seamark Enterprises, Inc." ("defendant") and for the amendment to relate back to the filing of the original complaint. The trial court granted plaintiff's Rule 15 motion to amend. The trial court granted defendant's Rule 12(b) motion to dismiss in accordance with *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995) and *Bob Killian Tire, Inc. v. Day Enters., Inc.*, 131 N.C. App. 330, 506 S.E.2d 752 (1998). Plaintiff appeals from the trial court's order of dismissal. After careful consideration of the briefs and record, we reverse.

On 29 May 1997, plaintiff purchased a jar of oysters from "Seamark Foods" store in Kitty Hawk, North Carolina. Plaintiff ate the oysters later that day and became ill. On 31 May 1997, plaintiff sought treatment at the Outer Banks Medical Center in Nags Head, North Carolina. Plaintiff was admitted to Chesapeake General Hospital in Chesapeake, Virginia on 1 June 1997. He tested positive for Aeomonas Sobria and was diagnosed with infectious diarrhea. Plaintiff was discharged on 5 June 1997.

Plaintiff's complaint was dated 9 May 2000 and the summons was issued on 11 May 2000. The complaint and the summons listed "Seamark Foods" as defendant. The addresses listed on the summons for "Seamark Foods" were 5400 N. Croatan Highway, Kitty Hawk, North Carolina and 5000 S. Croatan Highway, Nags Head, North Carolina. On 17 May 2000, a Deputy Sheriff for Dare County served Tim Walters at the 5400 N. Croatan Highway location and Bret Ference, on 19 May 2000, at the 5000 S. Croatan Highway location. Tim Walters is the president of "Seamark Enterprises, Inc." A Certificate of Assumed Name filed with the Register of Deeds for Dare County provides that "Seamark Enterprises, Inc." is a North Carolina corporation that operates a business under the assumed name of "Seamark Foods."

"Seamark Foods" moved for an extension of time to answer on 12 June 2000 which was granted by the court. After the expiration of the statute of limitations, "Seamark Enterprises, Inc." filed Rule 12(b)(2), (3), (5), and (6) motions to dismiss. Plaintiff filed a motion to amend the complaint and summons to name "Seamark Enterprises, Inc." as defendant and for the amendment to relate back to the filing of the complaint pursuant to Rule 15(c). At a hearing on 31 July 2000, the court granted plaintiff's motion to amend the summons and complaint. The court then granted "Seamark Enterprises, Inc.'s" motion to dismiss with prejudice. Plaintiff appeals.

Plaintiff contends that the trial court erred by not allowing plaintiff's amendment of the summons and complaint to relate back to the original filing date. After careful review, we agree and reverse.

First, plaintiff voluntarily dismissed "Willie R. Etheridge Seafood Company, Inc.," co-defendant, as they were not involved with "Seamark Foods" stores when the cause of action arose. The trial court's refusal to allow relation back of the amendment to the summons and complaint determines this action since "Seamark Enterprises, Inc." may plead the statute of limitations as a defense. The three year statute of limitations expired on 29 May 2000.

The relation back of amendments is the subject of Rule 15(c) of the North Carolina Rules of Civil Procedure and provides:

> (c) *Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

G.S. § 1A-1, Rule 15(c) (1999).

Our Supreme Court interpreted Rule 15(c) in *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 and stated:

> When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the original claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. We hold that this rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party.

Id. at 187, 459 S.E.2d at 717.

We have construed the *Crossman* decision to "mean that Rule 15(c) is not authority for the relation back of claims against a new party, but *may* allow for the relation back of an amendment to correct a mere misnomer." *Piland v. Hertford County Bd. of Comm'rs*, 141 N.C. App. 293, 299, 539 S.E.2d 669, 673 (2000). In *Bob Killian Tire*, 131 N.C. App. 330, 506 S.E.2d 752, we stated that "[t]he notice requirement of Rule 15(c) cannot be met where an amendment has

the effect of adding a new party to the action, *as opposed to correcting a misnomer.*" *Id.* at 331, 506 S.E.2d at 753 (citing *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995)) (emphasis added).

The question becomes whether the defect in the name is "sufficient to bar recovery by the plaintiffs and thereby support the defendant's motion to dismiss, or whether the defect was merely technical in nature and thereby subject to remedy." *Piland*, 141 N.C. App. 293, 296, 539 S.E.2d 669, 671.

"Seamark Enterprises, Inc." contends that the amendment has the effect of adding a new party to the action and *Crossman* should bar relation back of the complaint. Plaintiff contends that the amendment is merely a misnomer so the amendment should relate back to the original filing date of the complaint.

We are aware "that *Crossman* and its progeny have redefined the standard for what constitutes a misnomer for purposes of the relation-back rule" and conversely "are unaware of any case in our courts decided post-*Crossman* which has allowed an amendment effecting a name change of any sort to relate back to the original complaint." *Piland*, 141 N.C. App. 293, 300-01, 539 S.E.2d 669, 674. However, this is not a case of substituting a corporation for an individual. *See Bob Killian Tire*, 131 N.C. App. 330, 333, 506 S.E.2d 752, 754 (holding that the plaintiff's amendment sought to substitute an individual for a corporate defendant and "thereby nam[ed] a new party-defendant rather than correct[ed] a misnomer"). Nor is it a case of adding a new party by amending the complaint to add defendants in their official capacity rather than individual capacity or vice versa. *See Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996) ("Because *Crossman* prohibits the addition of new defendants under Rule 15(c), plaintiff's claims against the City and the officers in their official capacities may not take on the filing date of his original complaint . . . ."); *White v. Crisp*, 138 N.C. App. 516, 530 S.E.2d 87 (2000) (holding that amending the complaint to include defendant in his individual capacity had the effect of adding a new party and relation back was not proper under *Crossman*). Nor is this a case of plaintiff wanting to substitute one corporation for a separate corporation. *See Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 450 S.E.2d 24 (1994), *aff'd per curiam*, 342 N.C. 404, 464 S.E.2d 46 (1995) (holding that amendment substituting "Winn Dixie Raleigh, Inc." for "Winn Dixie Stores, Inc." was adding a new party and not correcting a misnomer when both were separate corporations). It is also not a case of

plaintiff amending his complaint adding a third-party defendant not named in the original complaint. *See Wicker v. Holland*, 128 N.C. App. 524, 495 S.E.2d 398 (1998) (holding that amending complaint to include third-party defendant after expiration of statute of limitations is adding a new party and therefore prohibited under *Crossman*).

Here, plaintiff is not attempting to add a new party to the action. Plaintiff is correcting the name of defendant. A misnomer is a "[m]istake in name; giving incorrect name to person in accusation, indictment, pleading, deed or other instrument." Black's Law Dictionary 1000 (6th ed. 1990). A misnomer would be technical in nature and subject to remedy.

The complaint and summons named "Seamark Foods" as defendant. In the complaint, plaintiff alleged that "Seamark Foods" was a "corporation organized and doing business in North Carolina, with its principal place of business in Nags Head, Dare County, North Carolina, and also conducts business at 5400 North Croatan Highway, Kitty Hawk, North Carolina 27949." "Seamark Enterprises, Inc." engaged in business under the name and title of "Seamark Foods" as evidenced by the Certificate of Assumed Name filed with the Dare County Register of Deeds. This certificate was signed by Timothy Walters as "President" of "Seamark Enterprises Inc." These are not two separate and distinct entities. Plaintiff is merely correcting a mistake in the name of defendant.

In addition, *Crossman* was concerned with an amendment of a name not providing the required notice. *Crossman*, 341 N.C. 185, 187, 459 S.E.2d 715, 717. In *Crossman*, the original claim would not have provided the required notice since the newly named defendant "[was] not aware of his status as such when the original claim [was] filed." *Id.* Here, "Seamark Enterprises, Inc." was not subject to this lack of notice. The president of "Seamark Enterprises, Inc." was served personally with the original claim at a "Seamark Foods" store. Defendant's request for an extension of time to answer and the certificate of service were from Yates, McLamb & Weyher as attorney for "Defendant Seamark Foods." Defendant's motion to dismiss and certificate of service were from Yates, McLamb & Weyher as attorney for "Defendant Seamark Enterprises, Inc." Defendant's brief in support of its motion to dismiss and the certificate of service were from Yates, McLamb & Weyher as attorney for "Defendant Seamark Enterprises, Inc., improperly designated as Seamark Foods." The same attorneys have been involved and representing "Seamark Enterprises, Inc." from the beginning of the action. "Seamark

Enterprises, Inc." cannot argue that they did not receive notice of the original claim.

Rule 15(c) is modeled after New York Civil Practice Law and Rules Sec. 203(e) (now codified as N.Y. CPLR Law § 203(f) (McKinney Cumm. Supp. 2001)). W. Brian Howell, *Shuford North Carolina Civil Practice and Procedure* § 15-5 (5th ed. 1998). *Crossman* held the interpretation given to Rule 15(c) is "consistent with the interpretation given a similar statute in New York." *Crossman*, 341 N.C. 185, 187, 459 S.E.2d 715, 717.

Under the law of New York, correction of a misnomer in a pleading is allowed even after the expiration of the statute of limitations provided certain elements are met. *Ober v. Rye Town* Hilton, 159 A.D.2d 16, 557 N.Y.S.2d 937 (1990). *See also Perrin v. McKenzie*, 266 A.D.2d 269, 698 N.Y.S.2d 41 (1999); *Bracken v. Niagara Frontier Transportation Authority*, 251 A.D.2d 1068, 674 N.Y.S.2d 221 (1998); *Pugliese v. Paneorama Italian Bakery Corp.*, 243 A.D.2d 548, 664 N.Y.S.2d 602 (1997). "An amendment to correct a misnomer in the description of a party defendant may be granted after the expiration of the Statute of Limitations if (1) there is evidence that the intended defendant has in fact been properly served, and (2) the intended defendant would not be prejudiced by the amendment." *Pugliese*, 243 A.D.2d at 549, 664 N.Y.S.2d at 603.

Here, there is evidence that the intended defendant, "Seamark Enterprises, Inc.", was properly served. An affidavit from a Dare County Deputy Sheriff establishes that a copy of the summons was served on 17 May 2000 upon Timothy Walters. The president of "Seamark Enterprises, Inc." is Timothy Walters.

"Seamark Enterprises, Inc." would not be prejudiced by the amendment. After its president was served, "Seamark Foods/ Enterprises, Inc." through counsel moved for an extension of time to answer and then filed a motion to dismiss. Through its president, defendant had notice of the action from the beginning and would suffer no prejudice as a result of the amendment.

Here, "we are concerned with only one legal entity which uses two names," not an "attempt to substitute one legal entity for another as defendant." *Tyson v. L'Eggs Products, Inc.*, 84 N.C. App. 1, 6, 351 S.E.2d 834, 837 (1987). Plaintiff did not add or substitute a new defendant to the action, he merely corrected a misnomer in the summons and complaint.

Accordingly, the decision of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HUNTER and HUDSON concur.

STATE OF NORTH CAROLINA v. JAMES ALEXANDER WIMBISH, JR.

No. COA00-1139

(Filed 20 November 2001)

Sentencing— firearm enhancement statute—first-degree burglary—failure of indictment to allege statutory factors

The trial court erred in a first-degree burglary case by using the firearm enhancement statute under N.C.G.S. § 15A-1340.16A to lengthen defendant's sentence by 60 months, because: (1) the indictment failed to allege that defendant used, displayed, or threatened to use or display a firearm at the time of the felony; and (2) defendant's plea of guilty has no bearing on the requirement that statutory factors supporting an enhancement must be included in the indictment.

Appeal by defendant from judgment entered 6 January 2000 by Judge Robert H. Hobgood in Vance County Superior Court. Heard in the Court of Appeals 18 September 2001.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Paul Pooley, for defendant-appellant.

CAMPBELL, Judge.

Defendant appeals from a 60-month enhancement of his first-degree burglary sentence imposed pursuant to section 15A-1340.16A of the North Carolina General Statutes ("section 15A-1340.16A").

Defendant is not entitled to an appeal as a matter of right[1] and did not petition this Court to review his case by writ of certiorari. Nevertheless, we exercise our discretionary power and choose to consider defendant's appeal as a petition for writ of certiorari "to prevent manifest injustice to" defendant. *See* N.C.R. App. P. 2 (2001). Accordingly, we reverse and remand the burglary sentence to the trial court with instructions to resentence defendant without imposition of an enhanced sentence pursuant to the firearm enhancement statute.

On 28 June 1997, defendant and his wife, Jendine Williams Wimbish, stayed overnight with defendant's uncle and aunt, James and Doris Jefferson. During the night, defendant began choking and assaulting his wife. Defendant's uncle called the police and made defendant leave the house. Defendant went to his own home and returned to his uncle's house with two shotguns. After his uncle refused to let him in, defendant shot the door twice with a shotgun, wounding his uncle and disabling the lock. After kicking in the door, defendant entered the house and shot his wife in the chest area, killing her. Defendant's aunt also died after being struck by four individual shotgun pellets, which fractured her skull and lacerated several arteries. When the police arrived, defendant admitted shooting both women.

Defendant was indicted for four offenses on 29 June 1997: first-degree burglary of his uncle and aunt's house (97 CRS 5444); assault with a deadly weapon with intent to kill inflicting serious injury ("ADWWIKISI") against his uncle (97 CRS 5445); first-degree murder of his aunt (97 CRS 5374); and first-degree murder of his wife (97 CRS 5375). Defendant was tried capitally before a jury at the 8 September 1998 Criminal Session in Vance County Superior Court. During the trial, presided over by Judge Robert H. Hobgood, a negotiated plea was reached and defendant entered pleas of guilty to two counts of second-degree murder and one count each of first-degree burglary and ADWWIKISI. The terms of the plea agreement specified that defendant's sentencing would run consecutively at the maximum aggravated range and that the firearm enhancement statute would apply to the burglary charge. The court sentenced defendant to terms

1. *See* N.C. Gen. Stat. § 15A-1444 (1999) (providing when a defendant found guilty of a crime is entitled to appeal). Since even with the 60-month enhancement, defendant's minimum sentence for the first-degree burglary conviction was within the appropriate presumptive range, defendant is limited to a review only by way of writ of certiorari.

of 237 to 294 months for each murder conviction, a term of 155 to 204 months for the burglary conviction (which included the firearm enhancement), and a term of 125 to 159 months for the ADWWIKISI conviction, all sentences running consecutively.

Defendant's 1 October 1999 petition for writ of certiorari was allowed by this Court on 20 October 1999. All judgments were vacated and remanded for resentencing because the trial court had departed from the presumptive range of sentences without supporting its departure by written findings.

A resentencing hearing was held on 6 January 2000 in Vance County Superior Court, again before Judge Hobgood. The court incorporated all evidence from the trial and original sentencing, and heard additional evidence. It then sentenced defendant to terms of 237 to 294 months for each murder conviction. The court also sentenced defendant to a term within the presumptive range of 137 to 174 months for the burglary conviction, including a 60-month firearm sentence enhancement, and to a term within the presumptive range of 100 to 129 months for the ADWWIKISI conviction. All sentences were to run consecutively. Defendant appeals the resentencing.

The issue raised by defendant is whether the trial court committed error when it enhanced his first-degree burglary sentence, pursuant to section 15A-1340.16A, without the statutory enhancement factors having been charged in the indictment, without submitting those factors to a jury, and without requiring the State to prove them beyond a reasonable doubt. We find that error was committed.

North Carolina's firearm enhancement statute provides, in part:

> If a person is convicted of a Class A, B1, B2, C, D, or E felony and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony, the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months. The court shall not suspend the 60-month minimum term of imprisonment imposed as an enhanced sentence under this section and shall not place any person sentenced under this section on probation for the enhanced sentence.

N.C. Gen. Stat. § 15A-1340.16A(a) (1999). However, this subsection does not apply if "[t]he evidence of the use, display, or threatened use

or display of a firearm is needed to prove an element of the underlying Class A, B1, B2, C, D, or E felony." § 15A-1340.16A(b)(2).[2]

Two United States Supreme Court cases recently addressed the issue of statutory sentence enhancement. Also, the North Carolina Supreme Court has specifically addressed the sentence enhancement statute at issue in this case. The holdings in these cases are binding on this Court.

In *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), the defendant was indicted, in part, under a federal carjacking statute containing subsections that authorized the imposition of an enhanced sentence. *See* 18 U.S.C. § 2119 (1988). Defendant eventually received an enhanced sentence even though the indictment did not allege any of the enhancement factors listed in the subsections. Although the United States Court of Appeals for the Ninth Circuit affirmed the defendant's sentence, the United States Supreme Court later reversed. It held that where a federal statute establishes separate offenses specified by distinct elements, each of those elements "must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Jones*, 526 U.S. at 252, 143 L. Ed. 2d at 331.

The holding in *Jones* was later applied to the states in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). In *Apprendi*, defendant was indicted, in part, for violating a New Jersey state law regarding firearm possession. *See* N.J. Stat. Ann. § 2C:39-4a (West 1995). After determining by a preponderance of the evidence that defendant's statutory violation was an attempt to intimidate racial minorities, the trial judge enhanced defendant's sentence by applying a New Jersey hate crime law. *See* N.J. Stat. Ann. § 2C:44-3(e) (West 2000). The hate crime law was not referred to in the indictment. The United States Supreme Court reversed the rulings of both the Appellate Division of the Superior Court of New Jersey and the New Jersey Supreme Court. It held 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. at 490, 147 L. Ed. 2d at 455.

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2. Defendant also argues that the enhancement of his first-degree burglary sentence should be vacated because his use of a firearm was necessary to prove the "breaking" element of the burglary charge. Although we disagree, this argument will not be addressed because we find error with the trial court's judgment on other grounds.

The North Carolina Supreme Court addressed the holdings in *Jones* and *Apprendi* in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001). In *Lucas*, the trial court had imposed an enhanced sentence on the defendant's burglary and kidnapping sentences pursuant to section 15A-1340.16A even though these enhancement factors had not been alleged in the indictments. The defendant argued that the "statute unconstitutionally authorizes imposition of an enhanced sentence without requiring submission of the enhancing factors to a jury and without requiring proof of those factors beyond a reasonable doubt." *Id.* at 592, 548 S.E.2d at 728.

Our Supreme Court ultimately granted the defendant a new sentencing hearing after making several holdings relevant to the present case. First, it held that section 15A-1340.16A was constitutional by requiring "the State [to] meet the requirements set out in *Jones* and *Apprendi* in order to apply the enhancement provisions of the statute." *Id.* at 598, 548 S.E.2d at 732. Second, "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, which may be the same indictment that charges the underlying offense, and submit those factors to the jury." *Id.* at 597-98, 548 S.E.2d at 731. Finally, our Supreme Court held "this ruling applies to cases in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final." *Id.* at 598, 548 S.E.2d at 732.

As previously stated, defendant argues that the trial court committed error when it applied the firearm enhancement statute to his first-degree burglary sentence. Based on the evidence, this Court is satisfied that defendant's possession of two shotguns while committing first-degree burglary, a class D felony under our statutes, is the type of crime normally eligible for enhancement. *See* N.C. Gen. Stat. § 14-52 (1999). However, the first-degree burglary indictment stated only that defendant:

> [U]nlawfully, willfully, and feloniously during the nighttime between the hours of 12:00 a.m. and 3:30 a.m. did break and enter the dwelling house of James T. Jefferson. . . .
>
> At the time of the breaking and entering the dwelling house was actually occupied by James T. Jefferson and Doris S. Jefferson. The defendant broke and entered with the intent to commit a felony therein: murder.

According to *Lucas*, in order for a defendant to be subjected to sentence enhancement, an indictment must allege that defendant "used, displayed or threatened to use or display a firearm at the time of the felony[.]" *See* N.C. Gen. Stat. § 15A-1340.16A(a) (1999). Neither this indictment nor any other alleges these firearm enhancement factors. Therefore, enhancing defendant's sentence absent statutory factors being included in an indictment violates *Lucas*.

Defendant's plea of guilty has no bearing on the requirement that statutory factors supporting an enhancement must be included in the indictment. Our Supreme Court has held that "a defendant, called upon to plead to an indictment, cannot plead guilty to an offense which the indictment does not charge him with having committed." *State v. Bennett*, 271 N.C. 423, 425, 156 S.E.2d 725, 726 (1967) (citing 22 C.J.S. Criminal Law § 423(1)). Even though the firearm enhancement statute was mentioned in the plea agreement, it was not included in an indictment. Thus, defendant is not bound by his plea allowing enhancement of his sentence.

Since the present case was pending on direct review at the time *Lucas* was decided, *Lucas* compels us to hold that the trial court erred in imposing the firearm enhancement statute on defendant's first-degree burglary sentence. Therefore, we reverse the burglary sentence and remand for a new sentencing hearing with instructions that defendant be resentenced without imposition of an enhanced sentence pursuant to section 15A-1340.16A.

Reversed and remanded for resentencing.

Judges GREENE and THOMAS concur.

STATE OF NORTH CAROLINA v. KENNETH MICHAEL BOEKENOOGEN

No. COA00-1194

(Filed 20 November 2001)

1. Kidnapping— first-degree—lesser included offense of false imprisonment

The trial court did not err in a first-degree kidnapping case by refusing to submit false imprisonment as a lesser included offense, because: (1) the evidence at trial indicated that defend-

ant's purpose was to terrorize his victim ex-wife as enumerated in the kidnapping statute under N.C.G.S. § 14-39(a)(3); and (2) there was no evidence from which a reasonable jury could conclude that defendant merely wished to communicate with his ex-wife.

2. Evidence— cross-examination—events of kidnapping—amnesia

The trial court did not abuse its discretion in a first-degree kidnapping case by permitting the State to cross-examine defendant about the events of 26 September 1998 even though defendant contends he suffered from amnesia and was unable to recall, because: (1) a prosecutor may properly argue the failure of a defendant to produce evidence; (2) a criminal defendant who takes the stand on his own behalf is subject to cross-examination to the same extent as any other witness; (3) once defendant took the stand, the State was entitled to thoroughly cross-examine him, including questioning his lack of memory for which there was no dispositive medical evidence; and (4) it was under such cross-examination that defendant admitted he could picture himself binding and gagging a woman that he loved.

Appeal by defendant from judgment entered 12 August 1999 by Judge Howard E. Manning, Jr., in Durham County Superior Court. Heard in the Court of Appeals 28 September 2001.

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

Kevin P. Bradley for defendant appellant.

TIMMONS-GOODSON, Judge.

On 12 August 1999, a jury found Kenneth Michael Boekenoogen ("defendant") guilty of first-degree kidnapping. The evidence at trial tended to show the following: On the morning of 26 September 1998, defendant entered a bakery in Durham County, North Carolina, where his ex-wife, Lynn Marie Boekenoogen ("Boekenoogen"), worked as the sole employee. Defendant immediately seized Boekenoogen by her hair, held a knife to her throat, and threatened to kill her. Defendant then pushed Boekenoogen into a back room of the bakery and proceeded to bind her head, arms and legs with duct tape. During the struggle, defendant sliced Boekenoogen's thumb with his knife and knocked out one of her teeth.

After binding Boekenoogen with tape, defendant locked the front door of the bakery and placed a small, hand-printed sign on the door announcing that, "Due to a family emergency, we will be closed today. We will reopen on Monday 9/28/98. Thank you." While defendant was occupied at the front of the bakery, Boekenoogen freed herself from the duct tape enough to exit from the rear of the building and obtain assistance. Durham police officers located defendant five days later at John Umstead Hospital, where defendant had been involuntarily committed for psychiatric evaluation and treatment after attempting suicide.

Defendant testified that he could recall nothing concerning the altercation with Boekenoogen. Dr. Michael Hill ("Dr. Hill"), a clinical associate professor of psychiatry at the University of North Carolina at Chapel Hill, testified that defendant's lack of memory was due to an alcohol-induced amnesia, also known as an "alcohol blackout." Dr. Hill admitted, however, that his diagnosis was based in part upon information given to him by defendant and that medical testing revealed no physical explanation for defendant's memory loss. Defendant also presented testimony from his friend Stephanie Gancarz ("Gancarz"), who stated that she talked to defendant on the telephone the morning of 28 September 1998. According to Gancarz, defendant was "hysterical," stating "I'm sorry. I'm sorry. I didn't mean to hurt her. . . . I want to die. I just wanted her to feel the pain that she made me feel." Defendant could not remember his telephone conversation with Gancarz.

Upon receiving the jury's guilty verdict, the trial court sentenced defendant to a minimum term of one hundred thirty-three (133) months' and a maximum term of one hundred sixty-nine (169) months' imprisonment. From his conviction and sentence, defendant appeals.

Defendant argues the trial court erred in refusing to submit false imprisonment as a lesser included offense of kidnapping to the jury, and that it abused its discretion in permitting certain cross-examination questions by the State. For the reasons stated herein, we reject defendant's arguments and conclude that the trial court committed no error.

[1] Defendant contends the trial court erred in denying defendant's request to submit the charge of false imprisonment to the jury. Defendant asserts there was evidence at trial from which the jury

could conclude that defendant committed the lesser included offense. We disagree.

North Carolina General Statutes section 14-39 states in pertinent part that:

> [a]ny person who 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 . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of: . . . [d]oing serious bodily harm to or terrorizing the person so confined.

N.C. Gen. Stat. § 14-39(a)(3) (1999). False imprisonment is a lesser included offense of kidnapping and must be submitted as such to the jury, unless there is no evidence of any purpose other than one of those enumerated in the kidnapping statute. *See State v. Kyle*, 333 N.C. 687, 703, 430 S.E.2d 412, 421 (1993). Although defendant could not recall his purpose in assaulting Boekenoogen, he nevertheless contends that Gancarz's testimony established that defendant's purpose in restraining his ex-wife was for reasons other than for the purpose of terrorizing her. Specifically, defendant argues that his statement to Gancarz that he "just wanted her to feel the pain that she made [defendant] feel" indicates that defendant merely wished to effectively communicate to his ex-wife the strong emotions he felt over their separation.

Defendant's argument is without merit. The evidence at trial overwhelmingly indicated that defendant's purpose on 26 September 1998 was to terrorize Boekenoogen. *See State v. Nicholson*, 99 N.C. App. 143, 147, 392 S.E.2d 748, 751 (1990) (holding that where the defendant grabbed the victim at gunpoint and threatened to kill her, such evidence "unerringly pointed to a purpose to terrorize"). Defendant, who is six feet tall and weighs approximately 170 pounds, entered the bakery and immediately seized Boekenoogen, who is four feet, eleven inches tall and weighs ninety-two pounds, by her hair. Holding a knife to her throat, defendant forced Boekenoogen to a back room, substantially injuring her in the process and repeatedly informing her that he was going to kill her. Defendant thoroughly bound Boekenoogen with duct tape, including her head and mouth. Defendant obviously deliberated upon his course of action, as evidenced by the sign he created stating that the bakery would be closed for several days, as well as by the duct tape he brought with him to the bakery. Given defendant's actions, there was no evidence from

which a reasonable jury could conclude that defendant merely wished to communicate with his ex-wife, and the trial court therefore properly denied defendant's request to submit the charge of false imprisonment to the jury. We therefore overrule defendant's first assignment of error.

[2] By his second assignment of error, defendant argues the trial court abused its discretion in permitting the State to cross-examine defendant. Defendant contends that, as he was unable to recall the events of 26 September 1998, several of the prosecution's questions to him were improper and made in bad faith. At trial, the following exchange occurred:

> Q [the State]: You cannot deny being the perpetrator that confined, restrained and removed [Boekenoogen], which constitutes a kidnapping charge, right?
>
> [Defense counsel]: Objection.
>
> THE COURT: Overruled.
>
> A [Defendant]: Yes, ma'am.
>
> . . . .
>
> Q: So you don't find it—you can see yourself—you can picture yourself binding and gagging a woman that you love, right?
>
> A: That's not exactly what I meant by the statement, but yes, ma'am.
>
> Q: You could picture yourself terrorizing, assaulting and threatening to kill a woman that you claim to love?
>
> A: No, ma'am.
>
> Q: Well, that's exactly what happened on September 26th.
>
> [Defense counsel]: Objection.
>
> THE COURT: Overruled.
>
> Q: You have not denied that that's exactly what happened on September 26—
>
> [Defense counsel]: Objection.
>
> THE COURT: Overruled.
>
> Q: —right?

A: That's correct.

Q: The bottom line is there's nothing you can say that can dispute one single thing that Lynn Boekenoogen told this jury—

[Defense counsel]: Objection.

Q: —right?

THE COURT: Overruled.

A: That's correct.

Defendant argues the above-stated questions were improper, in that they implied that defendant could not dispute the prosecution's version of events. We disagree.

In *State v. Fletcher*, 348 N.C. 292, 322, 500 S.E.2d 668, 685 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999), our Supreme Court noted that "[a] prosecutor may . . . properly argue the failure of the defendant to produce evidence." *See also State v. Tilley*, 292 N.C. 132, 143, 232 S.E.2d 433, 441 (1977) (holding that the State may properly draw the jury's attention to the failure of the defendant to produce exculpatory evidence or to contradict the State's case). Moreover, when a criminal defendant takes the stand to testify on his own behalf, he is subject to cross-examination to the same extent as any other witness. *See State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991). A defendant's admission as to a material fact does "not relieve the State of the burden of proving its entire case beyond a reasonable doubt as long as defendant [stands] on his plea of not guilty." *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971).

In the instant case, defendant chose to testify in his own defense, despite his claim of amnesia. Once defendant took the stand, the State was entitled to thoroughly cross-examine him, including questioning his lack of memory, for which there was no dispositive medical evidence. It was under such cross-examination that defendant admitted he could "picture [himself] binding and gagging a woman that [he] love[d]." Under such circumstances, the State's questions were appropriate, and the trial court properly overruled defendant's objections. We therefore overrule defendant's second assignment of error.

In summary, we hold defendant received a fair trial, free from prejudicial error.

No error.

Judges McGEE and BIGGS concur.

STATE OF NORTH CAROLINA v. WILLIAM ANTHONY HEARST

No. COA00-1402

(Filed 20 November 2001)

1. **Sentencing— IMPACT program not completed—no credit for time served**

The trial court did not err when activating a suspended sentence by denying defendant credit for time spent during probation in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT). N.C.G.S. § 15-196.1 manifests the General Assembly's intent that a defendant be credited with time in custody and not at liberty and the phrase "in custody" is shorthand for time spent committed to or in confinement in any State or local correctional, mental or other institution. The 1998 amendment converting IMPACT to a residential program acknowledged that participation in IMPACT is a lesser sanction than commitment to or confinement in a state institution.

2. **Constitutional Law— double jeopardy—credit for time served denied—IMPACT program**

The trial court's denial of credit for time served in an IMPACT program (Intensive Motivational Program of Alternate Correctional Treatment) upon activation of defendant's suspended sentence did not violate double jeopardy. Defendant was not required to participate in IMPACT, visit his probation officer, or comply with any of his probationary conditions, even though his failure to do so subjected him to activation of his suspended sentence. Furthermore, the IMPACT facility was not fenced or locked and defendant could quit the program at any time. Defendant was not in custody and was no more entitled to credit for time spent in IMPACT than to time spent during required visits to his probation officer.

Appeal by defendant from judgment entered 10 August 2000 by Judge Dennis J. Winner in Superior Court, Buncombe County. Heard in the Court of Appeals 17 October 2001.

Attorney General Roy Cooper, by Associate Attorney General Heather M. Beach, for the State.

Assistant Public Defender William H. Leslie for the defendant-appellant.

WYNN, Judge.

[1] The issue on appeal is whether upon activation of his suspended sentence, defendant William Anthony Hearst was entitled to credit for time spent during his probation in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT).

Defendant initially pled guilty to various charges and was awarded a suspended sentence with probation that was later modified to require his participation in the IMPACT program, which he did for eighty-one days. However, he violated conditions of his probation and the trial judge activated his sentence but denied him any credit for the time spent in IMPACT. Defendant appeals; we affirm the trial court's denial of credit.

Our General Assembly made extensive changes to our statutory scheme as it concerns the IMPACT program in the Current Operations Appropriations and Capital Improvement Appropriations Act of 1998, 1998 N.C. Sess. Laws ch. 212 (the "1998 Act"). *See* 1998 N.C. Sess. Laws ch. 212, § 17.21 (amending N.C. Gen. Stat. §§ 15A-1343(b1), 15A-1343.1, and 15A-1351(a)). These changes, in a section of the 1998 Act entitled "Convert IMPACT to Residential Program," became effective 1 December 1998 and therefore apply to the case at bar. *Id.* at § 17.21(c).

N.C. Gen. Stat. § 15A-1343(b1) (1999), as amended, provides that the trial court may require, as a condition of probation, that during probation the defendant comply with certain special conditions. Among the possible special conditions that may be imposed, the defendant may be required to:

> [s]ubmit to a period of *residential treatment* in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT), pursuant to G.S. 15A-1343.1, for a minimum of 90 days

> or a maximum of 120 days and abide by all rules and regulations of that program.

G.S. § 15A-1343(b1)(2a) (emphasis added). N.C. Gen. Stat. § 15A-1343.1 (1999), as amended, outlines the criteria for selecting and sentencing offenders to IMPACT, and provides that IMPACT "shall be a *residential program* within the meaning of G.S. 15A-1340.11(8), operated by the Department of Correction." (Emphasis added.) N.C. Gen. Stat. § 15A-1340.11(8) (1999) defines a "residential program" as one:

> in which the offender, as a condition of probation, is required to reside in a facility for a specified period and to participate in activities such as counseling, treatment, social skills training, or employment training, conducted at the residential facility or at other specified locations.

Prior to the amendments effected by the 1998 Act, G.S. § 15A-1343(b1)(2a) stated that a trial court may, as a special condition of probation, require the defendant to "[s]ubmit to a period of *confinement* in a facility operated by the Department of Correction . . . ." N.C. Gen. Stat. § 15A-1343(b1)(2a) (emphasis added) (amended effective 1 December 1998). In addition, language in N.C. Gen. Stat. § 15A-1344(e) and N.C. Gen. Stat. § 15A-1351(a) (each amended effective 1 December 1998), that referenced "probationary sentences which include a period of *imprisonment* in" IMPACT (emphasis added), was stricken under the 1998 Act.

Whether participation in IMPACT, as that program was altered under the 1998 Act, constitutes "confinement" as contemplated by N.C. Gen. Stat. § 15-196.1 (1999) is an issue of first impression.[1]

> Criminal statutes must be strictly construed. But, while a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. The intent of the legislature controls the interpretation

1. In *State v. Greene*, 143 N.C. App. 186, 546 S.E.2d 189 (2001) (unpublished), this Court held that the trial court erred in not granting the defendant credit under G.S. § 15-196.1 for time spent in IMPACT, as it existed prior to 1 December 1998. The defendant in *Greene* entered IMPACT in November 1998 as a condition of special probation pursuant to an order entered by the trial court in October 1998. This Court noted that the repealed version of G.S. § 15A-1351 referred to time spent in IMPACT as a "period of imprisonment," and noted the "custodial nature" of IMPACT. Nonetheless, this Court's opinion in *Greene* is of no precedential value in our determination of this appeal. *See* N.C.R. App. P. 30(e)(3) (2000).

> of a statute. When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

In re Banks, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) (internal citations omitted).

G.S. § 15-196.1, which provides for credit against prison sentences, controls the trial court's application of credit for time served in sentencing defendants upon probation revocation:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody . . . .

G.S. § 15-196.1. *See State v. Farris*, 336 N.C. 552, 444 S.E.2d 182 (1994). In *Farris*, our Supreme Court stated that "section 15-196.1 manifests the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as the result of the [underlying] charge." 336 N.C. at 556, 444 S.E.2d at 185. We must therefore determine whether defendant's time served participating in IMPACT was "custodial," such that he was "not at liberty" and must therefore be given credit for such time.

More recently, this Court considered G.S. § 15-196.1 and found it to be unambiguous, narrowly interpreting the statute to hold that house arrest does not constitute confinement and therefore "does not qualify as time that can be credited against a defendant's sentence pursuant to section 15-196.1." *State v. Jarman*, 140 N.C. App. 198, 206, 535 S.E.2d 875, 880 (2000). As explained in *Jarman*, the phrase "in custody" in the second sentence of G.S. § 15-196.1 is merely shorthand for time spent "committed to or in confinement in any State or local correctional, mental or other institution," as detailed in the statute's first sentence. G.S. § 15-196.1; *see Jarman*, 140 N.C. App. at 205, 535 S.E.2d at 880. Defendants are not entitled to time spent in house arrest as such time does not constitute commitment to or confinement in a "State or local correctional, mental or other institution."

We must therefore determine whether participation in IMPACT, as a condition of probation imposed under G.S. § 15A-1343(b1)(2a), constitutes commitment to or confinement in a State institution such that defendants are entitled to credit, under G.S. § 15-196.1, for time spent participating therein. Accordingly, we carefully examine statutes concerning IMPACT to determine the legislature's intent in converting IMPACT to a residential program.

In passing legislation to "convert IMPACT to [a] residential program," our General Assembly removed all references to periods of "imprisonment" in IMPACT. The 1998 Act also redefined participation in IMPACT as a special probationary condition in terms of "residential treatment" instead of "confinement." We conclude that the General Assembly's action in converting IMPACT to a residential program under section 17.21 of the 1998 Act acknowledged that participation in IMPACT is a lesser sanction than commitment to or confinement in a state institution.[2]

[2] Having concluded that defendant is not entitled under G.S. § 15-196.1 to credit against his active sentence for time spent participating in IMPACT as such program is not "custodial," we also reject defendant's argument that the failure to afford him such credit violates constitutional notions of double jeopardy. Just as defendant was required to visit with his probation officer as an original condition of his probation, he was required to submit to IMPACT as a special condition of his probation, following the violation of his original probation conditions. However, his participation in IMPACT was ultimately voluntary, as were his visits with his probation officer. Defendant was not *required* to participate in IMPACT, or visit his probation officer, or comply with any of his probationary conditions, even though his

2. Several other states have considered the circumstances under which defendants should receive credit against active sentences for time spent under court-imposed conditions. *See State v. Bradley*, 629 N.W.2d 462 (Minn. Ct. App. 2001) (defendant was not entitled to credit for time spent in private residential treatment facility as a condition of probation, although credit would be allowed for treatment received as part of confinement in a state correctional facility); *Williams v. State*, 780 So.2d 244 (Fla. Dist. Ct. App. 2001) (defendant was not entitled to credit for time spent in residential drug treatment facility as condition of probation, as he was not in the total control and custody of the state at all times); *State v. Fellhauer*, 943 P.2d 123 (N.M. Ct. App. 1997) (defendant's house arrest not deemed official confinement for purposes of receiving presentence confinement credit). *But see Dedo v. State*, 680 A.2d 464 (Md. 1996) (defendant was entitled to credit toward his sentence for the time he spent in home detention between his conviction and sentencing, where the restraints imposed upon him were sufficiently incarcerative; defendant was subject to a charge of escape for any unexcused absence).

failure to do so subjected him to the activation of his suspended sentence. Rather than restricting defendant's liberty, the imposition of probationary conditions actually served to increase it by allowing him an escape from involuntary confinement already lawfully imposed. Thus, defendant's participation in IMPACT did not constitute a coercive deprivation of liberty.

Furthermore, the IMPACT program did not "imprison" or "confine" defendant in such a way that he was "in custody and not at liberty" for purposes of our analysis under *Farris*. In a hearing before Superior Court Judge Dennis J. Winner on 10 August 2000, defendant testified that the IMPACT facility was not locked or fenced, and that he could have quit the program and left at any time. In light of the nature of the IMPACT program, we cannot conclude that the defendant was in "custody" while participating in the program such that he was entitled to credit against his active sentence for time served while participating therein. Defendant is no more entitled to credit for time spent in the IMPACT program than he is for time spent during required visits with his probation officer. As we conclude that time spent by defendant in IMPACT (as that program exists as of 1 December 1998 pursuant to the changes effected by the 1998 Act) was not sufficiently incarcerative as to be "custodial," and thus was not subject to being credited against defendant's active sentence under G.S. § 15-196.1, the trial court's denial of credit for time spent in IMPACT is,

Affirmed.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. EGAN LARKE TABRON, DEFENDANT

No. COA00-1260

(Filed 20 November 2001)

Conspiracy— attempted robbery—one conspiracy, two attempts

There was no error in defendant's first conviction for conspiracy to commit common law robbery, but the second was vacated, where defendant's long-time friend, Burgoin, suggested

that defendant rob Woodall; there were ongoing conversations between Burgoin, defendant and others about robbing Woodall; the identity of those involved in these conversations was not clearly established; the evidence showed many meetings and discussions of plans that took place over several months; an unidentified group of people including defendant were involved in the actual robbery attempts; and the two robbery attempts were separated in time by about five and one-half weeks. Statements that the participants in the first attempt "went about their business" after the attempt failed and that defendant and his friends thought that Woodall would "make a good hit" if they were down on their luck do not constitute substantial evidence of abandonment of the conspiracy.

Appeal by defendant from judgments entered 11 May 2000 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 October 2001.

Attorney General Roy Cooper, by J. Charles Waldrup, Special Deputy Attorney General, for the State.

John T. Hall, for defendant-appellant.

HUDSON, Judge.

Defendant appeals his convictions of two counts of conspiracy to commit common law robbery. Finding merit in certain of his assignments of error, we vacate the judgment in case number 00 CRS 11878 but find no error as to case number 00 CRS 11877.

At trial, Patton Burgoin testified that she and Phyllis Woodall were once friends, but had a falling out. Burgoin, determined to make trouble for Woodall, reported Woodall's drug activities to the Department of Social Services and the police. When nothing came of these actions, Burgoin approached Defendant, a long-time friend, and suggested that he rob Woodall. Burgoin told Defendant that Woodall kept drugs and a great deal of money at her house. Sometime in the Fall of 1999, Burgoin showed Defendant where Woodall lived and informed him that Woodall would be alone during the day, and that the back door was usually unlocked.

Detective Brad Kennon testified at trial that he learned from interviewing Defendant that Defendant attempted to rob Woodall on 8 December 1999, accompanied by Jonathan Murphy, Gregory Dells,

and Paul Bryant. Defendant waited in the car as a look-out while the other three men went to the house. The three men approached the house from the back and became confused about which house belonged to Woodall. A police car came through the neighborhood, and the men scattered. The four men then "went back about their business."

According to Burgoin, she, Defendant, and others talked about a possible robbery of Woodall weekly after the 8 December attempt had failed. Detective Kennon's interview notes revealed that Defendant and his friends thought that "if they got down on their luck," Woodall's place would "make a good hit."

Both Burgoin and Detective Kennon testified that on 14 January 2000, Defendant tried again to rob Woodall, this time accompanied by Keith Lewis (according to Burgoin, and as listed in the indictments) or Keith Gordon (according to Detective Kennon's testimony and notes) and Defendant's brother, Ronald Tabron. Before the robbery, the men were at Burgoin's house and told her they were going to Woodall's house. Ronald Tabron went up on Woodall's porch, and Defendant and Lewis/Gordon stayed at the bottom of the porch. A child let Ronald Tabron into the house, and Ronald Tabron asked Woodall for drugs. Woodall started screaming, threatened to call the police, and called to her husband. The men ran away, returned to Burgoin's house, and informed her that their attempt had failed.

Defendant was subsequently charged with two counts of conspiracy to commit common law robbery against Woodall and was tried before a jury. After the State rested, Defendant moved to dismiss both conspiracy charges due to insufficiency of the evidence. The trial court denied the motion. The jury returned guilty verdicts on both counts, and Defendant was sentenced to two consecutive terms of not less than ten and not more than twelve months imprisonment. Defendant appeals.

Defendant assigned three errors, which he has combined into one issue on appeal: whether the trial court erred in denying his motion to dismiss one of the conspiracy charges due to insufficient evidence of two separate conspiracies. We agree with Defendant that there was insufficient evidence of two conspiracies.

A trial court's denial of a defendant's motion to dismiss due to insufficiency of the evidence is proper if the State has presented "substantial evidence" of each element of the offense charged. *State*

v. Graves, 343 N.C. 274, 278, 470 S.E.2d 12, 15 (1996). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). Substantial evidence may consist of direct or circumstantial evidence, or both. *See State v. Barrett*, 343 N.C. 164, 172, 469 S.E.2d 888, 893, *cert. denied*, 519 U.S. 953, 136 L. Ed. 2d 259 (1996). However, "[i]f the evidence suffices only to raise a suspicion or conjecture that defendant committed the offense, it is insufficient." *State v. Rozier*, 69 N.C. App. 38, 47, 316 S.E.2d 893, 900, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). When ruling on a motion to dismiss, a court must consider the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences that can be drawn from the evidence. *See Graves*, 343 N.C. at 278, 470 S.E.2d at 15.

A criminal conspiracy is "an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975). The State here charged Defendant with conspiring with Paul Bryant, Gregory Dales, and Johnathan Murphy, on or about 8 December 1999, to commit common law robbery against Phyllis Woodall; and with conspiring with Ronnie Tabron and Keith Lewis, on or about 14 January 2000, to commit common law robbery against Phyllis Woodall. Defendant argues that he entered into only one conspiracy with Burgoin to rob Woodall, and that the two separate attempts were in furtherance of this one plot.

In North Carolina, "multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies." *Rozier*, 69 N.C. App. at 52, 316 S.E.2d at 902. "[W]hen the State elects to charge separate conspiracies, it must prove not only the existence of at least two agreements but also that they were separate." *State v. Griffin*, 112 N.C. App. 838, 840, 437 S.E.2d 390, 392 (1993). "There is no simple test for determining whether single or multiple conspiracies are involved: the essential question is the nature of the agreement or agreements, but factors such as time intervals, participants, objectives, and number of meetings all must be considered." *Rozier*, 69 N.C. App. at 52, 316 S.E.2d at 902 (citation omitted). "[A] single conspiracy is not transformed into multiple conspiracies simply because its members vary occasionally, and the same acts in furtherance of it occur over a period of time." *State v. Fink*, 92 N.C. App. 523, 532, 375 S.E.2d 303, 309 (1989).

The State here asserts that there were two conspiracies, both with the same objective. We are not persuaded, however, that the State has presented sufficient evidence of two separate agreements.

The State contends that, taken in the light most favorable to it, the evidence shows that Burgoin was involved in planning the first robbery attempt, but not the second; that the first conspiracy was abandoned; that there were different people involved in the two robbery attempts; that a significant amount of time separated the two robbery attempts; and that many meetings and discussions of plans took place. We agree with all of these contentions, except that we disagree that there is substantial evidence of an abandonment of the conspiracy.

The State argues that the conspiracy was abandoned on the basis of Detective Kennon's testimony that Defendant indicated to him that, after the first robbery attempt was interrupted by the police, the four men "went about their business." The State also argues that Defendant's statement that he and his friends thought Woodall would "make a good hit" if they were down on their luck indicates that the first conspiracy had been abandoned. Although this evidence is not inconsistent with the abandonment of the conspiracy to rob Woodall, it does not constitute substantial evidence of such. Rather, it "suffices only to raise a suspicion or conjecture" that Defendant abandoned an agreement. *Rozier*, 69 N.C. App. at 47, 316 S.E.2d at 900.

The State concedes that after the first robbery attempt, there were ongoing conversations between Burgoin and others about robbing Woodall, and that the identity of those involved in these conversations was not clearly established by the evidence. Thus, in the light most favorable to the State, the evidence shows that there were many meetings and discussions of plans that took place over several months; that an unidentified group of people were involved in these discussions, although different people were involved in the actual robbery attempts; and that the two robbery attempts were separated in time by about five and one-half weeks. On the basis of this evidence, the State would have us infer that two separate agreements were formed to rob Woodall. We conclude that there is no basis for such an inference. *See Fink*, 92 N.C. App. at 532, 375 S.E.2d at 309.

We hold that the evidence presented by the State does not constitute substantial evidence that Defendant entered into two separate conspiracies. Therefore, only the earliest conspiracy con-

viction should stand. Accordingly, we find no error in case number 00 CRS 11877, but we vacate the judgment in case number 00 CRS 11878. *See Griffin*, 112 N.C. App. at 842, 437 S.E.2d at 393.

No error as to 00 CRS 11877.

Vacated as to 00 CRS 11878.

Chief Judge EAGLES and Judge CAMPBELL concur.

TONJA F. BOWSER, EMPLOYEE, PLAINTIFF v. N.C. DEPARTMENT OF CORRECTION, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT), DEFENDANT

No. COA00-1418

(Filed 20 November 2001)

Workers' Compensation— injury arising out of and in the course of employment—traveling employee—distinct departure for personal errand

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff traveling employee's injuries, while returning to her lodging from a restaurant where she purchased dinner, arose out of and in the course of her employment because plaintiffs' injuries occurred during a distinct departure for a personal errand since she received no reimbursement for her meal expenses and all her meals together with her lodging were provided by defendant employer at a specific location.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission filed 10 August 2000. Heard in the Court of Appeals 9 October 2001.

The Law Office of Leslie O. Wickham, Jr., by Mark H. Woltz, for plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for defendant-appellant.

GREENE, Judge.

The N.C. Department of Correction (Defendant) appeals an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Full Commission) filed 10 August 2000 awarding Tonja F. Bowser (Plaintiff) temporary total disability benefits, medical expenses, and attorney's fees.

The record shows that Plaintiff began working for Defendant in August 1996 as a correctional officer trainee at Odom Correctional Institution in Jackson, North Carolina. Plaintiff's duties included supervising inmates to ensure they were in their proper location. In order to meet the duties of her employment, Plaintiff was required to complete a four-week basic training program (the program) at the North Carolina Justice Academy (the Academy) in Salemburg, North Carolina. Plaintiff received notification she was enrolled in the program from 27 January until 21 February 1997.

Plaintiff, along with two other women from her unit, Sarah Valentine (Valentine) and Kim James (James), attended the Academy in January 1997; thus, the three women decided to car pool. As the program was a commute of approximately two hours and thirty minutes away from their homes, the three women stayed in dormitories on the campus of the Academy and returned to their homes on the weekends. Three meals were served daily at the Academy at no cost to the program's participants, with dinner being served from 5:00 p.m. to 6:00 p.m. Barring no night classes, participants in the program were allowed to leave the Academy after class; however, they were not reimbursed for any meal or travel expenses incurred. There were no stores of any kind at the Academy nor were there any facilities where personal items could be purchased.

On 13 February 1997, Plaintiff, Valentine, and James completed their classes for the day at approximately 4:00 p.m. and decided to drive to Clinton, North Carolina, because James needed to purchase feminine hygiene products. Valentine, who had driven her car to Salemburg that week, along with Plaintiff and James left the campus of the Academy at approximately 5:00 p.m. and drove to a Rose's store in Clinton, a ten-to-fifteen mile distance from the Academy. The women shopped in Rose's for approximately thirty or forty minutes, and Plaintiff purchased candy and cards. On their return journey to the Academy, the women stopped at a Burger King for approximately ten minutes "because the cafeteria [at the Academy had] already closed." While returning to the Academy, the women were involved in

a serious car accident three miles from the Academy resulting in the death of Valentine. Plaintiff, who was riding in the front passenger seat, was thrown through the front windshield thus suffering severe traumatic brain injury, rib fractures, facial lacerations, liver lacerations, and a pulmonary contusion.

After several correspondences between Plaintiff and Defendant, Plaintiff was separated from her employment on 19 January 1999 due to her unavailability.

In an opinion and award filed on 10 August 2000, the Full Commission made findings of fact consistent with the above-stated facts, including the following pertinent findings of fact:

> 11. The fact that [P]laintiff was thrown through a windshield in a motor vehicle collision on February 13, 1997 was clearly an unusual occurrence which would constitute an injury by accident. Defendant contended that the accident did not arise out of and in the course of [Plaintiff's] employment. However, at the time of the accident, [P]laintiff was a traveling employee who was engaged in activities which were reasonable under the circumstances. Even if the shopping at Rose[']s and dinner at the fast food restaurant are considered a personal detour, [P]laintiff reentered the scope of employment when she began traveling back to the [A]cademy campus. When the accident occurred, [P]laintiff was not engaged in a personal errand which would constitute a distinct departure or deviation from her employment, and her injury was the result of risks associated with traveling, especially in unfamiliar areas.
>
> 12. Plaintiff was not engaged in performing her official duties as a correctional officer at the time of the accident. Classes were over for the day and she was in the process of attending to her own physical needs and accompanying co-workers who were also so engaged at the time of the injury.

The Full Commission then concluded Plaintiff sustained an injury by accident arising out of and in the course of her employment and therefore was entitled to compensation for temporary total disability until she returns to work or until ordered by the Industrial Commission. Commissioner Dianne C. Sellers dissented from the opinion and award on the basis that Plaintiff

> did not suffer an injury by accident arising out of and in the course and scope of her employment with [D]efendant-employer.

An employee whose work entails travel away from the employer's premises is within the course of her employment during the trip except when there is a distinct departure on a personal errand.

The dispositive issue is whether a traveling employee whose meals are provided at a specific location is within the course and scope of her employment while traveling to or from a meal not reimbursed by her employer.

"The Commission's determination that an accident *arose out of* and *in the course of* employment is a mixed question of law and fact; thus, this Court may review the record to determine if the findings and conclusions are supported by sufficient evidence." *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 49 (1997). This Court reviews the Full Commission's conclusions of law *de novo*. *Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 63, 546 S.E.2d 133, 139 (2001).

Generally, an employee "whose work requires travel away from the employer's premises [is] within the course of [her] employment *continuously* during such travel, except when there is a distinct departure for a personal errand." *Cauble*, 124 N.C. App. at 528, 477 S.E.2d at 679; *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 179, 123 S.E.2d 608, 611 (1962). Consistent with this general rule, this Court has held that where an employee is away from her employer's primary premises and the employer reimburses her for her meals without any restriction on where she should eat, any injuries occurring while the employee is going to or returning from a restaurant arise out of and in the course of her employment. *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 43-44, 167 S.E.2d 790, 794 (1969); *Cauble*, 124 N.C. App. at 529, 477 S.E.2d at 679-80. Thus, a traveling employee whose lodging and meals are provided by the employer at a specific location without reimbursement for meals taken at a different location is not within the course and scope of her employment while going to or returning from a meal taken at that different location. This is so because when meals are provided at a specific location without any reimbursement for meals taken at a different location, it is not necessary or incidental to the employment for the employee to travel away from the specific location to take her meals and any departure away from this specific location without being reimbursed is a personal errand.

In this case, Plaintiff, a traveling employee, was injured while returning from a restaurant, where she had purchased dinner, to her lodging at the Academy as provided by Defendant. Plaintiff, however, received no reimbursement for her meal expenses and all of her meals together with her lodging were provided at the Academy. Accordingly, as Plaintiff's injuries occurred during "a distinct departure for a personal errand," the Full Commission erred in concluding Plaintiff's injuries arose out of and in the course of her employment. *See Cauble*, 124 N.C. App. at 528, 477 S.E.2d at 679.

Reversed.

Judges HUNTER and THOMAS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 NOVEMBER 2001

BAKER v. FOOD LION, INC. No. 01-34	Cumberland (99CVS2682)	Reversed and remanded
BOONE v. HOME INS./ RISK ENTER. MGMT. No. 00-1137	Ind. Comm. (I.C. 653203)	Affirmed
FORD v. ALLSTATE INS. CO. No. 00-1441	Richmond (98CVS879)	Affirmed
HILL v. HILL No. 00-1071-2	Henderson (99CVS67)	Affirmed
HOUSING AUTH. OF THE CITY OF RALEIGH v. GREEN No. 00-1466	Wake (00CVD8457)	Affirmed in part and reversed in part
HOWELL v. SYKES No. 00-1362	Halifax (97CVS585)	Affirmed
IN RE ESTATE OF CRAVER No. 00-1545	Davidson (95E682)	Affirmed
IN RE RUFFIN No. 00-1128	Wilson (00J56B)	Affirmed
IN RE SEALEY No. 01-157	Forsyth (97J240) (97J241) (97J242)	Affirmed
RHODES v. MARCUS CABLE ASSOCS., L.L.C. No. 00-1454	Buncombe (99CVS4076)	No error in part; reversed in part
SHORT v. EVANS No. 00-1303	Buncombe (98CVS4697)	No error
STATE v. BAILEY No. 00-1037	Richmond (99CRS2354)	No error
STATE v. CARTER No. 00-1406	Wake (99CRS28188) (99CRS28189)	No error
STATE v. JONES No. 00-1191	Durham (98CRS052890) (98CRS052891)	No error
STATE v. MORSTON No. 00-1428	Hoke (91CRS1442) (91CRS3253)	Vacated and remanded

STATE v. SLADE No. 00-1302	Forsyth (99CRS26120)	No error
STATE v. SPENCER No. 00-1296	Cumberland (99CRS70730)	Affirmed
STATE v. SQUIRE No. 00-1342	Halifax (98CRS9680) (98CRS9681) (99CRS7846)	No error
STATE v. SULLIVAN No. 00-1351	Lee (99CRS3453) (99CRS3454) (99CRS3455)	No error
YOUNG v. NATIONWIDE MUT. INS. CO. No. 99-1245-2	Catawba (99CVS376)	Reversed and remanded

RAMON L. EVERTS AND WIFE, REGINE M. EVERTS, PLAINTIFFS v. JOHN PARKINSON AND WIFE, VICKI T. PARKINSON; A.T. DOMBROSKI, JR., INDIVIDUALLY; A.T.D. CONSTRUCTION COMPANY, INC.; RICKS CONSTRUCTION, INC.; AND PRIME SOUTH CONSTRUCTION, INC., DEFENDANTS

No. COA00-1148

(Filed 4 December 2001)

1. Statutes of Limitations and Repose— synthetic stucco claims—time when damage might have been discovered—summary judgment

Summary judgment should not have been granted for plaintiff in a synthetic stucco action on the issue of whether plaintiffs' claims against the original owners of the house were barred by the statute of limitations where the evidence produced during discovery indicated at least three times at which the defects or damage might have reasonably become apparent to plaintiffs, the last of which occurred within three years prior to the filing of the complaint. N.C.G.S. §§ 1-50(a)(5)(f), 1-52.

2. Fraud— synthetic stucco—action against original owner—failure to disclose material fact—reasonable reliance

The trial court erred in a synthetic stucco action by granting summary judgment for defendant Mr. Parkinson on a fraud claim, but correctly granted summary judgment for defendant Mrs. Parkinson, where a jury could infer from the evidence that the alleged material defects were known to Mr. Parkinson; Mr. Parkinson knew that the defects were not discoverable in the exercise of plaintiffs' diligent attention or observation; Mr. Parkinson therefore had a duty to disclose the existence of the defects to plaintiffs, which he failed to do; Mr. Parkinson's breach of the duty to disclose was reasonably calculated to deceive and undertaken with the intent to deceive; plaintiffs were in fact deceived; and this deception resulted in damage to plaintiffs. Reasonable reliance is a redundant and unnecessary element in the context of a claim of fraud based on a failure to disclose a material fact.

3. Fraud— negligent misrepresentation—synthetic stucco—statements in contract to sell—condition precedent—no liability

Summary judgment for defendants was affirmed as to a negligent misrepresentation claim in a synthetic stucco action

against the original owners of the house where the statements relied upon by plaintiffs (who purchased the house from defendants were in the contract to sell and were within the context of a condition precedent. As such, they may not be the basis for liability.

4. Contracts— sale of synthetic stucco house—condition of purchase—condition precedent—no liability

The trial court in a synthetic stucco action correctly granted summary judgment for defendants Parkinson (the original purchasers who in turn sold to plaintiffs) as to a breach of contract claim where the language relied upon by plaintiffs was in an addendum to the contract and was a condition of purchase. The failure of a plaintiff to comply with conditions precedent in a contract may allow the buyer to terminate the contract prior to closing, but may not subject the seller to liability.

5. Warranties— sale of synthetic stucco house—express warranty claim

The trial court in a synthetic stucco action did not err by granting summary judgment for defendants Parkinson on a breach of express warranty claim. There is no authority indicating that a breach of express warranty claim may be brought upon alleged warranties in a contract for the sale of a dwelling or real property as opposed to goods. The proper cause of action would be a claim for breach of contract.

6. Warranties— implied warranty of habitability—action by subsequent purchaser against original owner

Summary judgment was properly granted for defendants Parkinson in a synthetic stucco action on a claim for breach of an implied warranty of habitability where the Parkinsons were the original purchasers of the house who then sold to defendants. This cause of action may only be maintained against a defendant who is both the builder and the vendor of a building, consistent with the rationale that builder-vendors have superior knowledge of the construction process and materials, the ability to avoid defects, and the ability to bear risk.

7. Negligence— synthetic stucco—inspection by builder three years after first sale—liability to subsequent purchaser

Summary judgment was properly granted for the builder of a house in a synthetic stucco action by a subsequent purchaser

where plaintiffs contended that ATD was negligent in its inspection of a window for the original purchaser. The Court of Appeals declined to hold that the builder of a house owes a duty to a subsequent owner where the builder was called upon by the original owner to inspect the house for damage more than three years after the house was completed and performed no repair work at that time.

8. Negligence— synthetic stucco—liability of contractor doing repairs to subsequent purchaser

The trial court did not err in a synthetic stucco action by granting summary judgment for a company which performed improvement work on the house for the original owners. There is no authority holding that a party which undertakes to repair a house under contract with the original owner owes a duty of care to a subsequent purchaser of the house. Moreover, even if there was a duty of care, there was no forecast of evidence of negligence.

Appeal by plaintiffs from orders entered 18 May 2000 by Judge Herbert O. Phillips, III in New Hanover County Superior Court. Heard in the Court of Appeals 22 August 2001.

Lewis & Roberts, P.L.L.C., by Daniel K. Bryson and F. Murphy Averitt, III, for plaintiff-appellants.

Marshall, Williams & Gorham, L.L.P., by John L. Coble, for defendant-appellees John Parkinson and Vicki T. Parkinson.

Dean & Gibson, L.L.P., by Christopher J. Culp; Frost Brown Todd, LLC, by Kathy Kendrick and Carl E. Grayson, for defendant-appellees A.T. Dombroski, Jr. and A.T.D. Construction Company, Inc.

Bennett & Guthrie, P.L.L.C., by Rodney A. Guthrie, for defendant-appellee Prime South Construction, Inc.

HUNTER, Judge.

Ramon L. Everts and Regine M. Everts ("plaintiffs") appeal from three orders entered 18 May 2000 granting summary judgment in favor of five defendants. We affirm in part, and reverse in part and remand for further proceedings.

This case involves a house clad with Exterior Insulation and Finish System ("EIFS"), also known as synthetic stucco. By contract dated 26 June 1993, plaintiffs purchased the house, located in Wilmington, North Carolina, from defendants John Parkinson and Vicki T. Parkinson ("the Parkinsons"), the original owners. On 9 June 1997, plaintiffs filed this action against the Parkinsons, as well as the builders of the house, A.T.D. Construction Company and its president A.T. Dombroski, Jr. (together "ATD"), and a company that performed improvement work on the house, Prime South Construction, Inc. ("PSC"). The complaint alleges that plaintiffs have had to undertake extensive and costly repairs to the house as a result of water intrusion and wood rot problems. The complaint sets forth the following causes of action: (1) as to the Parkinsons, fraud, negligent misrepresentation, breach of contract, breach of express warranty, and breach of implied warranty; (2) as to ATD, willful and wanton negligence; and (3) as to PSC, negligence. The complaint also sets forth a claim against an additional defendant (Ricks Construction, Inc.) which is not at issue in this appeal. The trial court granted summary judgment in favor of the Parkinsons, ATD, and PSC on all claims against them. Plaintiffs appeal.

Rule 56 of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). A defendant may show that it is entitled to summary judgment by:

> (1) proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party (2) cannot produce evidence to support an essential element of his or her claim, or (3) cannot surmount an affirmative defense which would bar the claim.

Bernick v. Jurden, 306 N.C. 435, 440-41, 293 S.E.2d 405, 409 (1982) (citation omitted). Furthermore, "[t]he record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences reasonably arising therefrom." *Ausley v. Bishop*, 133 N.C. App. 210, 214, 515 S.E.2d 72, 75 (1999). Having carefully reviewed the record, we reverse in part the trial court's order granting summary judgment in favor of the Parkinsons and we remand for further proceedings on plaintiffs' claim of fraud as against Mr. Parkinson only. As

to the claim of fraud against Mrs. Parkinson and all remaining claims against the Parkinsons, and as to the claims against ATD and PSC, we affirm the trial court's grant of summary judgment.

I. The Parkinsons

[1] We first address plaintiffs' five claims against the Parkinsons: fraud, negligent misrepresentation, breach of contract, breach of express warranty, and breach of implied warranty.

A. Statute of Limitations

The Parkinsons contend, at the outset, that they are entitled to summary judgment on all five claims because each is barred by the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52 (1999). We disagree. It is well-established that:

> Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate.

Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citations omitted). When the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury. *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974).

We believe that the Parkinsons were not entitled to summary judgment on the basis of the statute of limitations because the facts here are in conflict as to when the statute of limitations period started to run. The parties do not dispute that all of plaintiffs' claims against the Parkinsons are subject to the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52. There is also no dispute that plaintiffs' causes of action did not accrue until the defect or damage to plaintiffs' property became apparent or ought reasonably to have become apparent to them. *See* N.C. Gen. Stat. § 1-50(a)(5)(f) (1999) ("[f]or purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant"); *Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 444 S.E.2d 423

(1994) (holding that N.C. Gen. Stat. § 1-50 applies to any claim arising out of an improvement to real property). Thus, whether these claims are barred by the statute of limitations requires a determination of when the alleged defect or damage became apparent, or ought reasonably to have become apparent to plaintiffs.

The evidence produced during discovery indicates at least three possible points in time at which it might be determined that the alleged damage or defects became apparent or reasonably should have become apparent to plaintiffs. First, Mrs. Everts testified during her deposition that she discovered water intrusion in the garage and living room within three months after the purchase of the house from the Parkinsons in August of 1993. Second, Mrs. Everts testified that in approximately March of 1994, plaintiffs hired a painter who inspected the house and notified Mrs. Everts that he had worked on the exterior of the house about two years before when the Parkinsons were the owners, at which time he had painted the exterior of the house, cleaned the roof, and sealed the roof with a "special sealer." He told Mrs. Everts that he had found rot on certain windows and that he had pointed this out to Mr. Parkinson at that time. He also told her that he had noticed Mr. Parkinson doing "repair work on the windows quite often," and that, as a result, "he was under the impression that quite a number of windows had water problems." The Parkinsons point to these two points in time and contend that by at least March of 1994 the alleged damage was apparent or reasonably should have been apparent to plaintiffs, and that their claim filed on 9 June 1997 is therefore barred by the three-year statute of limitations.

Plaintiffs, on the other hand, point to a third point in time, February of 1996, and contend that they did not discover that their home suffered significant water intrusion damage and construction defects until this time. Mr. Everts testified that he attended a meeting about synthetic stucco in late 1995 or early 1996, after which he followed the suggestion of the New Hanover County Building Commission and hired an engineer who conducted a moisture test on the home and provided a detailed report as to its condition. Thus, plaintiffs contend, they did not realize the nature of the defects and the extent of the damage until February of 1996, and, therefore, their complaint filed on 9 June 1997 is not barred.

We believe that the evidence produced during discovery allows at least an inference that the alleged damage was not apparent, and should not reasonably have been apparent, to plaintiffs prior to June

of 1994. Thus, the issue of whether plaintiffs' claims against the Parkinsons are barred by the statute of limitations is an issue for the jury, and the Parkinsons are not entitled to summary judgment on this basis.

B. Causes of Action Against the Parkinsons

The Parkinsons further argue that there are no genuine issues as to any material facts and that they are entitled to summary judgment as a matter of law on all five causes of action. *See* N.C.R. Civ. P. 56(c). We review each cause of action in turn.

1. Fraud

[2] The essential elements of fraud are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). This State has long recognized that "[w]here a material defect is known to the seller, and he knows that the buyer is unaware of the defect and that it is not discoverable in the exercise of the buyer's diligent attention or observation, the seller has a duty to disclose the existence of the defect to the buyer." *Carver v. Roberts*, 78 N.C. App. 511, 512-13, 337 S.E.2d 126, 128 (1985) (citing *Brooks v. Construction Co.*, 253 N.C. 214, 217, 116 S.E.2d 454, 457 (1960)). In such cases, *suppressio veri* (a failure to disclose the truth) is as much fraud as *suggestio falsi* (an affirmative false representation). *Id.* at 512, 337 S.E.2d at 128. Thus, as the sellers of the house, the Parkinsons were under an affirmative duty to disclose to plaintiffs, as the buyers of the house, the existence of any known material defects in the home which were not known to plaintiffs and which were not discoverable by them in the exercise of their diligent attention or observation.

a. Intent to Deceive

The Parkinsons argue, first, that plaintiffs have failed to show any genuine issue of material fact as to whether the Parkinsons concealed any material fact with the intent to deceive. As to Mr. Parkinson, we disagree. After the Parkinsons moved into the house in November of 1988, they experienced numerous problems with the house. The first problem involved "Becker window lights." Within the first year, Mr. Parkinson discovered that the seal in fifteen to twenty window lights did not function properly and allowed moisture to enter the space between the two panes of glass, which caused fogging in the win-

dows. Mr. Parkinson "viewed it as a problem" and wrote a letter to the Becker company, complaining that "the seal failure problem in the Colonial Seal Windows is much worse than originally believed," and stating that repairing these windows would be a "major undertaking." In response, a representative from Becker came to the house and fixed the windows by replacing the glass. Thereafter, in December of 1990 and at other times between 1988 and 1992, additional window lights became fogged, but Mr. Parkinson did not hire a professional to replace them, and instead decided to replace them himself. In performing this work, Mr. Parkinson did not use butyl bedding compound, as recommended by Becker in the company's literature; instead, he used a latex acrylic caulking compound. Mr. Parkinson conceded that he did not know whether the latex acrylic caulking would work.

The second problem involved rotting brick mold. After approximately two years, Mr. Parkinson began to discover rotting pieces of brick mold around at least seven windows or doors. At the time, Mr. Parkinson believed that the brick mold was rotting because the house was built such that the brick mold extended beyond the stucco and, as a result, was exposed to rain and the elements. Mr. Parkinson did not hire a professional to replace these pieces of rotting brick mold; instead he repaired the brick mold himself because "it seemed to be a relatively simple type of maintenance problem." However, Mr. Parkinson acknowledged that he has no idea whether the caulk he used was compatible with the synthetic stucco surface to which it was applied.

The third problem involved window six. In early 1992, the Parkinsons hired a painter who "power washed" the house and discovered that window six, which was one of the windows around which Mr. Parkinson had previously replaced some brick mold, was rotted in the sash, jamb and part of the sill. Mr. Parkinson became concerned and called Mr. Dombroski. Mr. Dombroski came to the house and, after examining window six, told Mr. Parkinson that the jamb would have to be repaired, the sashes and the brick mold were going to have to be replaced, and the sill was going to have to be spliced or replaced. Mr. Dombroski told Mr. Parkinson that the water intrusion at window six was coming from the failure of the caulk joint located between the brick mold and the stucco. Mr. Parkinson testified that at this point, he "began to wonder what would happen if this occurred at other places."

Although Mr. Dombroksi examined the window, he did not repair the window. Instead, Mr. Parkinson again made the repairs himself. This repair work involved removing two sashes and a jamb, sawing through a portion of the sill to remove it, replacing that portion of the sill and two sashes and a jamb, and resealing the window. Mr. Parkinson testified that he performed the work himself because "[i]t didn't appear that complicated." However, John Bahr, P.E., a registered professional engineer who inspected the house, testified that window six had undergone "extensive repair" behind the surface cladding between the inner and outer walls.

After performing this repair work to window six, Mr. Parkinson remained concerned and decided, based on viewing other houses, to attempt to protect the windows from water by having a band of stucco built around the perimeter of each window extending beyond the brick mold and covering up the caulk joint. Mr. Parkinson testified that he hired Mr. Ricks of Ricks Construction, Inc. ("Ricks") to perform this job. However, Mr. Parkinson conceded that he did not ask Mr. Ricks whether this idea—adding a band of stucco to protect the windows from water intrusion—would, in fact, work. Moreover, although the contract with Ricks provides that the purpose of the work was "to create a waterproof barrier around the perimeter of all windows and doors," a memorandum attached to the contract, written by Ricks, states: "To create a waterproof intersection, caulk is necessary and is not included in our scope of work." Mr. Parkinson proceeded to hire Ricks to perform this work despite the fact that Ricks told him that the stucco bands would not protect the windows from water intrusion without caulk.

Ricks apparently started the job in March of 1993. However, Mr. Parkinson fired Ricks and hired PSC in April of 1993 to complete the job. The contract with PSC, dated 7 April 1993, provides the following description of the work to be performed:

> [1.] Straightening and smoothing previously base coated window bands to the best of our ability with the existing work[.]
>
> [2.] Additional base coat applied to bands where needed[.]
>
> [3.] Finish coat applied to window bands[.]
>
> [4.] Caulking applied where requested by the homeowner[.]

At the time he signed the contract, Mr. Parkinson attached a letter to the contract, dated 12 April 1993, which states that "[t]he purpose of

the scope of work described is to create a waterproof perimeter on all doors and windows to which the banding is applied." This letter provided a space for the signature of a PSC representative to indicate acceptance, but the letter was not signed by anyone from PSC.

Mr. Best, the president of PSC, testified during his deposition that Mr. Parkinson hired PSC only "to straighten up the bands and put finish coat on a job that somebody else had started," and that the bands were for "decorative" purposes only. Mr. Best testified that PSC did receive Mr. Parkinson's letter attached to the contract, and that, in response, PSC "informed Mr. Parkinson . . . that the coatings that go over the band aren't waterproof and . . . that the bands aren't going to add any waterproofness to his house and that . . . all we were providing was decorative banding." Mr. Best testified that this is why a representative from PSC did not sign Mr. Parkinson's letter. According to Mr. Best, Mr. Parkinson told PSC to "go ahead with the work anyway." Also, although the contract provides that PSC was to apply caulking "where requested by the homeowner," Mr. Parkinson conceded that he did not specifically direct PSC to apply caulking anywhere, and does not know whether they ever did apply caulking anywhere. Mr. Best testified that PSC did not use or apply any caulk in finishing these stucco bands. Finally, Mr. Best also testified that the "decorative" stucco bands, once built, could have had the effect of concealing the original sealant joint, or intersection, between the EIFS and the window. Engineer John Bahr similarly testified that the decorative band of synthetic stucco did, in fact, "carefully conceal[] the joints around each window and door."

At the time of sale, the Parkinsons did not inform plaintiffs about the Becker window lights that Mr. Parkinson had replaced, the brick mold repair work that Mr. Parkinson had performed on a number of windows and doors, or the extensive repair work to window six that Mr. Parkinson had performed. Nor did they inform plaintiffs about the construction of the stucco bands by Ricks and PSC. Mr. Parkinson testified that he did not disclose this information, or provide plaintiffs with any of the documents that he possessed regarding any repair work that had been done, because he did not feel that he had an obligation to do so. He also acknowledged that the stucco bands that were added to all of the windows covered up the same joint that had failed in window six, and that, in order for plaintiffs or an inspection company hired by plaintiffs to have examined those joints, they would have had to remove the stucco bands from each window. He further acknowledged that the house had not sold the first time it was

put on the market, and that it was put on the market a second time at almost exactly the time that the stucco bands were completed, and acknowledged that at least one of the reasons they decided to sell the house was because of the maintenance and repair work required as a result of the rotting brick mold problem. Viewing the evidence in the light most favorable to plaintiffs, we believe there are genuine issues of material fact as to whether Mr. Parkinson engaged in conduct with the intent to deceive. However, we believe there is no evidence in the record that would support a finding that Mrs. Parkinson engaged in conduct with an intent to deceive. Thus, we address the remaining fraud issues only as to Mr. Parkinson.

b. Reasonable Reliance

Mr. Parkinson contends that plaintiffs have failed to establish reasonable reliance for purposes of their fraud claim. In general, the reason for requiring a showing of reasonable reliance in cases of fraud has been explained in the following way:

> The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest.

Calloway v. Wyatt, 246 N.C. 129, 134-35, 97 S.E.2d 881, 886 (1957). However, in the specific context of a claim of fraud based upon a breach of a duty to disclose a material fact, we believe that the reasonable reliance requirement is unnecessary because it is virtually identical to what is already required to establish that a duty to disclose exists in the first place.

A duty to disclose material facts arises "[w]here material facts are accessible to the vendor only, *and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser.*" *Brooks*, 253 N.C. at 217, 116 S.E.2d at 457 (emphasis added). In other words, in order to establish fraud based upon a seller's failure to disclose material defects, a buyer must, in part, show that the material defects were "not discoverable in the exercise of the buyer's diligent attention or observation." *Carver*, 78 N.C. App. at 512-13, 337 S.E.2d at 128.

This requirement serves the same purpose as the reasonable reliance requirement in other fraud claims: it precludes a claim of

fraud where a plaintiff has been negligent or inattentive to his own interests. This is because, if a defect *is* discoverable in the exercise of a buyer's diligent attention or observation, and the buyer fails to employ diligent attention or observation (and thus fails to discover the defect), a claim for fraud will not stand because in such a situation there is no duty on the part of the seller to disclose the defect. *See, e.g., Clouse v. Gordon*, 115 N.C. App. 500, 445 S.E.2d 428 (1994) (seller did not disclose that the property was subject to flooding, but no duty to disclose because fact that property was located in flood plain was of public record, buyers knew creek ran through property, buyers had full opportunity to view topography of property, including fact that mall and four-lane thoroughfare were located upstream from creek on property, and buyers had full opportunity to inquire of other residents whether there were flooding problems).

Our holding—that reasonable reliance is a redundant and unnecessary element in the context of a claim of fraud based on a failure to disclose a material fact—is supported by this Court's opinion in *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979). In *Rosenthal*, this Court held that the plaintiffs' fraud claim was properly dismissed because, among other things, the plaintiffs had failed to allege in their pleadings that they reasonably relied upon the defendants' concealment. *See id.* at 452, 257 S.E.2d at 66. However, the Court then stated that this "reasonable reliance" requirement would have been sufficiently pleaded if plaintiffs had alleged that the material fact was not discoverable "by the exercise of reasonable diligence." *Id.* (citing *Calloway*, 246 N.C. 129, 97 S.E.2d 881). This formulation of "reasonable reliance" is virtually identical to the requirement that the seller know that a defect "is not discoverable in the exercise of the buyer's diligent attention or observation," *Carver*, 78 N.C. App. at 512-13, 337 S.E.2d at 128, and is therefore redundant to the requirements for establishing the existence of a duty to disclose in the first place.

Our holding also finds persuasive support in N.C.P.I., Civ. 800.00 ("Fraud"), which provides the following explanation regarding the element of reasonable reliance in a claim for fraud based on concealment of a material fact:

> The plaintiff's reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in the exercise of ordinary care for his own welfare, would not have discovered the concealment.

Again, this definition of "reasonable reliance" is virtually identical to the requirement that the material fact be a fact that is not "discoverable in the exercise of the buyer's diligent attention or observation." *Carver*, 78 N.C. App. at 512-13, 337 S.E.2d at 128. Finally, our holding finds support in two cases in which reasonable reliance was simply not required as an element in establishing fraud based on a seller's breach of a duty to disclose material defects. *See Brooks*, 253 N.C. 214, 116 S.E.2d 454; *Carver*, 78 N.C. App. 511, 337 S.E.2d 126 (specifically addressing the elements that must be alleged to withstand a Rule 12(b)(6) motion to dismiss a claim of fraudulent concealment of a material defect).

Viewing the evidence in the light most favorable to plaintiffs, we believe there are genuine issues of material fact as to whether the alleged defects were discoverable in the exercise of plaintiffs' diligent attention or observation and, therefore, whether Mr. Parkinson had a duty to disclose the defects. The record contains an affidavit from John Tullous, a licensed residential home inspector who performed an inspection on the house in July of 1993 at the request of plaintiffs prior to purchase. He testified that, at the time of the inspection, he "did not observe any rot or water infiltration," or "any problems with the exterior windows or doors on the house." He further testified that the "decorative bands," which had been installed around the windows before his inspection, "concealed the joint where the synthetic stucco met the window brick molding," and that, as a result, he "was not able to visually observe the perimeter joints of the exterior windows." He also stated that he "was not informed by the owner or the owner's realtor of any moisture intrusion problems involving the windows or window joint perimeter prior to [his] inspection," and that such information is "crucial information that [he] would have needed to know." He testified that if he had been informed of moisture intrusion problems, his company would have performed an intrusive test by inserting a moisture probe into the synthetic stucco, but that it was not the normal practice of his company to perform this kind of test unless they were provided with information about water intrusion problems.

Viewing the evidence in the light most favorable to plaintiffs, we believe that a jury could infer from the evidence that: the alleged material defects were known to Mr. Parkinson; Mr. Parkinson knew that the defects, of which plaintiffs were unaware, were not discoverable in the exercise of plaintiffs' diligent attention or observation; Mr. Parkinson, therefore, had a duty to disclose the existence of the

defects to plaintiffs, which he failed to do; Mr. Parkinson's breach of the duty to disclose was reasonably calculated to deceive and undertaken with the intent to deceive; plaintiffs were in fact deceived; and this deception resulted in damage to plaintiffs. Therefore, as to Mr. Parkinson, we reverse the trial court's grant of summary judgment on the claim of fraud, and we remand so that this claim may be heard and determined by the trier of fact. As to Mrs. Parkinson, we affirm the trial court's grant of summary judgment.

2. Negligent Misrepresentation

[3] "The 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." *Fulton v. Vickery*, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358, *disc. review denied*, 313 N.C. 599, 332 S.E.2d 178 (1985). Here, plaintiffs argue that the Parkinsons supplied false information to them by representing in the contract (1) that the structural components of the home "shall be performing the function for which intended and shall not be in need of immediate repair," and (2) that "there shall be no unusual drainage conditions or evidence of excessive moisture adversely affecting the structure."

These statements in the contract appear in Paragraph Eight, which states:

> INSPECTIONS: Unless otherwise stated herein: (i) the electrical, plumbing, heating and cooling systems and built-in appliances, if any, shall be in good working order at closing; (ii) the roof, gutters, structural components, foundation, fireplace(s) and chimney(s) shall be performing the function for which intended and shall not be in need of immediate repair; (iii) there shall be no unusual drainage conditions or evidence of excessive moisture adversely affecting the structure(s); and (iv) the well/water and septic/sewer systems, if any, shall be adequate, not in need of immediate repair and performing the function for which intended. Buyer shall have the option to have the above listed systems, items and conditions inspected . . . , but such inspections must be completed in sufficient time before closing to permit any repairs to be completed by closing. If any repairs are necessary, Seller shall have the option of (a) completing them, (b) providing

> for their completion, or (c) refusing to complete them. If Seller elects not to complete or provide for the completion of the repairs, then Buyer shall have the option of (d) accepting the Property in its present condition, or (e) terminating this contract, in which case the earnest money shall be refunded. Closing shall constitute acceptance of each of the systems, items and conditions listed in (i), (ii), (iii) and (iv) above in its then existing condition unless provision is otherwise made in writing.

Paragraph Eight essentially provides that the buyer, after signing the contract but prior to closing, is entitled to have the structural components of the house inspected, and that, following any such inspection, if repairs are necessary and if the seller refuses to complete such repairs, the buyer may either accept the property or terminate the contract. Thus, Paragraph Eight sets forth a series of steps which, if followed by the buyer but not complied with by the seller, allow the buyer to terminate the contract. In other words, Paragraph Eight, taken as a whole, is a condition precedent.

" 'A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance.' " *In re Foreclosure of C and M Investments*, 346 N.C. 127, 132, 484 S.E.2d 546, 549 (1997) (citation omitted). "In negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement." *Federal Reserve Bank v. Manufacturing Co.*, 213 N.C. 489, 493, 196 S.E. 848, 850 (1938). " ' "Breach or nonoccurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability." ' " *C and M Investments*, 346 N.C. at 132, 484 S.E.2d at 549 (citations omitted).

The statements which plaintiffs contend constitute representations by the Parkinsons are not representations upon which liability may be based; instead, they are statements made within the context of a condition precedent and, as such, may not be the basis for liability. Because we hold that these statements, taken in context, do not constitute representations by the Parkinsons upon which liability may be based, and because the record discloses no other representations by the Parkinsons, plaintiffs have failed to establish the elements of negligent misrepresentation as a matter of law. Summary judgment as to this claim is therefore affirmed.

3. Breach of Contract

[4] The contract here included an Addendum, signed by plaintiffs and the Parkinsons, which provided in part:

> 1. In addition to the Standard Inspections listed in Paragraph #8 in the Standard Provisions, it is also a condition of the purchase that the following be performed:
>
> . . .
>
> D. Seller to provide copies of builder's construction records pertaining to materials and type of construction methods used to prevent excessive moisture build-up and damage due to any wood destroying insect.

Plaintiffs contend that the Parkinsons failed to provide to plaintiffs certain documents that were in their possession, which documents should have been provided pursuant to Paragraph 1D of the Addendum, and that the Parkinsons thereby breached the contract. However, as expressly set forth at the outset of Paragraph 1 of the Addendum, the items listed in Paragraph 1 were conditions of the purchase. As stated above, the failure of a seller to comply with conditions precedent in a contract may allow the buyer to terminate the contract prior to closing, but may not subject the seller to liability. *Id.* Thus, the Parkinsons may not be subjected to liability for breaching the contract based on a failure to comply with Paragraph 1D, since Paragraph 1D was a condition precedent. We therefore affirm the trial court's grant of summary judgment in favor of the Parkinsons as to plaintiffs' claim for breach of contract.

4. Breach of Express and Implied Warranties

[5] Plaintiffs' complaint alleges that the Parkinsons provided an express warranty to plaintiffs within the contract that, among other things, the roof, gutters, and other structural components of the home were in sound condition. Regardless of whether this allegation may be true, we do not believe plaintiffs here may maintain an action for breach of express warranty against the Parkinsons based on this sale of real property. Breach of express warranty claims are generally governed by the North Carolina Uniform Commercial Code ("UCC"), codified in Chapter 25 of our General Statutes. *See* N.C. Gen. Stat. §§ 25-1-101 to 25-11-108 (1999); Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts* § 26.32, at 459 (1991). Article 2 of the UCC ("Sales") applies only to contracts for the purchase or sale of

"goods," and it is well-established that "[r]eal estate does not fall under the U.C.C.'s definition of 'goods.' " *Cudahy Foods Company v. Holloway*, 55 N.C. App. 626, 628, 286 S.E.2d 606, 607 (1982) (citing N.C. Gen. Stat. § 25-2-105). Plaintiffs have failed to cite, and we have been unable to find, any authority indicating that a breach of express warranty claim may be brought based upon alleged warranties in a contract for the sale of a dwelling or real property, as opposed to goods. *See* John N. Hutson, Jr. and Scott A. Miskimon, *North Carolina Contract Law* § 15-2, at 698 (2001) ("[a]n express warranty is a promise made by a seller to a buyer which relates to the title, condition or quality of the *goods* being sold." (Emphasis added)). Indeed, at least one case has implied precisely the opposite. *See Stanford v. Owens*, 46 N.C. App. 388, 392-93, 265 S.E.2d 617, 620-21, *disc. review denied*, 301 N.C. 95, — S.E.2d — (1980). It appears that a claim for breach of contract, rather than breach of express warranty, is the proper cause of action available to plaintiffs in such cases. We conclude that the trial court properly granted summary judgment in favor of the Parkinsons on plaintiffs' breach of express warranty claim.

[6] The complaint also alleges that the Parkinsons breached an implied warranty of habitability.

> The doctrine of implied warranty of habitability requires that a dwelling and all of its fixtures be "sufficiently free from major structural defects, and . . . constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction." The test for breach of implied warranty of habitability is "whether there is a failure to meet the prevailing standard of workmanlike quality" in the construction of the house . . . .

Allen v. Roberts Constr. Co., 138 N.C. App. 557, 571, 532 S.E.2d 534, 543 (citation omitted), *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). A review of our case law indicates that this cause of action may only be maintained against a defendant who is both the builder and the vendor of a dwelling. *See, e.g., Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976); *Medlin v. Fyco, Inc.*, 139 N.C. App. 534, 534 S.E.2d 622 (2000), *disc. review denied*, 353 N.C. 377, 547 S.E.2d 12 (2001); *Lumsden v. Lawing*, 107 N.C. App. 493, 421 S.E.2d 594 (1992); *Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 406 S.E.2d 646 (1991); *George v. Veach*, 67 N.C. App. 674, 313 S.E.2d 920 (1984); *Lyon v. Ward*, 28 N.C. App. 446, 221 S.E.2d 727 (1976). The Parkinsons are not "builder-vendors," but are merely ordi-

nary vendors or casual sellers of a single dwelling. Thus, plaintiffs essentially ask this Court to dramatically expand the implied warranty of habitability doctrine, and this we decline to do. We note that this position is consistent with the approach taken in other jurisdictions. *See* Frona M. Powell and Jane P. Mallor, *The Case for an Implied Warranty of Quality in Sales of Commercial Real Estate*, 68 Wash. U. L.Q. 305, 337 n.71 (1990) ("Courts have steadfastly refused to apply the implied warranty in sales by 'ordinary vendors' or 'casual sellers.' This is consistent with the supporting rationale that builder-vendors have superior knowledge of the construction process and materials, ability to avoid defects, and ability to bear risk."); William K. Jones, *Economic Losses Caused by Construction Deficiencies: The Competing Regimes of Contract and Tort*, 59 U. Cin. L. Rev. 1051, 1061 (1991) ("The warranty is applicable to sellers engaged in the business of constructing houses for sale. . . . Warranties are not implied in the sale of 'used' residences by their owners." (Footnotes omitted)). Therefore, we conclude that plaintiffs may not maintain an action against the Parkinsons for breach of an implied warranty of habitability, and summary judgment was properly granted on this claim as well.

II. ATD

[7] We next review plaintiffs' claim of willful and wanton negligence against ATD. Plaintiffs' complaint alleges that ATD was negligent in two separate respects. First, the complaint alleges that ATD was "willfully and wantonly negligent in [its] construction of the house" in November of 1988. Second, the complaint alleges that ATD was negligent in its inspection of the house in May of 1992. ATD filed a motion for summary judgment, contending that there were no genuine issues of material fact, and that plaintiffs' claim was barred by the applicable statutes of limitations and repose. This motion was granted.

We need not reach the question of whether plaintiffs' claim against ATD is barred by the statute of repose because we believe plaintiffs are unable to establish an essential element of their claim, namely a legal duty of care, and that summary judgment was therefore properly granted. In their brief, plaintiffs argue only that ATD was willfully and wantonly negligent in its inspection of a single window in May of 1992. Plaintiffs do not argue that ATD was negligent in its construction of the house in 1988. Plaintiffs' failure to present any argument on appeal regarding ATD's alleged negligence in constructing the house constitutes an abandonment of one of the two theories

upon which plaintiffs' claim against ATD was originally premised. *See* N.C.R. App. P. 28(a); *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 632, 224 S.E.2d 580, 588 (1976) ("[u]nder Rule 28, . . . appellate review is limited to the arguments upon which the parties rely in their briefs"). The only contention before us, then, is that ATD was willfully and wantonly negligent in its inspection of a window in 1992.

The complaint alleges that on this occasion, ATD was willfully and wantonly negligent in "[f]ail[ing] to repair known leaks in the EIFS system," in "[f]ail[ing] to adequately investigate potential water intrusion into the home and damage therefrom," and in "improperly and incorrectly assess[ing] the nature and extent of said intrusion and damage." The evidence tends to establish that in approximately May of 1992, Mr. Parkinson called Mr. Dombroski, the president of A.T.D. Construction Company, and asked him to come to the house to look at "a problem with some brick molding" and to "give him a price on replacing it." Mr. Dombroski went to the house and examined a particular window where a piece of brick mold had been removed by Mr. Parkinson. Mr. Dombroksi saw "some discoloration" in the "sheathing plywood" and some deterioration in the left end of the window sill. Mr. Dombroski told Mr. Parkinson that he would "put together a price" for replacing the brick mold and replacing the sill. Mr. Parkinson did not ask Mr. Dombroski to look at any other windows, and Mr. Dombroski did not ultimately do any repair work on any of the windows. Based on these facts, and resolving any inconsistencies in the evidence in favor of plaintiffs, we believe ATD was entitled to summary judgment as a matter of law because plaintiffs cannot establish that ATD owed plaintiffs a legal duty of care under these circumstances.

The law imposes upon the builder of a house the general duty of reasonable care in constructing the house to anyone who may foreseeably be endangered by the builder's negligence, including a subsequent owner who is not the original purchaser. *See Oates v. JAG, Inc.*, 314 N.C. 276, 280-81, 333 S.E.2d 222, 225-26 (1985). Pursuant to *Oates*, ATD, as the builder of the house, owed a general duty of reasonable care to plaintiffs *in its construction of the house in 1988.* However, as noted above, plaintiffs on appeal argue only that ATD was willfully and wantonly negligent *in its inspection of the window, which occurred over three years after the house was constructed.* Thus, plaintiffs essentially request this Court to significantly extend the rule in *Oates* and hold that the builder of a house, who is called upon by the original owner to inspect the house for damage more than three

years after the house is completed, and who performs no repair work on the house at that time, owes a legal duty of care to a subsequent owner *in its inspection of the house.* This we decline to do. Because plaintiffs are unable to establish the existence of a legal duty of care owed to plaintiffs by ATD under the circumstances, summary judgment was properly granted.

III. PSC

[8] Finally, we review plaintiffs' negligence claim against PSC. Plaintiffs' complaint states that PSC was "retained by the defendant Parkinsons to conduct certain post-construction repair work on the EIFS system on the home" in 1993. The complaint alleges that PSC breached a duty of care to plaintiffs by

> negligently and improperly attempting repairs which concealed, rather than rectified, the damages resulting from [previous work performed on the house]; negligently failing to report the defects in the EIFS system when called upon to inspect and repair the home; and by negligently failing to advise the Parkinsons of the need for further inspection and testing to verify the nature and extent of the water intrusion and damage to the home.

PSC denied these allegations and filed a motion for summary judgment, contending that there were no genuine issues of material fact, and that plaintiffs' claims were barred by the statute of limitations. This motion was granted. We need not reach the question of whether plaintiffs' claim is barred by the statute of limitations because we believe PSC did not owe a duty of care to plaintiffs, and because, even if it did, the evidence produced during discovery fails to forecast any negligence on the part of PSC.

We are unable to find, and plaintiffs have not directed our attention to, any cases holding that a party who undertakes to *repair* a house under contract with the original owner owes a duty of care to a subsequent purchaser of the house. As with plaintiffs' claim against ATD, such a holding would require us to extend the rule in *Oates*, in which case it was held that the law imposes upon the *builder* of a house the general duty of reasonable care in *constructing* the house to anyone who may foreseeably be endangered by the builder's negligence, including a subsequent owner. *See Oates*, 314 N.C. 276, 333 S.E.2d 222. We decline to so extend the rule in *Oates*. We believe PSC did not owe plaintiffs a duty of care recognized by law under the circumstances.

Moreover, even if we were to hold that PSC owed a duty of care to plaintiffs, we believe plaintiffs failed to present any evidence during discovery to forecast negligence on the part of PSC. Mr. Everts testified during his deposition that he "didn't really know" what the role of PSC was in the construction of the home until he received a copy of the contract between PSC and Mr. Parkinson. Mr. Everts then realized that PSC was hired only "to finish a job" that another company had started, and that "the application of the stucco was [already] there" at the time PSC performed its work. Mr. Everts testified that he has no reason to believe that PSC failed to perform the work that they had agreed to perform in their contract with Mr. Parkinson. In addition, when referred to the portions of the complaint alleging that PSC breached a duty to perform "inspection" work on the house, and when asked what "inspection" work he believes PSC had a duty to perform, Mr. Everts stated: "Well, I can tell you that this was composed before we had the information at hand, and, so, I would say that, according to what I've read, this wouldn't apply." We believe that the trial court properly granted summary judgment in favor of PSC on plaintiffs' negligence claim.

In summary, we reverse the trial court's order granting summary judgment on plaintiffs' claim of fraud against Mr. Parkinson and we remand for further proceedings on this claim. As to the claim of fraud against Mrs. Parkinson, and as to all other claims against the Parkinsons (negligent misrepresentation, breach of contract, breach of express and implied warranties) we affirm the trial court's grant of summary judgment in favor of the Parkinsons. We affirm the trial court's order granting summary judgment in favor of defendants ATD and PSC.

Affirmed in part, reversed in part and remanded.

Judges TYSON and SMITH concur.

KATHY A. WOOD AND EVALYN GONZALES, PLAINTIFFS v. NORTH CAROLINA STATE UNIVERSITY, DEFENDANT

No. COA00-1129

(Filed 4 December 2001)

Immunity— sovereign—waiver—liability insurance—doctrine of quasi-estoppel—ministerial duty exception

The trial court erred in a sexual harassment case, based on defendant university's failure to take disciplinary action against a professor, by granting plaintiff students' motion to strike defendant's defense of sovereign immunity and by denying defendant's motion for summary judgment, because: (1) the State does not waive sovereign immunity through the purchase of liability insurance in the same manner as the city or county level of government; (2) jurisdiction over tort claims against the State and its agencies remains exclusively with the Industrial Commission under N.C.G.S. § 143-291(a) even if the State has purchased liability insurance since the insurance reduces the payment obligation of the State and does not further waive immunity; (3) the insurance policy was purchased pursuant to N.C.G.S. § 58-32-15, which expressly provides that the purchase of such insurance does not constitute a waiver of sovereign immunity; (4) the university is not barred from arguing its sovereign immunity defense by the doctrine of quasi-estoppel since it is an equitable doctrine and the law is clear that any waiver of the State's sovereign immunity must be by action of the General Assembly; and (5) the university is not barred from arguing its sovereign immunity defense by the ministerial duty exception even though the university had a written sexual harassment policy that made it mandatory for the university to take disciplinary action against the professor.

Appeal by defendant from order entered 15 August 2000 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 22 August 2001.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellees.

Attorney General Roy Cooper, by Thomas O. Lawton III, Assistant Attorney General, for defendant-appellant.

HUDSON, Judge.

North Carolina State University ("NCSU") appeals an order granting the plaintiffs' motion to strike its defense of sovereign immunity and denying its motion to dismiss, which the court converted to a motion for summary judgment, on the ground of sovereign immunity. Because we hold that to the extent NCSU's sovereign immunity was waived, jurisdiction is in the Industrial Commission, we vacate the order and remand this action to the superior court for dismissal.

I.

The facts relevant to this appeal are not in dispute. Plaintiffs Kathy A. Wood and Evalyn Gonzales are former students at NCSU who alleged that they were sexually harassed by Shuaib Ahmad, a former NCSU professor. Plaintiffs filed a complaint on 28 May 1999, alleging intentional infliction of mental and emotional distress against Ahmad and against NCSU on the theory that NCSU ratified Ahmad's conduct by failing to discipline and fire him. On 20 July 1999, NCSU moved to dismiss the complaint on the basis of sovereign immunity. Plaintiffs moved to strike the defense of sovereign immunity on 13 September 1999. Plaintiffs then amended their complaint to allege that NCSU waived its sovereign immunity by purchasing liability insurance and to add causes of action against NCSU for negligent retention and negligent supervision. NCSU moved for dismissal of the amended complaint on the basis of sovereign immunity on 27 September 1999. On 4 October 1999, Plaintiffs voluntarily dismissed Ahmad as a defendant.

After a hearing, the superior court granted Plaintiffs' motion to strike the defense of sovereign immunity and denied NCSU's motion to dismiss the amended complaint, which the court had converted to a motion for summary judgment. The trial court determined that NCSU had waived the defense of sovereign immunity by purchasing liability insurance; that the doctrine of sovereign immunity does not apply to the facts of this case due to a ministerial duty exception to the doctrine; that the doctrine of sovereign immunity does not apply to claims of negligent retention and negligent supervision; and that NCSU is estopped from asserting the defense of sovereign immunity. NCSU appeals this order.

II.

We have held that "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant imme-

diate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999). Therefore, although this is an appeal from an interlocutory order, it is properly before us. *See* N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1) (1999); *Vest v. Easley*, 145 N.C. App. 70, 72, 549 S.E.2d 568, 571 (2001).

Sovereign immunity protects the State and its agencies from suit absent waiver or consent. *See Guthrie v. State Ports Authority*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983); *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 172-73, 118 S.E.2d 792, 795 (1961); *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 192, 371 S.E.2d 503, 506-07 (1988), *appeal dismissed and disc. review denied*, 323 N.C. 706, 377 S.E.2d 229-30, *cert. denied*, 493 U.S. 808, 107 L. Ed. 2d 19 (1989), *overruled on other grounds by Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied sub nom. Durham v. Corum*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). NCSU is a State agency. *See Truesdale*, 91 N.C. App. at 192, 371 S.E.2d at 506-07. Therefore, since there is no allegation that NCSU consented to suit, it is immune from suit unless its sovereign immunity has been waived.

A waiver of sovereign immunity must be established by the General Assembly. Our Supreme Court has stated that "[i]t is for the General Assembly to determine when and under what circumstances the State may be sued." *Guthrie*, 307 N.C. at 534, 299 S.E.2d at 625 (emphasis and internal quotation marks omitted). The Court has further stated that

> [t]he State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a clear waiver by the lawmaking body. The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by plain, unmistakable mandate of the lawmaking body.

Orange County v. Heath, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972). Moreover, a statute creating a waiver must be strictly construed. *See Floyd v. Highway Commission*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955); *Jones v. Pitt County Mem. Hospital*, 104 N.C. App. 613, 615-16, 410 S.E.2d 513, 514 (1991).

Plaintiffs argue that the trial court properly struck NCSU's defense of sovereign immunity for three reasons: (1) NCSU waived its sovereign immunity by purchasing liability insurance; (2) NCSU is

precluded from arguing the defense of sovereign immunity by the doctrine of quasi-estoppel; and (3) the ministerial duty exception to the doctrine of sovereign immunity applies here. We disagree on all grounds. The trial court relied upon the three grounds listed above, and additionally found that the doctrine of sovereign immunity does not apply to claims of negligent retention and negligent supervision. The court erred in this finding. *See Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 684, 529 S.E.2d 458, 462 ("[W]e find negligent supervision to be a viable tort claim subject to the doctrine of sovereign immunity."), *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000).

A.

Plaintiffs first argue that NCSU waived its sovereign immunity by purchasing liability insurance, at least up to the limit of the insurance coverage. While it may be possible to interpret the law this way, we are not persuaded that there is a "plain, unmistakable mandate" from the General Assembly to waive immunity in these circumstances. *Heath*, 282 N.C. at 296, 192 S.E.2d at 310; *see Guthrie*, 307 N.C. at 534-35, 299 S.E.2d at 625 (explaining that the State's immunity may be waived only by the General Assembly).

1.

Plaintiffs rely on *dicta* that has been promulgated through some of our reported cases. In *EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources*, 108 N.C. App. 24, 422 S.E.2d 338 (1992), *overruled in part by Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997), this Court stated that "sovereign immunity precludes suit against the State and its agencies unless the State has consented to be sued or waived its right. Such waiver is manifested by the purchase of liability insurance . . . ." 108 N.C. App. at 27, 422 S.E.2d at 340 (citation omitted). The *EEE-ZZZ Lay Drain* Court cited *Baucom's Nursery Co. v. Mecklenburg County*, 89 N.C. App. 542, 544, 366 S.E.2d 558, 560, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 274 (1988), for this proposition. However, we did not hold in *Baucom's Nursery* that the State waives its immunity by purchasing liability insurance. Rather, we stated that "a county in this State may waive governmental immunity by purchasing liability insurance," and we cited to the statutory provision that created this waiver. 89 N.C. App. at 544, 366 S.E.2d at 560 (emphasis added). Indeed, N.C. Gen. Stat. § 153A-435 (1999) provides that "[p]urchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insur-

ance coverage, for any act or omission occurring in the exercise of a governmental function." N.C.G.S. § 153A-435(a) (emphasis added); *see also* N.C. Gen. Stat. § 160A-485(a) (1999) (providing that a city may "waive its immunity from civil liability in tort by the act of purchasing liability insurance."). Subsequently, this Court stated in *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993), that the doctrine of sovereign immunity "is inapplicable . . . where the state has consented to suit or has waived its immunity through the purchase of liability insurance." 110 N.C. App. at 714, 431 S.E.2d at 493-94. The *Messick* Court cited *EEE-ZZZ Lay Drain* in support of this statement.

Despite Plaintiffs' contention to the contrary, the broad statements in *EEE-ZZZ Lay Drain* and *Messick* are *dicta*, because the holdings of those cases did not rely on the proposition that the State waives its immunity by purchasing liability insurance. *See Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby."). The *EEE-ZZZ Lay Drain* Court held that there was no waiver because none of the conditions that could constitute a waiver were present in the case; there was apparently no allegation that any of the governmental defendants had purchased liability insurance. *See EEE-ZZZ Lay Drain*, 108 N.C. App. at 27, 422 S.E.2d at 341. The *Messick* Court held that there was no waiver because the record did not show that the defendant-county had purchased liability insurance. *See Messick*, 110 N.C. App. at 714, 431 S.E.2d at 494. The *dicta* from *EEE-ZZZ Lay Drain* and *Messick* have been repeated, but we have found no opinion in which the issue of whether the State waives its sovereign immunity by purchasing liability insurance was squarely confronted and decided. Because these cases do not hold that the State waives its immunity by purchasing insurance, nor do they cite a statute specifically providing that the State waives its immunity by purchasing insurance, we do not find them binding on this point.

2.

The State "partially waived" its sovereign immunity with respect to certain tort claims when the General Assembly enacted the Tort Claims Act. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 329, 293 S.E.2d 182, 185 (1982). The Tort Claims Act provides in relevant part:

(a) The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of damages as provided in subsection (a1) of this section, but in no event shall the amount of damages awarded exceed the amounts authorized in G.S. 143-299.2 cumulatively to all claimants on account of injury and damage to any one person arising out of a single occurrence. . . . The fact that a claim may be brought under more than one Article under this Chapter shall not increase the foregoing maximum liability of the State.

. . . .

(b) If a State agency, otherwise authorized to purchase insurance, purchases a policy of commercial liability insurance providing coverage in an amount at least equal to the limits of the State Tort Claims Act, such insurance coverage shall be in lieu of the State's obligation for payment under this Article.

N.C. Gen. Stat. § 143-291 (Supp. 2000).[1]

Our Supreme Court explained that the "effect of the Tort Claims Act was twofold": the State "consent[ed] to direct suits brought as a

1. We note that the statute was amended after Plaintiffs filed their claim, but the amendment applies to claims that were pending on or after 1 July 2000. *See* The Current Operations and Capital Improvements Appropriations Act of 2000, S.L. 2000-67, §§ 7A.(k), 28.5, 2000 N.C. Sess. Laws 197, 228, 440.

result of negligent acts committed by its employees in the course of their employment" and "the Act provided that the forum for such direct actions would be the Industrial Commission, rather than the State courts." *Teachy*, 306 N.C. at 329, 293 S.E.2d at 185. As the Court further explained in *Guthrie*, "an action in tort against the State and its departments, institutions, and agencies is within the exclusive and original jurisdiction of the Industrial Commission," and therefore, "a tort action against the State is not within the jurisdiction of the Superior Court." *Guthrie*, 307 N.C. at 539-40, 299 S.E.2d at 628.

Plaintiffs assert that N.C.G.S. § 143-291(b), which the General Assembly added subsequent to *Teachy* and *Guthrie*, constitutes a waiver of sovereign immunity by the State for tort actions when the State has purchased commercial liability insurance in an amount equal to or exceeding the limit set forth in § 143-291(a). Implicit in Plaintiffs' argument is the contention that, through N.C.G.S. § 143-291(b), the State has, in addition to waiving its sovereign immunity, consented to be sued in superior court for amounts up to the limits of the insurance coverage. We cannot agree with Plaintiffs that this statute implicitly waives immunity and confers jurisdiction on the superior court in cases where the State has purchased commercial liability insurance providing coverage at least equal to the limit in the Tort Claims Act.

Plaintiffs rely on *Meyer v. Walls*, 122 N.C. App. 507, 471 S.E.2d 422 (1996), *aff'd in part and rev'd in part by* 347 N.C. 97, 489 S.E.2d 880 (1997), in which this Court held that a county department of social services came within the purview of both N.C.G.S. § 143-291, the Tort Claims Act, and N.C.G.S. § 153A-435, the statute authorizing a county to purchase liability insurance. *See* 122 N.C. App. at 514, 471 S.E.2d at 427-28. Because the Tort Claims Act waives immunity while vesting jurisdiction in the Industrial Commission, and N.C.G.S. § 153A-435 waives immunity while vesting jurisdiction in superior court, this Court concluded that there was a potential conflict between the two statutes and applied rules of statutory construction in an attempt to reconcile the perceived conflict. *See* 122 N.C. App. at 511-14, 471 S.E.2d at 426-28. It was within this context that the Court stated:

> Under the plain language of G.S. 143-291(b), the Tort Claims Act no longer controls the payment of damages where a State agency has procured liability insurance with policy limits equal to or greater than the . . . cap provided for in G.S. 143-291(a). It follows

> logically that G.S. 143-291(b) requires that the Tort Claims Act is no longer controlling with regard to jurisdiction once a governmental entity has procured liability insurance with policy limits equal to or greater than [this cap]. Jurisdiction is then controlled by the statute authorizing the governmental entity to purchase liability insurance.

Id. at 513, 471 S.E.2d at 427.

On appeal, our Supreme Court held that a county department of social services is not a State agency, and therefore does not fall within the purview of the Tort Claims Act. *See Meyer*, 347 N.C. at 103, 489 S.E.2d at 883. Instead, a county department of social services is a county agency, subject only to N.C.G.S. § 153A-435. *See Meyer*, 347 N.C. at 108, 489 S.E.2d at 886. Hence, there is no statutory conflict, and jurisdiction lies in superior court when a county agency has waived its sovereign immunity. Because the entire analysis of the Court of Appeals opinion was predicated on the assumption, held by the Supreme Court to be erroneous, that there was a potential conflict between the jurisdictional provisions of N.C.G.S. § 143-291 and N.C.G.S. § 153A-435, we do not find our Court's opinion in *Meyer* compelling.

We conclude that the issue of whether N.C.G.S. § 143-291(b) constitutes a waiver of sovereign immunity beyond that created in N.C.G.S. § 143-291(a) is an issue of first impression. Our Supreme Court has held that the Tort Claims Act must be strictly construed because it is in derogation of sovereign immunity. *See Floyd*, 241 N.C. at 464, 85 S.E.2d at 705. Strictly construing the language at issue here, we believe that the phrase "such insurance coverage shall be in lieu of the State's obligation for payment under this Article," N.C.G.S. § 143-291(b), is more consistent with a designation of the source of payment than with a designation of the forum for adjudication.

In the absence of language explicitly expressing such intent, we are constrained to hold that the General Assembly did not intend N.C.G.S. § 143-291(b) to waive the State's sovereign immunity beyond that specified in N.C.G.S. § 143-291(a), and that jurisdiction over tort claims against the State and its agencies remains exclusively with the Industrial Commission. Similar language in other statutory provisions governing tort claims brought against the State, its agencies, and its employees, supports this interpretation of N.C.G.S. § 143-291(b) as designating the source of payment of an award when the State has purchased liability insurance of a certain amount. Article 31, "Tort

Claims against State Departments and Agencies," governs tort claims brought directly against the State, its departments, or agencies. A statutory provision within this Article states as follows:

> (a) The maximum amount that the State may pay cumulatively to all claimants on account of injury and damage to any one person arising out of any one occurrence, whether the claim or claims are brought under this Article, or Article 31A or Article 31B of this Chapter, shall be five hundred thousand dollars ($500,000), less any commercial liability insurance purchased by the State and applicable to the claim or claims under G.S. 143-291(b), 143-300.6(c), or 143-300.16(c).
>
> (b) The fact that a claim or claims may be brought under more than one Article under this Chapter shall not increase the above maximum liability of the State.

N.C. Gen. Stat. § 143-299.2 (Supp. 2000) (emphasis added). The emphasized portion of this provision suggests the General Assembly envisioned that any commercial liability insurance would be used to offset the State's payment obligation, not to further waive the State's immunity.

Article 31A of Chapter 143 of the General Statutes is entitled "Defense of State Employees, Medical Contractors and Local Sanitarians." This Article provides for the defense by the State of an action brought against a State employee "on account of an act done or omission made in the scope and course of his employment as a State employee." N.C. Gen. Stat. § 143-300.3 (1999). Additionally, Article 31A provides that the State will pay any judgment "awarded in a court of competent jurisdiction against a State employee," not to exceed the maximum amount payable under the Tort Claims Act. N.C. Gen. Stat. § 143-300.6(a) (Supp. 2000). Subsection (c) of N.C.G.S. § 143-300.6 provides that "[t]he coverage afforded employees . . . under this Article shall be excess coverage over any commercial liability insurance, other than insurance written under G.S. 58-32-15, up to the limit provided in subsection (a)." Section 58-32-15 authorizes State departments and agencies to acquire additional insurance covering their employees and is discussed further below. Section 143-300.6(c) again indicates that the General Assembly intended that commercial liability insurance would reduce the payment obligation of the State, rather than further waive immunity. Indeed, the same statute that provides for the payment of a judgment awarded against an employee expressly states that it "does not waive

the sovereign immunity of the State with respect to any claim." N.C.G.S. § 143-300.6(a). These provisions may explain why an agency would purchase insurance in an amount exceeding the limit in the Tort Claims Act. When actions against a State employee are allowable, they are brought in superior court, where an award is not limited as in N.C.G.S. § 143-291(a). *See Meyer*, 347 N.C. at 105, 489 S.E.2d at 884. Although the agency itself is not liable for an amount exceeding the limit in the Tort Claims Act, it may purchase insurance to cover the liability of an employee.

3.

Furthermore, after careful review of the insurance policy on which Plaintiffs rely for their argument, we conclude that the policy was purchased pursuant to N.C. Gen. Stat. § 58-32-15 (1999). Because this statute expressly provides that the purchase of such insurance does not constitute a waiver of sovereign immunity, *see* N.C.G.S. § 58-32-15(c), the purchase of this policy did not waive NCSU's immunity.

Article 32 of Chapter 58 of the General Statutes is entitled "Public Officers and Employees Liability Insurance Commission." The Article establishes the Public Officers and Employees Liability Insurance Commission ("the Commission"). *See* N.C. Gen. Stat. § 58-32-1 (1999). The Commission is authorized to "acquire from an insurance company or insurance companies a group plan of professional liability insurance covering the law-enforcement officers and/or public officers and employees of any political subdivision of the State." N.C. Gen. Stat. § 58-32-10 (1999). Additionally, the Commission is authorized to "acquire professional liability insurance covering the officers and employees, or any group thereof, of any State department, institution or agency or any community college or technical college." N.C.G.S. § 58-32-15(a). Other than these two provisions, no other statutory authorization has been given to the Commission for the purchase of liability insurance.

The policy which Plaintiffs have provided in the record on appeal lists as the named insured "Public Officers & Employees Liability Insurance Commission and All Persons Covered Under Defense of State Employees State of North Carolina." Because the Commission is authorized to purchase insurance for a State agency pursuant only to N.C.G.S. § 58-32-15, we must conclude that it purchased this policy pursuant to that statute.

Moreover, the Commission is authorized to acquire professional liability insurance pursuant to N.C.G.S. § 58-32-15 "only if the coverage to be provided by the insurance policy is in excess of the protection provided by Articles 31 and 31A of Chapter 143 of the General Statutes." N.C.G.S. § 58-32-15(b). The policy at issue here states that "[t]he insurance afforded by this policy is . . . excess of any amount payable by the State, or its agencies or departments, pursuant to the requirements of the Defense of State Employees Act, North Carolina General Statute 143.300.2 through 143-300.6." The fact that language in the policy parallels language in N.C.G.S. § 58-32-15(b) further demonstrates that the policy was issued pursuant to this statute. Accordingly, purchase of this policy did not constitute a waiver of sovereign immunity. *See* N.C.G.S. § 58-32-15(c).

4.

In summary, we conclude that N.C.G.S. § 143-291(b) does not constitute a waiver of sovereign immunity beyond that provided in N.C.G.S. § 143-291(a), and, according to the express terms of N.C.G.S. § 58-32-15, the purchase of the insurance policy at issue here did not waive the State's immunity. Therefore, the superior court does not have jurisdiction over Plaintiffs' claim against NCSU, and any such claim would proceed, if at all, under the Tort Claims Act in the Industrial Commission.

B.

Plaintiffs next argue that NCSU is barred from arguing its sovereign immunity defense by the doctrine of quasi-estoppel. We disagree.

Plaintiffs cite several cases in support of their argument that NCSU should be estopped from asserting its immunity defense. In none of these cases, however, did the court invoke quasi-estoppel to bar an assertion by the State of its sovereign immunity. In *Holland Group v. N.C. Dept. of Administration*, 130 N.C. App. 721, 504 S.E.2d 300 (1998), an administrative agency was estopped from making certain factual assertions. *See* 130 N.C. App. at 725-27, 504 S.E.2d at 304-05. In *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E.2d 167 (1982), a workers compensation case, a county was estopped from arguing that an injured worker was not its employee. *See* 306 N.C. at 358-60, 293 S.E.2d at 168-69. In *Washington v. McLawhorn*, 237 N.C. 449, 75 S.E.2d 402 (1953), our Supreme Court, while acknowledging that circumstances might arise under which estoppel may be applied

against a county, held that the plaintiffs failed to allege an estoppel against a county that had asserted title to land. *See* 237 N.C. at 454, 75 S.E.2d at 405-06. No issue of sovereign immunity was raised in any of these cases.

As Plaintiffs concede, quasi-estoppel is an equitable doctrine. *See, e.g., Thompson v. Soles*, 299 N.C. 484, 486, 263 S.E.2d 599, 602 (1980). However, the law is clear that any waiver of the State's sovereign immunity must be by action of the General Assembly. *See Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435 (1992) ("We feel that any change in this doctrine [of sovereign immunity] should come from the General Assembly."); *Guthrie*, 307 N.C. at 534, 299 S.E.2d at 625 ("It is for the General Assembly to determine when and under what circumstances the State may be sued." (emphasis and internal quotation marks omitted)); *Steelman v. City of New Bern*, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971) ("[A]ny further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court."). If a court could estop NCSU from asserting its otherwise valid sovereign immunity defense, then, effectively, that court, rather than the General Assembly, would be waiving the State's sovereign immunity.

C.

Finally, citing *Broome v. Charlotte*, 208 N.C. 729, 182 S.E. 325 (1935), Plaintiffs contend that the ministerial duty exception to the doctrine of sovereign immunity applies here, thereby depriving NCSU of its sovereign immunity defense, because NCSU had a written sexual harassment policy that made it mandatory for NCSU to take disciplinary action against Ahmad. While the record shows that NCSU did have such a policy, we disagree that it implicates an exception to the doctrine of sovereign immunity in this case.

In *Broome*, our Supreme Court explained that a city's immunity is not absolute:

> In its public or governmental character a municipal corporation acts as agent of the State for the better government of that portion of its people who reside within the municipality, while in its private character it exercises powers and privileges for its own corporate advantage. When a municipal corporation is acting in its ministerial or corporate character in the management of

> property for its own benefit, it may become liable for damages caused by the negligence of its agents subject to its control. But when the city is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its agents, unless some statute subjects the corporation to responsibility.

208 N.C. at 731, 182 S.E. at 326. We need not consider whether, as Plaintiffs assert, the administration of a sexual harassment policy comes within this exception. In cases where a county or city asserts its immunity, this Court, following our Supreme Court, continues to recognize the distinction between torts committed during the performance of governmental functions, on the one hand, and torts committed during the performance of ministerial or proprietary functions, on the other hand; a county or city enjoys immunity only with respect to the former. *See, e.g., Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 104-05, 545 S.E.2d 243, 248-49 (2001). Our Supreme Court has held that, although the proprietary function exception is valid as applied to the city or county level of government, the exception is not applicable when the State asserts its sovereign immunity. *See Guthrie*, 307 N.C. at 534, 299 S.E.2d at 625 ("The State has absolute immunity in tort actions without regard to whether it is performing a governmental or proprietary function except insofar as it has consented to be sued or otherwise expressly waived its immunity."). It is not clear whether the proprietary function exception is distinct from the ministerial duty exception, and we have not found a case addressing whether the ministerial duty exception is applicable to the State. Nevertheless, the Supreme Court's reasoning in rejecting the proprietary function exception to the State's sovereign immunity makes clear that the nature of the action is irrelevant. *See id.* (rejecting the proprietary function exception as applied to the State due to the well-established proposition that the State's immunity is "*absolute and unqualified*"). Therefore, NCSU "is entitled to claim the defense of sovereign immunity absent express statutory waiver." *Id.* at 535, 299 S.E.2d at 625.

III.

In conclusion, we hold that the trial court erred in granting Plaintiffs' motion to strike NCSU's defense of sovereign immunity and denying summary judgment for NCSU. To the extent that NCSU's sovereign immunity has been waived, jurisdiction lies with the Industrial

Commission, pursuant to N.C.G.S. § 143-291(a). Accordingly, we remand to the superior court for dismissal of the action.

Reversed and remanded.

Judges McGEE and JOHN concur.

IN THE MATTER OF: JAMYA NESBITT

No. COA00-1168

(Filed 4 December 2001)

Termination of Parental Rights— neglect—willfully leaving child in foster care

The trial court abused its discretion by entering an order terminating the parental rights of respondent mother based on neglect and a violation of N.C.G.S. § 7B-1111(a)(2) (previously N.C.G.S. § 7A-289.32) regarding willfully leaving a child in foster care for more than twelve months without making reasonable progress, because: (1) many of the isolated incidents outlined in the trial court's findings were immediately corrected by the mother, and testimony of a psychotherapist, a clinical social worker, and a social worker supports a finding that reasonable progress was made by the mother; (2) on the issue of safety concerns, petitioner failed to meet its burden of demonstrating by clear, cogent, and convincing evidence the lack of reasonable progress by the mother to support grounds for termination of her parental rights; (3) on the issue of housing, the findings that the mother had made no progress in securing permanent stable housing are all based on events that occurred after the child had been removed from the home, and the trial court's own findings show that at the time of the hearing the mother had secured a new home and had been living in that home for almost a year; (4) on the issue of employment, the mother continues her efforts to secure employment, the mother is precluded from securing employment as an exotic dancer which provided a living for her family for many years, the mother sought work that would coincide with available hours that she could visit with her child, and the mother has maintained child support payments while her

child was in the custody of Youth and Family Services; (5) the mother was cooperative with the social workers, completed all required parenting classes and mental health therapy, and visited with her child at every possible chance; and (6) the decision of whether to terminate parental rights should not be relegated to a choice between the natural parent and the foster family, even if the foster family would best provide for the child's welfare, as long as the parent provides for the child adequately.

Appeal by respondent from judgment entered 22 March 2000 by Judge Elizabeth M. Currence in Mecklenburg County District Court. Heard in the Court of Appeals 23 May 2001.

Alan B. Edmonds, for petitioner-appellee Mecklenburg County Youth & Family Services.

Rick Lail, for respondent-appellant Caroline Nesbitt.

Chiege Okwara, Child Advocate with Guardian Ad Litem.

BIGGS, Judge.

On 22 March 2000, the trial court entered an order terminating the parental rights of Caroline and Jamey Nesbitt. Ms. Nesbitt gave notice of appeal in open court. Jamey Nesbitt did not contest the order and is not a party to this action. For the reasons that follow, we reverse the trial court's order terminating the parental rights of Caroline Nesbitt.

Jamya (Mimi) Nesbitt was born in Mecklenburg County on 30 July 1995, to Caroline and Jamey Nesbitt. Caroline and Jamey separated in 1996; since their separation, Jamey's whereabouts are unknown. Youth and Family Services (YFS) filed a juvenile petition to remove Mimi from Ms. Nesbitt's custody. The petition alleged that Ms. Nesbitt neglected Mimi by failing to provide proper care, supervision, and discipline. On 13 August 1997, YFS obtained a non-secure custody order and placed Mimi in foster care. On 11 September 1997, an adjudicatory hearing was held on the allegations in the petition. Mimi was adjudicated dependent; and, the portion of the petition alleging neglect was held in abeyance. Mimi has remained in the custody of YFS since her removal and has been with the same foster family the entire time. The foster family wishes to adopt Mimi.

In February 1999, the trial court, upon review of this matter, found that Ms. Nesbitt was not making reasonable progress toward

reunification and approved changing the goal of the case from reunification to termination of parental rights and adoption. On 5 May 1999, DSS filed a petition to terminate the parental rights of Ms. Nesbitt. Hearings on the petition were conducted on 7 December 1999, 11 February 2000, 9 March 2000 and 13 March 2000 before Judge Elizabeth M. Currence of Mecklenburg County District Court.

The trial court found that Ms. Nesbitt had willfully left Mimi in foster care for more than twelve (12) months without making reasonable progress toward correcting the conditions that led to Mimi's placement in foster care in violation of N.C.G.S. § 7B-1111(a)(2) (1999). At the final hearing on 13 March 2000, the court determined that termination of parental rights was in Mimi's best interest, and on 15 September 2000, filed an order terminating Ms. Nesbitt's parental rights.

Initially, we note that the North Carolina Juvenile Code, including the provisions governing proceedings to terminate parental rights, was revised effective 1 July 1999. This revision replaced various articles of Chapter 7A with new Chapter 7B. The petition in the instant case was filed on 5 May 1999, which was prior to the effective date of Chapter 7B; accordingly, this case is governed by the appropriate provisions of Chapter 7A.

We find that it was error for the trial court to rely on Chapter 7B as statutory authority for its decision. However, we find this error to be harmless in that there is no material difference in the pertinent portions of Chapter 7A which actually control in the instant case.

Termination of parental rights proceedings are conducted in two phases: adjudication and disposition. *See generally, In re Brim*, 139 N.C. App. 733, 535 S.E.2d 367 (2000); *In re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997). During adjudication, the petitioner has the burden of proof to demonstrate by clear, cogent and convincing evidence that one or more of the statutory grounds for termination exist. *In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995); *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992). The standard of appellate review of the trial court's conclusion that grounds exist for termination of parental rights is whether the trial judge's findings of fact are supported by clear, cogent, and convincing evidence, and whether these findings support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (2000), *disc. review denied*, 353 N.C. 374, —, S.E.2d

— (2001); *In re Allred*, 122 N.C. App. 561, 471 S.E.2d 84 (1996). The statutory grounds for termination are set forth in N.C.G.S. § 7A-289.32 (now N.C.G.S. § 7B-1111(a)).

If the petitioner meets its burden of proving that there are grounds to terminate parental rights, the trial court then moves to the dispositional phase and must consider whether termination is in the best interests of the child. *In re Brake*, 347 N.C. 339, 341, 493 S.E.2d 418, 420 (1997); *In re Shue*, 311 N.C. 586, 319 S.E.2d 567 (1984). The trial court does not automatically terminate parental rights in every case that presents statutory grounds to do so. *In re Leftwich*, 135 N.C. App. 67, 518 S.E.2d 799 (1999); *In re Allred*, 122 N.C. App. 561, 471 S.E.2d 84 (1996). The trial court has discretion, if it finds that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the child's best interests. *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001); *In re McLemore*, 139 N.C. App 426, 533 S.E.2d 508 (2000). The trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard. *In re Brim*, 139 N.C. App. 733, 535 S.E.2d 367 (2000); *In re Allred*, 122 N.C. App. 561, 471 S.E.2d 84 (1996).

Caroline Nesbitt contends that the trial court erred by finding as fact and concluding as a matter of law that grounds exist to terminate her parental rights under N.C.G.S. § 7B-1111(a)(2). We agree.

The trial court based its order of termination on four grounds; however, the court found that, while all four grounds apply to the father, only one of the grounds set forth applied to Ms. Nesbitt. The court concluded that Caroline Nesbitt had "willfully left Jamya Nesbitt in foster care for more than twelve (12) months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting the conditions which lead to removal in violation of N.C.G.S. § 7B-1111(a)(2)." Further, the court found that it "was in the best interest of Jamya Nesbitt that Ms. Nesbitt's parental rights be terminated."

It is undisputed that Mimi has been in foster care over twelve months. At the time of the termination proceeding, she had been in foster care for twenty-seven (27) months. Thus, this Court must determine whether there is clear, cogent and convincing evidence to support the trial court's finding that Ms. Nesbitt failed to make reasonable progress in correcting the conditions which led to Mimi's removal and further, that such failure was willful.

We first note that it is unclear from the record what specific conditions existed at the time of Mimi's removal which were to be corrected before she could be returned to Ms. Nesbitt's custody. This is due in large part to the failure to include in the record a number of critical documents such as the order adjudicating Mimi dependent. The record does indicate, however, that the major concern expressed by YFS at the time of removal was related to Mimi's safety. The exact safety issue is not apparent from the record. Further, it would appear that it was not until the case plan changed from reunification to termination, that additional concerns were expressed concerning housing and employment. The record does suggest that the areas upon which the trial court evaluated Ms. Nesbitt's progress in the order terminating her parental rights were safety concerns and parenting skills, housing and employment.

The trial court made the following findings to support its conclusion that Ms. Nesbitt had not made reasonable progress related to safety issues and parenting skills:

. . . .

6. The visits had to be supervised largely due to safety concerns, i.e., Caroline Nesbitt was unable to establish boundaries which would allow the child to visit with her unsupervised.

7. Specific examples of the mother's lack of awareness of boundaries included not holding the child's hand when crossing the street, and having a lit candle on the floor at a home visit. When these occurred, the child was only two years old. Caroline Nesbitt did not seem to understand a two-year-old could not be trusted to use correct judgment in every situation.

8. Even after being advised, Ms. Nesbitt had the lit candle on her floor at the next visit. Ms. Nesbitt responded she always lights candles and Jamya knew not to go near them. The mother also allowed the child to run around near a floor fan with a rotating blade. The mother had an unrestrained, medium-sized dog at some of the visits.

. . . .

10. Also, Ms. Nesbitt talked to Jamya about adult emotional issues as if she were an adult. When the mother would discuss her personal life and problems such as housing and employment, Jamya would cry because she did not understand what her mother was saying.

. . . .

12. Mr. Bullard [the YFS social worker] had to address at least one of the above outlined problems each visit.

13. The mother also demonstrated inappropriate conduct by jumping off the steps (a vertical distance of 4 to 5 feet) at the Arosa House, the child's placement, in front of Jamya. Another time, Ms. Nesbitt jumped over a fence during a visit. Jamya was unable to follow her. Arosa House staff were concerned Jamya could get hurt if she imitated her mother.

14. During the time Derrick Bullard supervised the visits, the mother was never able to graduate to unsupervised visits as she was unable to consistently maintain age appropriate boundaries and deal with Jamya's tantrums adequately. There also continued to be some safety concerns.

. . . .

18. During the time Ms. Tamikia Scott supervised the visits, the mother was never able to have an unsupervised visit with the child. On the client/parent interactions report, the mother always had many blocks checked in the fair and poor category. Specific examples of the safety prompts given by Ms. Scott and the circumstances which led to the safety prompts include:

a. On May 10, 1999, Caroline and Jamya Nesbitt were playing in the park and Caroline continued to talk to another parent about her pregnancy while Mimi was climbing up the sliding board the wrong way. When Mimi reached the top of the slide, she called for her mother to look out for her. Ms. Nesbitt had to be prompted to maintain her level of supervision of the child and not put her primary focus on external factors around her.

b. On June 7, 1999, Ms. Nesbitt had to be prompted twice to stay focused on Mimi during the visit and not on the Family Center staff.

c. On June 14, 1999, Ms. Nesbitt allowed Mimi to stand on the edge of a brick wall surrounding a pond while she was looking at ducks swimming in the pond. Mimi was leaning over the edge to watch the ducks and Ms. Nesbitt walked back to a bench and sat down. Family Center staff removed Mimi from the edge and counseled her and her mother on this safety risk.

d. On June 21, 1999, Family Center staff counseled the mother the week before on safety risks in her home. When Mimi was brought to visit, there was an exposed light bulb burning on the floor of the house. The mother could have provided light to the room where the visit was occurring by opening a blind, but did not do so neither did she follow a suggestions [sic] made a week earlier to buy a lampshade for the lamp to cover the exposed light bulb.

e. On July 26, 1999, Family Center staff gave Ms. Nesbitt a safety prompt for leaving Mimi unattended at a Chuckie Cheese restaurant while Ms. Nesbitt was ordering a pizza.

The safety prompts continued after Ms. Scott stopped supervising the visits, however, the frequency of safety prompts declined. Ms. Scott noted in her February 2000 report the mother's ability to incorporate new knowledge about child development has been limited [sic]. The [c]ourt finds from the evidence this problem is significant because she is unable to apply the things she learns, consistently, especially the instruction she has received regarding child safety.

While we do conclude that there is evidence in the record to support these findings; we hold that this evidence does not rise to the level of clear, cogent and convincing evidence of grounds for termination of parental rights.

"Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *The N.C. State Bar v. Harris*, 137 N.C. App. 207, 218, 527 S.E.2d 728, 735 (2000) (quoting *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985)). And it "has been defined as evidence which should fully convince." *Id.* This Court has required strong evidence to support termination. *See Alleghany County Dept. of Social Services v. Reber*, 75 N.C. App. 467, 331 S.E.2d 256, 258 (1985) (held that case law requires stronger evidence to terminate parental rights); *In re Adcock*, 69 N.C. App. 222, 227, 316 S.E.2d 347, 350 (1984) (court found the totality of evidence to support termination was plenary, clear, cogent and convincing); *In re Moore*, 306 N.C. 394, 405, 293 S.E.2d 127, 133 (1982) (grounds exist where there was no evidence to the contrary); *In re Biggers*, 50 N.C. App. 332, 343, 274 S.E.2d 236, 243 (1981) (court found "overwhelming and uncontradicted evidence to support termination"). As in *Reber*,

we conclude that the evidence in this case is "neither plenary, nor overwhelming, nor uncontradicted."

Moreover, there is substantial evidence in the record that demonstrates that many of the isolated incidents outlined in the court's findings were immediately corrected by Ms. Nesbitt. With regards to a lit candle on the floor, Mr. Bullard testified to the following:

> Q: Did Ms. Nesbitt appear to recognize . . . and remove [the] potential hazard or risk?
>
> A: . . . [Y]es, sir.

****

With regards to a floor fan and medium size dog, Mr. Bullard testified to the following:

> A: There was the situation with the floor fan, a situation with a medium dog. . . .
>
> Q: So was the dog problem remedied? Was the dog either removed—
>
> A: It was remedied, yes, sir.
>
> Q: Was the fan remedied?
>
> A: Yes, sir.

In addition, the following testimony of Lynn Yarborough, a psychotherapist; Elaine Yates, a clinical social worker at the Family Center; and Tamikia Scott, a social worker with YFS, support a finding that reasonable progress was made by Ms. Nesbitt.

Ms. Yarborough began working with Ms. Nesbitt in October 1997, following Ms. Nesbitt's court ordered mental health evaluation. Ms. Yarborough testified that she did incorporate safety concerns in Ms. Nesbitt's therapy in June 1998. In an effort to help Ms. Nesbitt deal with the safety issues presented by YFS, Ms. Yarborough referred Ms. Nesbitt to a coping skills group. Ms. Nesbitt completed sessions with the coping skills group. Ms. Yarborough stated that Ms. Nesbitt kept virtually all of her appointments and has continued to meet with Ms. Yarborough.

Ms. Yates testified that from her observation of Ms. Nesbitt and Mimi, there was not a reason for restrictive visitation. She testified that Ms. Nesbitt selected appropriate TV shows and provided toys

and "physical safety." Ms. Yates also noted, for the court, a series of visits documenting Ms. Nesbitt's significant attempts to recognize and improve her reactions to Mimi:

> "[December 20th], [Ms. Nesbitt] appropriate [] TV shows, did a drawing exercise [with Mimi]."
>
> "January 31st, there were no prompts. . . ."
>
> "February 7th, . . .[Ms. Nesbitt] arrived an hour and a half early. She provided adequate parenting regarding safety issues. There were no prompts. . . ."
>
> "February 14th . . . [Ms. Nesbitt] was exceptionally appropriate and very trustful of me in dealing therapeutically with [Mimi's] regressions. She provided affection as I instructed her to and she did a real good job."
>
> "February 21st, no prompts . . . ."

While Ms. Yates stated that "[Ms. Nesbitt's] ability to incorporate new knowledge about child development has been limited", she further explained that this was due to "strongly-held beliefs about normal development" which are often attributed to personal childhood experiences. Ms. Yates explained an observation where Ms. Nesbitt expected Mimi to reminisce at an adult level of maturity while they "went through old clothes". Ms. Yates stated, that while she had to explain that children have different reactions, she did not find the interaction damaging. Rather, she stated, "I think actually it was quite helpful."

Finally, though the court found that Ms. Nesbitt was never able to have unsupervised visits with Mimi while Tamikia Scott supervised the visits, Ms. Scott testified that the frequency of the safety prompts decreased. Further, she testified:

> that Ms. Nesbitt "had improved some from the last visits we had. . . . Puts child well-being first. That was a major issue in the beginning. Safety, she had improved some on that one. Keeping [Mimi] safe in visit [sic], she had improved some on that one."

This Court is not at all persuaded by the numerous references to so called "safety prompts," particularly to matters as trivial as whether the mother used a lamp without a shade for lighting rather than opening the blinds; allowing a child to climb a slide the wrong way; or having a medium-sized dog. Even finding, as we do, that each of the

incidents set forth in the court's findings are supported by evidence, we conclude that these incidents, even considered cumulatively, do not support grounds for termination of parental rights. Accordingly, on the issue of the safety concerns, we conclude that the petitioner failed to meet its burden of demonstrating by clear, cogent and convincing evidence the lack of reasonable progress by Ms. Nesbitt to support grounds for termination of her parental rights.

The second area of concern upon which the trial court evaluated Ms. Nesbitt's progress was housing. The court made the following findings:

. . . .

22. When Julie Crapster became her social worker in June 1998, Ms. Nesbitt was living in an apartment on East 36th Street in Charlotte. However, the mother was evicted from that apartment in January, 1999. During the remainder of the time Julie Crapster was the worker on the case, the mother was unable to establish regular housing.

23. Immediately after being evicted, the mother lived in a hotel room for two weeks which her employer, Bally's Fitness, helped her secure. The mother was supposed to be saving money during this time.

24. On 8 January 1999, the mother met a man at a bus station who had just gotten out of prison and needed a roommate. Ms. Nesbitt discussed moving in with him. Julie Crapster encouraged her to go to the homeless shelter instead to save money.

25. On 20 January, the mother reported that she had moved in with the man she met at the bus station.

26. When Julie Crapster ceased being the worker on the case in March, 1999, Ms. Nesbitt was either living at the shelter or with the man she met at the bus station.

The court concluded that Ms. Nesbitt had made no progress in securing permanent stable housing. We first note that these findings related to housing are all based on events that occurred after Mimi had been removed from the home. Further, the court's own findings show that at the time of the hearing, Ms. Nesbitt had secured a new home and according to testimony from a social worker had been living in that home for almost a year. On cross-examination, Ms. Carrie Trammell, social worker, testified that Ms. Nesbitt's home was not "dirty—things weren't broken. . . ." She acknowledged that the apart-

ment was "reasonably well-kept". The trial court, however, expressed concern that Ms. Nesbitt had paid the last two months rent with money from her income tax returns but failed to provide a plan for paying future rent. While we acknowledge this as a legitimate concern, we also recognize that making ends meet from month to month is not unusual for many families particularly those who live in poverty. However, we do not find this a legitimate basis upon which to terminate parental rights. We again conclude that the petitioner has failed to meet its burden of demonstrating by clear, cogent and convincing evidence the absence of reasonable progress related to housing to support termination of Ms. Nesbitt's parental rights.

The third concern, upon which the court evaluated Ms. Nesbitt, was employment. On this particular issue, the court made the following findings:

> 84. Some time in 1993, the couple moved to Charlotte. In October, 1993, Ms. Nesbitt began to work as an exotic dancer, which she did for four years.
>
> 85. During the time she was an exotic dancer, she averaged making $1,000 a week.
>
> 86. At the time she became pregnant with Jamya, she stopped dancing temporarily and received Aid to Families with Dependent Children.
>
> . . . .
>
> 89. She continued working as an exotic dancer until February 1998. The mother was arrested for lewd and indecent conduct while dancing and, as a result, was fired from her employment at Leather & Lace South.
>
> 90. As part of an agreement with the District Attorney's office to have those charges dismissed, she agreed not to seek employment as an exotic dancer.
>
> 91. Caroline Nesbitt related many, many different jobs she had held since moving to Charlotte.
>
> 92. The most recent job was from May, 1999 through December, 1999 when she worked at Burger King. She was discharged from there in early December 1999.

Though the court's findings do indicate that Ms. Nesbitt has had approximately seven jobs since Mimi was removed, we are impressed

with the mother's continued efforts to secure employment. We further note that by agreement with the District Attorney's office, she is precluded from securing employment as an exotic dancer, employment that had provided a living for her family for many years. Moreover, we are impressed with the testimony that she sought work that would "coincide with available hours that she could visit with her daughter." Finally, the record shows that in spite of her troubled work history, Ms. Nesbitt has maintained child support payments while Mimi was in the custody of YFS and has maintained a home for almost a year.

Even, assuming *arguendo*, that the court's finding of failure to make reasonable progress was supported by clear, cogent and convincing evidence, in order to uphold the trial court's order, we must find that Ms. Nesbitt's failure was willful. *In re Bishop*, 92 N.C. App. 662, 375 S.E.2d 676 (1989). Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. *See Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995) (parent's refusal to obtain treatment for alcoholism constituted willful failure to correct conditions that had led to removal of child from home); *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992) (general lack of involvement with child over two year period supports finding that respondent willfully left child in foster care). In *In re Bishop*, 92 N.C. App. 662, 375 S.E.2d 676 (1989), the court found "willfulness" where respondent initially participated in programs designed to improve her circumstances, but later "largely abandoned these efforts"; her visits with her daughter were "infrequent"; and the social worker had a difficult time reaching her. *Id.* at 669, 375 S.E.2d at 681.

Here, we find that Ms. Nesbitt was cooperative with the social workers, completed all required parenting classes, mental health therapy, and visited with Mimi at every possible chance. Mr. Bullard testified that Ms. Nesbitt was "extremely cooperative, arrive[d] on time and actually early, prepared to visit for each visit, was very receptive to any feedback I gave her and was not defensive, [but, instead] cooperative." He also confirmed that "Mimi was excited to see mommy. . . ." Mimi and Ms. Nesbitt were "very affectionate towards each other." Ms. Julie Crapster testified that Ms. Nesbitt completed the mental health evaluation as ordered by the court and maintained current child support payments.

Finally, we are troubled by the numerous findings made by the trial court regarding the foster parents. The decision of whether to

terminate parental rights should not be relegated to a choice between the natural parent and the foster family. Our Supreme Court has held that "even if it were shown, . . . that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*. *Petersen v. Rogers*, 337 N.C. 397, 401, 445 S.E.2d 901, 904 (1994) (emphasis added). This was not a choice between Ms. Nesbitt and the foster parents. Rather, an independent decision of Ms. Nesbitt's fitness to parent should be made, and only if she is found to be either unwilling or unable to parent her child should the foster home then be considered under the best interests standard.

We conclude that this record fails to demonstrate clear, cogent and convincing evidence that Ms. Nesbitt willfully left her child in foster care without making reasonable progress. Accordingly, we do not reach review of the court's conclusion that it was in the best interest of the child to terminate Ms. Nesbitt's parental rights.

While we recognize that the trial court is perhaps in the best position to evaluate the evidence in these very sensitive cases and are mindful of the need for permanency for young children; we believe that the law requires compelling evidence to terminate parental rights. The permanent removal of a child from its natural parent requires the highest level of scrutiny and should only occur where there is compelling evidence of potential risk of harm to the child or their well being. This Court would not hesitate to support the drastic judicial remedy of termination of parental rights if it was clear from the record that grounds exist to do so. This record fails to support such grounds.

Accordingly, we reverse and vacate the trial court's order terminating parental rights.

Reversed and vacated.

Judges WYNN and CAMPBELL concur.

COMBS & ASSOCIATES, INC., PLAINTIFF v. CURTIS KENNEDY, DONALD MILLER, CAROLINA ENVIRONMENTAL TECHNOLOGIES, LLC, AND AMERICAN SIGMA, INC., DEFENDANTS

No. COA00-1068

(Filed 4 December 2001)

1. **Appeal and Error— appealability—partial summary judgment—voluntary dismissal of remaining claim**

The trial court did not err by denying defendant former employee's motion to dismiss plaintiff company's appeal on the issue of breach of employee duty of loyalty even though defendant contends the trial court's order is interlocutory based on the trial court's grant of only partial summary judgment regarding defendant, because plaintiff voluntarily dismissed the claim which survived summary judgment, making the trial court's grant of partial summary judgment a final order.

2. **Trade Secrets— misappropriation of trade secrets—sales forecasting information—customer database—territory review summary form**

The trial court did not err by granting summary judgment in favor of defendants on a claim for misappropriation of trade secrets, because: (1) the 6 November 1998 e-mail sent by defendant former employee to defendant business competitor containing sales forecasting information was either already possessed by defendant company or could have easily been compiled from its business records, and plaintiff's president provided this identical information in a 29 January 1999 letter to defendant company; (2) the customer database stored on defendant employee's computer could have been compiled by defendants through public listings such as trade show and seminar attendance lists; and (3) the territory review summary was a form which defendant company had provided to its southeast sales representatives including plaintiff.

3. **Wrongful Interference— tortious interference with contract—enticement and hiring of an at-will employee by a competing company**

The trial court did not err by granting summary judgment in favor of defendants on a claim for tortious interference with a contract based on defendant company and defendant business competitor allegedly interfering with defendant former em-

ployee's employment by inducing the employee to compete directly with plaintiff company, because: (1) plaintiff company fails to provide any evidence that either defendant company or defendant business competitor had knowledge of the terms of the policies and rules that formed the basis for a contractual relationship between defendant former employee and plaintiff, or that either intentionally induced defendant former employee to breach this contractual relationship; (2) the mere enticement and hiring of an at-will employee by a competing company, absent an improper motive, does not give rise to a tortious interference with a contract claim; and (3) the evidence in the light most favorable to plaintiff shows that both defendant company and defendant business competitor acted under legitimate business motives.

4. Wrongful Interference— tortious interference with contract—cancellation of exclusive representation contract

The trial court did not err by granting summary judgment in favor of defendants on a claim for tortious interference with a contract based on defendant former employee and defendant business competitor allegedly interfering with plaintiff company's exclusive representation contract with defendant company by inducing defendant company to cancel its contract, because: (1) there is no evidence that defendant business competitor acted maliciously or with a bad motive in his effort to compete with plaintiff company for defendant company's business; (2) our state does not recognize an independent tort for breach of duty of loyalty by an at-will employee absent evidence of a fiduciary relationship, and plaintiff failed to present evidence that it held a fiduciary relationship with defendant former employee; and (3) the two actions cited by plaintiff in support of its claim were actions by either defendant business competitor or defendant new business and are not directly attributable to defendant employee.

5. Conspiracy— civil—termination of exclusive representation contract

The trial court did not err by granting summary judgment in favor of defendants on a claim for civil conspiracy based on defendant company's termination of its exclusive representation contract with plaintiff company, because: (1) the fact that defendant company may have agreed with the individual defendants that their company, yet to be formed, would eventually replace plain-

tiff does not by itself demonstrate that defendants acted unlawfully; and (2) defendant company's effort to secure an alternative representative prior to the exercise of a 30-day termination clause is a sound business practice.

6. Unfair Trade Practices— misappropriation of trade secrets—tortious interference with contracts—civil conspiracy

The trial court did not err by granting summary judgment in favor of defendants on a claim for unfair and deceptive trade practices based on plaintiff's claims for misappropriation of trade secrets, tortious interference with contracts, and civil conspiracy, because the trial court properly granted summary judgment on each of these claims meaning that no claim for unfair and deceptive trade practices exists.

7. Damages— punitive—liability for compensatory damages required

The trial court did not err by granting summary judgment in favor of defendants on a claim for punitive damages under N.C.G.S. § 1D-15(a), because: (1) punitive damages may only be awarded if a claimant proves that defendant is liable for compensatory damages and that defendant is guilty of fraud, malice, or willful or wanton conduct; and (2) the trial court properly granted summary judgment in favor of defendants on plaintiff's claims for misappropriation of trade secrets, tortious interference with contracts, civil conspiracy, and unfair and deceptive trade practices.

Appeal by plaintiff from order granting partial summary judgment entered 27 April 2000 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 September 2001.

Van Hoy, Reutlinger & Adams, by Stephen J. Dunn and Philip M. Van Hoy, for plaintiff-appellant.

No brief filed by defendants-appellees Curtis Kennedy and Carolina Environmental Technologies, LLC.

Caudle & Spears, PA, by Harold C. Spears and Christopher J. Loebsack, for defendant-appellee Donald Miller.

Roseman & Colin, LLP, by Richard L. Farley, for defendant-appellee American Sigma, Inc.

WALKER, Judge.

Plaintiff initiated this action against defendants on 26 January 1999. In its amended complaint, plaintiff presents claims for misappropriation of trade secrets, two counts of tortious interference with a contract, defamation, breach of employee duty of loyalty, unfair and deceptive trade practices, civil conspiracy and punitive damages. Following discovery, plaintiff moved for summary judgment against defendant Curtis Kennedy (Kennedy) for the breach of employee duty of loyalty claim and against all defendants on the civil conspiracy claim. All defendants moved for summary judgment on all claims. Defendant American Sigma, Inc. (Sigma) also moved to strike certain exhibits which plaintiff submitted with its motion for summary judgment. After receiving arguments and reviewing the record over the course of three hearings, the trial court denied plaintiff's motion for summary judgment, Sigma's motion to strike, and Kennedy's motion for summary judgment with regard to the breach of employee duty of loyalty claim against him. However, the trial court granted defendants' summary judgment motion on all remaining claims. Plaintiff then voluntarily dismissed without prejudice its surviving claim against Kennedy.

The relevant facts as presented by the record may be summarized as follows: Plaintiff is a corporation which provides sales representation for manufacturers of water and wastewater equipment and processes. Sigma is a subsidiary corporation of Danaher, Inc. and manufactures water and wastewater equipment. In May of 1994, plaintiff and Sigma entered into a contract wherein Sigma appointed plaintiff as its exclusive sales representative for North Carolina, South Carolina and Virginia. The parties renewed the contract in April of 1997. Each contract included a clause giving either party the right to terminate the contract by serving the other written notice within thirty (30) days. The contracts also contained a provision in which plaintiff agreed to keep Sigma informed as to its sales activities within its assigned territory.

Kennedy began working for plaintiff as a salesperson on 18 April 1994. On this date, he signed a statement indicating that he had reviewed plaintiff's "Policies and Rules" which contained provisions requiring employees to devote all of their "time, attention, knowledge, and skills solely" to plaintiff's business. The "Policies and Rules" also prohibited employees from imparting to outsiders information relative to plaintiff's business affairs. Kennedy's job responsibilities included the selling of Sigma's products.

Around August of 1998, Kennedy approached Donald Miller (Miller) and suggested the possibility of their forming a new manufacturers' sales representative company. Miller had worked for Sigma in various sales and business development positions since January 1983 but had resigned his employment effective 14 August 1998. At that time, Miller remained undecided as to his future plans; however, by mid-September both he and Kennedy had committed to the idea of their forming a new company—Carolina Environmental Technologies, LLC (CET). Throughout the next several weeks, they exchanged e-mails in which they discussed preliminary plans for launching CET. These plans involved setting up an office in Kennedy's home, attending a water and wastewater industry association conference, and identifying potential clients. The list of potential clients included Sigma. On 5 November 1998, they incorporated CET with Kennedy as the registered agent. However, Kennedy did not resign from plaintiff's employ until 7 December 1998.

Meanwhile, as part of its subsidiary relationship with Danaher Inc., Sigma had begun to implement various management techniques designed to increase growth of its business. In early 1998, Sigma's Regional Sales Manager, James Heuer (Heuer), created a "Rep Plan" for each sales representative, including plaintiff. The "Rep Plan" provided plaintiff with sales goals and "action items" to assist plaintiff in achieving the goals within its territory. However, by May of 1998, Sigma had concluded that plaintiff was not going to achieve increased sales, unless it increased its representation activities. One month later, Sigma's President, Richard Wissenbach (Wissenbach), assigned Susan McHugh (McHugh) as the Regional Manager for plaintiff's territory and instructed her to increase sales and Sigma's market share. Over the next two months, McHugh met once with plaintiff and reached the conclusion that plaintiff "did not appear to be motivated to improve sales and increase Sigma's market share in the [t]erritory." Consequently, during the fall of 1998, McHugh and Sigma's sales director, Todd Garber (Garber), began to re-evaluate plaintiff's representation of Sigma and considered finding a replacement.

In late September of 1998, Miller approached Garber to discuss the possibility of having CET represent its products in the Carolinas. Following this discussion and after CET was incorporated, CET developed a "Sales Action Plan" in which it identified key markets for Sigma products and outlined a business strategy time line for 1999. This plan was submitted to Sigma on 12 November 1998. In the meantime, McHugh, Garber and Wissenbach met with plaintiff's President,

Tony Combs, regarding the lack of growth in Sigma's sales within plaintiff's territory. Subsequent to this meeting, McHugh prepared a memorandum dated 23 November 1998 and titled "Justification to Replace Representation in North Carolina/South Carolina/Virginia Territory" (McHugh memorandum). In the memorandum, McHugh pointed out that plaintiff's year-to-date sales were $668,000 against an annual target of $1.1 million and that plaintiff's sales of Sigma products had shown a zero growth rate over a three-year period. McHugh also stated that plaintiff had experienced an attrition rate in employees with "[t]he most recent vacancy [being] confirmed 12/7/98 by the resignation of Comb's key North & South Carolina salesman." As a result of the factors summarized in this memorandum, Sigma notified plaintiff on 21 December 1998 of its intention to exercise the termination clause of their contract effective January 1999.

Plaintiff appeals the trial court's grant of summary judgment with respect to defendants Sigma, Kennedy and Miller. Sigma cross-assigns as error the trial court's denial of its motion to strike certain exhibits submitted by plaintiff. Finally, Kennedy filed a motion to dismiss plaintiff's appeal as interlocutory.

[1] We first address defendant Kennedy's motion to dismiss plaintiff's appeal. Kennedy contends that, because the trial court granted only a partial summary judgment as to him, the trial court's order is interlocutory and therefore is not immediately appealable.

Ordinarily, an appeal from an order granting summary judgment to fewer than all of a plaintiff's claim is premature and subject to dismissal. *See Mozingo v. North Carolina Nat'l Bank*, 27 N.C. App. 196, 218 S.E.2d 506 (1975). However, since the plaintiff here voluntarily dismissed the claim which survived summary judgment, any rationale for dismissing the appeal fails. Plaintiff's voluntary dismissal of this remaining claim does not make the appeal premature but rather has the effect of making the trial court's grant of partial summary judgment a final order. *See General Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 1040 (6th Cir. 1990) (finding plaintiff's voluntary dismissal of its sole remaining claim after trial court granted partial summary judgment in favor of defendant on all other claims made order final under Fed. R. Civ. P. 54(b), permitting an immediate appeal). Thus, the order is no longer interlocutory in nature and an appeal is permissible.

This view comports with the procedural posture of appeals this Court has initially dismissed as being interlocutory and then subse-

quently heard on appeal following voluntary dismissals. In *Whitford v. Gaskill*, 119 N.C. App. 790, 460 S.E.2d 346 (1995), *reversed on other grounds*, 345 N.C. 475, 480 S.E.2d 690 (1997), the trial court granted partial summary judgment in plaintiff's favor. *Whitford*, 119 N.C. App. at 791, 460 S.E.2d at 347. The defendant appealed and this Court dismissed the appeal as interlocutory because no damages had been determined. On remand, the plaintiff voluntarily dismissed her claim for damages. This Court then allowed the defendant's renewed appeal of the trial court's summary judgment order. *Id.* at 792, 460 S.E.2d at 347. Similarly, in *Berkeley Federal Savings Bank v. Terra Del Sol, Inc.*, 119 N.C. App. 249, 457 S.E.2d 736 (1995), *disc. rev. denied*, 342 N.C. 639, 466 S.E.2d 276 (1996), the trial court granted the plaintiff summary judgment on some of its claims and all of defendants' counterclaims. *Berkeley Federal*, 119 N.C. App. at 250, 457 S.E.2d at 736. This Court initially dismissed defendants' appeal as interlocutory, only to allow the appeal following plaintiff's voluntary dismissal of its remaining claims. *See Id.*

Turning to the substantive issues, plaintiff assigns as error the trial court's grant of defendants' motion for summary judgment, arguing there were genuine issues of material fact regarding its claims for misappropriation of trade secrets, tortious interference with a contract, civil conspiracy, unfair and deceptive trade practices, and punitive damages.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980), *overruled on other grounds by Myers & Chapman, Inc., v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Because summary judgment supplants trial of the factual issues, all the evidence is viewed in the light most favorable to the nonmoving party. *See Coats v. Jones*, 63 N.C. App. 151, 303 S.E.2d 655, *affirmed*, 309 N.C. 815, 309 S.E.2d 253 (1983). The burden of proving the absence of any genuine issue of material fact rests with the movant. *Holley v. Burroughs Wellcome Co.*, 318 N.C. 352, 348 S.E.2d 772 (1986).

I. Misappropriation of Trade Secrets

[2] Plaintiff first argues that a factual issue exists regarding its claim for misappropriation of trade secrets. The law of this State gives the

owner of a trade secret a cause of action and remedy for its misappropriation. N.C. Gen. Stat. § 66-152 *et seq.* (1999). The burden of proof initially rests with the owner who must establish a *prima facie* case of misappropriation by introducing substantial evidence that the person against whom relief is sought:

> (1) knows or should have known of the trade secret; and
>
> (2) has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

N.C. Gen. Stat. § 66-155 (1999). Once the owner establishes a *prima facie* case, the burden of proof shifts to the defendant who may rebut the allegation by introducing substantial evidence that the trade secret was acquired through "independent development, reverse engineering, or . . . was obtained from another person with a right to disclose the trade secret." *Id.; see also Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 376, 542 S.E.2d 689, 693 (2001).

The threshold question in any misappropriation of trade secrets case is whether the information obtained constitutes a trade secret which is defined as:

> [B]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3) (1999). From this statutory definition, our courts have fashioned six factors which are to be considered when determining whether information is a trade secret:

> (1) the extent to which the information is known outside the business;
>
> (2) the extent to which it is known to employees and others involved in the business;

(3) the extent of measures taken to guard the secrecy of the information;

(4) the value of information to business and its competitors;

(5) the amount of effort or money expended in developing the information; and

(6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

State ex rel Utilities Comm'n v. MCI, 132 N.C. App. 625, 634, 514 S.E.2d 276, 282 (1999) (*citing Wilmington Star News v. New Hanover Regional Medical Center*, 125 N.C. App. 174, 180-81, 480 S.E.2d 53, 56, *appeal dismissed*, 346 N.C. 557, 488 S.E.2d 826 (1997)).

Here, plaintiff contends the following information constitutes three trade secrets: (1) the contents of a 6 November 1998 e-mail sent by Kennedy to Miller, (2) a customer database stored on a computer which Kennedy used during his employment with plaintiff, and (3) a "Territory Review Summary." We disagree.

First, the 6 November 1998 e-mail sent by Kennedy to Miller contains sales forecasting information which identifies existing customers for Sigma's products along with the names of prospective customers within plaintiff's territory. However, the record shows that Sigma either already possessed this information or could have easily compiled it from its business records. Moreover, plaintiff's president provided this identical information in a 29 January 1999 letter to Sigma. Consequently, the information was not subject to reasonable efforts to maintain its secrecy. *See Glaxo Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280 (E.D.N.C. 1996), *affirmed*, 110 F.3d 1562 (4th Cir. 1997). Second, regarding the customer database stored on Kennedy's computer, the record shows that defendants could have compiled a similar database through public listings such as trade show and seminar attendance lists. *See Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 478, 528 S.E.2d 918, 922 (2000) (holding customer lists were not considered "trade secrets" where information would have been easily accessible through a local telephone book). Finally, the "Territory Review Summary" was a form which Sigma had provided to its southeast sales representatives, including plaintiff. The form included space for plaintiff to furnish certain information concerning plaintiff's sales activities within the territory. The terms of the exclusive representation agreement contractually obligated plaintiff to provide this information to Sigma.

After applying the six factors set forth in *Wilmington Star News*, we conclude the information identified by plaintiff does not constitute trade secrets. Thus, the trial court properly granted defendants' motion for summary judgment on plaintiff's claim for misappropriation of trade secrets.

II. Tortious Interference with a Contract

Plaintiff next argues that factual issues exist with respect to each of its two counts for tortious interference with a contract. In order to maintain an action for tortious interference with a contract, a plaintiff must show: (1) a valid contract between the plaintiff and a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) the defendant's inducement is unjustified and (5) actual damages to the plaintiff. *See 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, 84 S.E.2d 176 (1954)).

A. Kennedy's Employment with Plaintiff

[3] Plaintiff's first count claims Sigma and Miller tortiously interfered with Kennedy's employment by inducing Kennedy to compete directly with plaintiff. Specifically, plaintiff contends that its employment relationship with Kennedy was subject to the provisions in its "Policies and Rules" which prohibited an employee from disclosing information relevant to its business affairs and required the employee to devote all of his "time, attention, knowledge, and skills solely" to its "business and interests." Assuming that these "Policies and Rules" form the basis of a contractual relationship between Kennedy and plaintiff, plaintiff fails to provide any evidence that either Sigma or Miller had knowledge of the terms or intentionally induced Kennedy to breach this contractual relationship. Moreover, our Supreme Court has held that the mere enticement and hiring of an at-will employee by a competing company, absent an improper motive, does not give rise to a tortious interference with a contract claim. *See Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 222-23, 367 S.E.2d 647, 650-51 (1988) (*citing Childress*, 240 N.C. at 678-79, 84 S.E.2d at 184). Here, the evidence in the light most favorable to plaintiff shows that both Sigma and Miller acted under legitimate business motives: Sigma wanted to increase sales of its products and Miller desired to establish a competing business. *See Id.; see also Pleasant Valley Promenade v. Lechmere*, 120 N.C. App. 650, 657, 464 S.E.2d 47, 54 (1995). Thus, we conclude that plaintiff has failed to present facts

that would raise an issue of whether Sigma or Miller tortiously interfered in plaintiff's employment relationship with Kennedy.

B. Plaintiff—Sigma Exclusive Representation Contract

[4] Plaintiff's second claim is that Miller and Kennedy tortiously interfered with its exclusive representation contract with Sigma by inducing Sigma to cancel the contract. In support of this claim, plaintiff points to two specific actions of Miller and Kennedy: (1) a 23 October 1998 letter from Miller to Sigma, and (2) the Sales Action Plan which CET submitted to Sigma on 12 November 1998. On each of these dates, Miller and Kennedy had a different relationship with the plaintiff; i.e. Miller as a potential competitor and Kennedy as an employee. Therefore, we review plaintiff's claim as to each defendant in these different contexts.

Where the circumstances surrounding a tortious interference claim involve a business competitor, the party asserting the claim must show that the competitor acted with malice or a bad motive. *Childress*, 240 N.C. at 675, 84 S.E.2d at 182. Plaintiff concedes that Miller was free to compete for Sigma's representation. However, plaintiff argues that Miller acted unlawfully by enticing Kennedy to breach his employee "duty of loyalty" and by misappropriating plaintiff's trade secrets. We have already concluded that no factual issue exists with respect to either plaintiff's misappropriation of trade secrets claim or plaintiff's claim against Miller for tortiously interfering with Kennedy's employment relationship. Thus, we find no merit in plaintiff's claim that Miller acted maliciously or with a bad motive in his effort to compete with plaintiff for Sigma's business.

Next, plaintiff argues that Kennedy's interference with its contract with Sigma was unjustified because it involved the breach of his "fiduciary duty of loyalty" to plaintiff. Our Supreme Court has recently addressed the issue of an at-will employee's duty of loyalty to his employer in the context of starting a competing company. *See Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001). In *Dalton*, the Court held that, outside the purview of a fiduciary relationship, our State does not recognize an independent tort for breach of duty of loyalty by an at-will employee. *Id.* at 652, 548 S.E.2d at 708. Plaintiff presents no evidence that it held a fiduciary relationship with Kennedy. Indeed, a review of plaintiff's "Policies and Rules" in the context of its breach of loyalty claim against Kennedy strongly suggests the absence of such a relationship. Finally, the two actions cited by plaintiff in support of its claim were actions by either Miller or

CET and are not directly attributable to Kennedy. Accordingly, we find no factual issue exists regarding plaintiff's contention that Kennedy, by breaching his duty of loyalty, unjustifiably interfered with its exclusive representation contract with Sigma.

III. Civil Conspiracy

[5] In its next assignment of error, plaintiff argues the trial court erred in granting summary judgment on its claim for civil conspiracy.

A claim for civil conspiracy "requires the showing of an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way that results in damages to the claimant." *Dalton v. Camp*, 138 N.C. App. 201, 213, 531 S.E.2d 258, 266 (2000), *reversed on other grounds*, 353 N.C. 647, 548 S.E.2d 704 (2001); *see also Pleasant Valley Promenade*, 120 N.C. App. at 657, 464 S.E.2d at 54.

The essence of plaintiff's civil conspiracy claim is that although Sigma could lawfully terminate its exclusive representation, the manner in which defendants went about this termination was unlawful. In light of our previous discussion we find no basis for this contention.

Plaintiff suggests that the inconsistent dates in the McHugh memorandum show that defendants had agreed amongst themselves to replace plaintiff with CET months in advance of Sigma's termination notice. However, the fact that Sigma may have agreed with Miller and Kennedy that their company, yet to be formed, would eventually replace plaintiff does not by itself demonstrate that the defendants acted unlawfully. Indeed, Sigma's effort to secure an alternative representative prior to the exercise of a 30-day termination clause, appears to us to be a sound business practice. *See Tar Heel Industries v. E.I. duPont de Nemours*, 91 N.C. App. 51, 56-57, 370 S.E.2d 449, 452 (1988) (holding that a company's efforts to seek alternatives to plaintiff's contract prior to the exercise of a termination clause did not constitute an unfair and deceptive trade practice). We conclude the evidence clearly demonstrates that Sigma made an operational decision in exercising its contractual right to terminate its relationship with plaintiff. Therefore, we overrule this assignment of error.

IV. Unfair and Deceptive Trade Practices

[6] Plaintiff next contends its claim for unfair and deceptive trade practices should have survived summary judgment. To prevail on a

Chapter 75 unfair and deceptive trade practices claim, a plaintiff must show: "(1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or effecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business." *Dalton*, 138 N.C. App. at 209, 531 S.E.2d at 264 (*quoting Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 9, 472 S.E.2d 358, 362 (1996), *disc. rev. denied*, 345 N.C. 344, 483 S.E.2d 173 (1997)). A trade practice is considered unfair when it offends established public policy because it is "immoral, unethical, oppressive, unscrupulous, or substantially injurious" to consumers. *Process Components, Inc. v. Baltimore Aircoil Co.*, 89 N.C. App. 649, 654, 366 S.E.2d 907, 911, *affirmed*, 323 N.C. 620, 374 S.E.2d 116 (1988). A trade practice is deceptive if it "has the capacity or tendency to deceive." *Edwards v. West*, 128 N.C. App. 570, 574, 495 S.E.2d 920, 924 (1998) (citation omitted).

Here, plaintiff's claim that defendants engaged in unfair and deceptive trade practices rests with its claims for misappropriation of trade secrets, tortious interference with contracts and civil conspiracy. Having determined that the trial court properly granted summary judgment on each of these claims, we likewise conclude that no claim for unfair and deceptive trade practices exists.

V. Punitive Damages

[7] Finally, plaintiff alleges a claim for punitive damages. Pursuant to our statutes, punitive damages may be awarded only if a claimant proves that the defendant is liable for compensatory damages and that the defendant is guilty of fraud, malice, or willful or wanton conduct. N.C. Gen. Stat. § 1D-15(a) (1999).

We have already concluded that the trial court properly granted defendants' summary judgment on plaintiff's claims for misappropriation of trade secrets, tortious interference with contracts, civil conspiracy and unfair and deceptive trade practices. Accordingly, we find no merit to plaintiff's claim for punitive damages.

Having found no factual issue with respect to each of plaintiff's claims for compensatory and punitive damages and in light of the fact plaintiff has taken a voluntary dismissal with respect to its remaining claim against Kennedy, we conclude the trial court properly granted summary judgment for the defendants.

In sum, we deny defendant Kennedy's motion to dismiss plaintiff's appeal as interlocutory. The trial court's grant of summary judg-

ment for defendants is affirmed. Therefore, we do not address Sigma's cross-assignment of error.

Affirmed.

Judges McGEE and HUDSON concur.

TALLY EDDINGS, M.D., PLAINTIFF v. SOUTHERN ORTHOPEDIC AND MUSCULOSKELETAL ASSOCIATES, P.A., DEFENDANT

No. COA00-1197

(Filed 4 December 2001)

1. **Appeal and Error— appealability—order denying arbitration—immediately appealable**

An order denying arbitration is interlocutory but immediately appealable because it involves a substantial right (the right to arbitrate) which might be lost if appeal is delayed.

2. **Arbitration and Mediation— physician's employment contract—interstate commerce—Federal Act**

An arbitration provision in a physician's employment contract was governed by the Federal Arbitration Act where plaintiff was practicing as an orthopedic surgeon in Tennessee when he came to interview with defendant, plaintiff left his practice in Chattanooga and began practicing in North Carolina, and the agreement included a covenant not to compete which prevented plaintiff from practicing in portions of South Carolina and Tennessee. Such a transaction clearly involves interstate commerce under the Act.

3. **Arbitration and Mediation— Federal Act—attack on contract rather than arbitration clause—arbitration required**

The trial court erred by refusing to enforce an arbitration agreement in a physician's employment agreement governed by the Federal Arbitration Act where the grounds upon which the trial court based its refusal went to the entire contract and not to the arbitration agreement. Claims which are an attack on the formation of the contract generally rather than only

on an arbitration clause are required by the FAA to be heard by an arbitrator.

Judge GREENE dissenting.

Appeal by defendant from order entered 30 June 2000 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 11 September 2001.

Kelly & Rowe, P.A., by E. Glenn Kelly, for plaintiff-appellee.

McGuire, Wood & Bissette, P.A., by T. Douglas Wilson, Jr., and Joseph P. McGuire, for defendant-appellant.

CAMPBELL, Judge.

Defendant Southern Orthopedic and Musculoskeletal Associates, P.A. ("SOMA") appeals from the trial court's grant of plaintiff's motion to stay arbitration and denial of defendant's motion to compel arbitration and dismiss plaintiff's complaint.

The record discloses that in the fall of 1997, plaintiff, an orthopedic surgeon in Chattanooga, Tennessee, interviewed for an employment position with Asheville Orthopedic Associates ("AOA"),[1] a professional association comprised of four orthopedic surgeons. During his interview, plaintiff primarily dealt with Don Mullis, M.D. ("Mullis"), President of AOA. During the course of negotiations, plaintiff was advised by Mullis that AOA was going to merge into SOMA in the near future, and that Mullis was going to become President of SOMA and a member of SOMA's Board of Directors. Plaintiff was also advised by Mullis that plaintiff had to sign an employment contract with AOA in order to subsequently become employed by SOMA.

On 16 November 1997, plaintiff signed an initial employment contract with AOA, which included a separately signed handwritten addition that read as follows:

> It is my understanding that this contract is null and void after the SOMA contract is signed and in effect.

On 3 December 1997, plaintiff signed the Non-Shareholder Physician Employment Agreement with Southern Orthopedic ("SOMA Employment Agreement"), which was to become effective

1. AOA is one of five medical practices that subsequently merged into defendant SOMA.

on 1 January 1998. The SOMA Employment Agreement contained the following arbitration clause:

> (10) Dispute Resolution by Arbitration. Any controversy, dispute or disagreement arising out of or relating to this Agreement, including the breach thereof, shall be settled exclusively by binding arbitration, which shall be conducted in a location to be mutually agreed upon by the parties, or at the principal office of the corporation, in accordance with the National Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and which to the extent of the subject matter of the arbitration, shall be binding not only on all parties to this Agreement, but on any other entity controlled by, in control of or under common control with the party to the extent that such affiliate joins in the arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Any arbitrator so appointed shall have the express authority, but not the obligation, to award attorney fees and expenses to the prevailing party in such proceeding.

In addition, the SOMA Employment Agreement contained a termination provision that required plaintiff to provide written notice of his resignation no less than 180 days prior to the date of termination. Exhibit 3A of the SOMA Employment Agreement further required that plaintiff give preliminary written notice of resignation twelve (12) months prior to the effective date of termination. Exhibit 3A also contained a covenant not to compete which precluded plaintiff from engaging in the practice of orthopedic surgery within a fifty-mile radius of the AOA Care Center for a period of five years following termination of his employment. Upon breach of this covenant not to compete, plaintiff was required to pay SOMA $120,000.00.

On 17 July 1998, plaintiff signed the Southern Orthopedic Care Center Agreement ("Care Center Agreement") which contained an arbitration clause similar to the one in the SOMA Employment Agreement. The Care Center Agreement was signed by Mullis, as President of SOMA, on 10 August 1998, and plaintiff began working as an orthopedic surgeon for SOMA on 17 August 1998.

Plaintiff worked as an orthopedic surgeon for SOMA from 17 August 1998 until 4 January 2000. By letter dated 4 January 2000, plaintiff immediately terminated his employment with SOMA, citing the following reasons:

1. Misrepresentation of all contracts including the Asheville Orthopedic Associates contract, the SOMA employee contract, and the Care Center Agreement. These contracts fail to reflect the future purchase shares in SOMA. I, along with other recent employees, was recruited with the promise of "no buy in." It is now clear from other SOMA documents that there was always a share purchase intended and that the senior partners of AOA knew about these shares, and willfully misrepresented the contracts.

2. The failure of management to address concerns brought to their attention in good faith concerning the above. My other concerns including expenses have also been repeatedly ignored.

3. There is ample evidence that since my one-year anniversary that I have not been wanted in the office. This includes the repeated statements to other physicians in my office by Don Mullis, President of SOMA, that "Tally will never be a shareholder of SOMA." This is further illustrated by his refusal to provide medical care to established patients in my practice in my absence. He also has refused to talk to me since October 1999.

4. Continued recruitment for physicians in our care center in spite of a November meeting in which it was decided by AOA to cease all recruiting efforts. This represents the managements' willingness to take only themselves into consideration when making any decision.

5. The inability to ever become a property owner.

6. The current valuation and financing of shares offered.

Plaintiff's letter of resignation was intended to serve as his twelve-month notice pursuant to the termination provision found in Exhibit 3A of the SOMA Employment Agreement. However, this letter of resignation clearly violated the notice of termination provision.

Following his resignation from SOMA, plaintiff began practicing with Blue Ridge Bone & Joint Clinic, P.A., a competing orthopedic practice in Asheville, in violation of the covenant not to compete contained in Exhibit 3A of the SOMA Employment Agreement. On 25 February 2000, SOMA filed a request for arbitration with the American Health Lawyers Association in an attempt to resolve its dispute with plaintiff. Specifically, SOMA claimed that plaintiff had breached the SOMA Employment Agreement (1) by failing to give

timely notice of his resignation, (2) by breaching the covenant not to compete, and (3) by breaching the duty of loyalty he owed SOMA by referring business to his new employer.

Rather than submit to binding arbitration, plaintiff filed the complaint in the instant case on 9 March 2000, seeking rescission of the SOMA Employment Agreement on the basis of fraud and breach of fiduciary duty. Specifically, plaintiff alleged that SOMA and its agents fraudulently misrepresented and concealed facts concerning the formula to be used in computing plaintiff's compensation, thereby inducing plaintiff to sign the employment contracts with SOMA. Plaintiff also sought a stay of the arbitration proceeding initiated by SOMA, as well as a declaratory judgment that no enforceable employment contract existed between the parties. In addition, plaintiff sought damages for fraud, unfair and deceptive trade practices, and *quantum meruit*. Plaintiff subsequently amended his complaint to add a claim seeking a declaratory judgment that the SOMA Employment Agreement was unconscionable and against public policy.

SOMA filed a motion to dismiss plaintiff's complaint and compel arbitration of all the matters alleged in the complaint. Plaintiff filed a motion to stay arbitration pursuant to N.C. Gen. Stat. § 1-567.3(b), which provides:

> (b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is not an agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forth with and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

N.C. Gen. Stat. § 1-567.3(b) (2000).

On 30 June 2000, after reviewing plaintiff's complaint and the affidavits presented by SOMA, the trial court entered an order granting plaintiff's motion to stay arbitration and denying SOMA's motion to compel arbitration and dismiss plaintiff's complaint. The trial court concluded that plaintiff's contracts with SOMA—both the initial contract with AOA and the SOMA Employment Agreement—were procured by fraud, and, therefore, all provisions of the two agreements, including the arbitration clause in the SOMA Employment Agreement, were void. Thus, the trial court concluded that plaintiff was not required to submit his claims against SOMA to binding arbi-

tration. The trial court further concluded that the SOMA Employment Agreement was so vague and indefinite, and subject to amendment at any time by SOMA, that there was no meeting of the minds between plaintiff and SOMA, and, thus, all of its provisions were unenforceable. The court also concluded that the SOMA Employment Agreement was so unconscionable that it should not be enforced. In addition to denying SOMA's motion to compel arbitration, the trial court ordered immediate dismissal of the request for arbitration filed by SOMA on 25 February 2000. From this order, SOMA appeals. For the following reasons, we reverse the decision of the trial court.

[1] As an initial matter, we note that the trial court's order is interlocutory because it fails to resolve all issues between all parties in the action. *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999). While interlocutory orders are generally not immediately appealable, this Court has consistently held that an order denying arbitration is immediately appealable because it involves a substantial right—the right to arbitrate a claim—which may be lost if appeal is delayed. *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999); *Burke v. Wilkins*, 131 N.C. App. 687, 688, 507 S.E.2d 913, 914 (1998).

[2] A threshold question we must answer before analyzing the trial court's order is whether state or federal law governs. Both state and federal statutes address the validity and effect of arbitration provisions. The Federal Arbitration Act ("FAA") provides:

> A written provision in any maritime transaction or a *contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1999) (emphasis added).

Similarly, the Uniform Arbitration Act, Article 45A of the North Carolina General Statutes, provides, in pertinent part:

> (a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision

> for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all parties, without regard to the justiciable character of the controversy.

N.C. Gen. Stat. § 1-567.2(a) (2000).

The distinction between the FAA and the Uniform Arbitration Act is that the FAA only applies to maritime transactions and "contracts evidencing a transaction involving commerce." 9 U.S.C. § 2. The arbitration provision at issue in the case *sub judice* clearly has no relation to a maritime transaction; therefore, we must determine whether the SOMA Employment Agreement evidences a transaction involving commerce within the meaning of the FAA.

The FAA defines commerce broadly as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . ." 9 U.S.C. § 1. Thus, for the FAA to apply, the contract must involve interstate or foreign commerce.

In *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 130 L. Ed. 2d 753 (1995), the United States Supreme Court addressed the question of whether Section 2 of the FAA was intended to reach to the limits of Congress' Commerce Clause powers, or whether the phrase "a contract *evidencing* a transaction *involving* commerce," 9 U.S.C. § 2 (emphasis added), was intended to restrict the Act's application. The Court began by restating the basic purpose behind the FAA to overcome courts' refusals to enforce agreements to arbitrate and to place arbitration agreements on the same footing as other contracts. *Allied-Bruce*, 513 U.S. at 270-71, 130 L. Ed. 2d at 762. The Court then reaffirmed its earlier decision in *Southland Corp. v. Keating*, 465 U.S. 1, 79 L. Ed. 2d 1 (1984), where the Court held that the FAA is federal substantive law which is fully applicable in state courts and preemptive of state laws hostile to arbitration. The Court then turned to interpreting the phrase "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2.

The Court first focused on the words "involving commerce," and concluded that these words are broader than the often-used words of

art "in commerce." *Allied-Bruce*, 513 U.S. at 273, 130 L. Ed. 2d at 764. Therefore, the Court concluded, the words "involving commerce" cover more than persons or activities within the flow of interstate commerce. *Id.* (citing *U.S. v. American Bldg. Maintenance Industries*, 422 U.S. 271, 276, 45 L. Ed. 2d 177, 183 (1975) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195, 42 L. Ed. 2d 378, 386-87 (1974)) (defining "in commerce" as related to the "flow" and defining the "flow" to include "the generation of goods and services for interstate markets and their transport and distribution to the consumer"). The Court then considered how far beyond the flow of commerce the word "involving" actually reached. The Court ultimately concluded that the phrase "involving commerce" was functionally equivalent to the phrase "affecting commerce," and signaled Congress' intent to exercise its Commerce Clause powers to the full. *Id.* at 274, 130 L. Ed. 2d at 764.

The Court then turned to interpreting the phrase "evidencing a transaction," and concluded that it meant "that the transaction (that the contract "evidences") must turn out, *in fact*, to have involved interstate commerce[.]" *Id.* at 277, 130 L. Ed. 2d at 766 (emphasis in original). In so holding, the Court rejected an alternative interpretation of the phrase "evidencing a transaction," which focused on the contemplation of the parties at the time they entered into the contract—specifically whether the parties contemplated substantial interstate activity. In rejecting this "contemplation of the parties" interpretation, the Supreme Court called into question the decisions of several federal district courts and state courts, including the North Carolina Supreme Court's decision in *Board of Education v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816 (1981) (applying the "contemplation of the parties" interpretation). In summary, the United States Supreme Court in *Allied-Bruce* concluded that Section 2 of the FAA extends to the limits of Congress' Commerce Clause powers, and in order to come within the scope of Section 2 of the FAA, the contract in question must evidence a transaction that in fact involves interstate commerce.

Applying the principles set forth in *Allied-Bruce* to the case *sub judice*, we hold that the SOMA Employment Agreement falls within the scope of the FAA. Plaintiff in the instant case was practicing as an orthopedic surgeon in Chattanooga, Tennessee, when he came to North Carolina to interview with AOA and entered into negotiations concerning possible future employment with SOMA. The SOMA Employment Agreement evidences a transaction—the creation of the

employer-employee relationship between plaintiff and SOMA—by which plaintiff left his practice in Chattanooga and crossed state lines to begin practicing in North Carolina. Such a transaction clearly involves interstate commerce.[2] Therefore, we hold that the arbitration provision in the SOMA Employment Agreement is governed by the FAA.[3]

[3] Having determined that the arbitration provision in the SOMA Employment Agreement is governed by federal law pursuant to the FAA, we must analyze the trial court's order to determine whether it is sufficient to support its refusal to enforce the parties' arbitration agreement. In so doing, we keep in mind that the only limitation on the enforceability of arbitration provisions that are governed by the FAA is that they may be revoked "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The trial court based its conclusion that the parties' arbitration agreement was not enforceable on the following three grounds: (1) the SOMA Employment Agreement was procured by fraud, (2) the terms of the SOMA Employment Agreement are so unconscionable that it should not be enforced, and (3) the SOMA Employment Agreement is so vague and indefinite, and subject to amendment by SOMA, that it was not the product of a valid meeting of the minds between the parties.

SOMA first argues that a claim of fraud in the inducement of the contract generally—as opposed to the arbitration provision specifically—is an issue to be resolved by an arbitrator and not by the courts. SOMA's argument on this issue is based on the United States Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 18 L. Ed. 2d 1270 (1967), where the Court held, with respect to cases brought in federal court that are governed by the FAA, a claim for fraud in the inducement of the arbitration clause

2. We also note that the covenant not to compete contained in the SOMA Employment Agreement prevents plaintiff from practicing orthopedic surgery within a fifty-mile radius of Asheville. By preventing plaintiff from practicing in portions of Tennessee and South Carolina, this covenant not to compete also impacts on interstate commerce.

3. We further note that Section 1 of the FAA, which excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, does not exempt the SOMA Employment Agreement from coverage under the Act. The United States Supreme Court recently addressed this issue in *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 149 L. Ed. 2d 234 (2001), and held that the exemption contained in 9 U.S.C. § 1 only applies to contracts of employment for transportation workers.

itself is an issue for the federal court to adjudicate, whereas a claim for fraud in the inducement of the entire contract is an issue to be referred to arbitration. In light of the Supreme Court's holding in *Southland Corp.* that the FAA is federal substantive law applicable in state courts, we hold that the reasoning in *Prima Paint* applies equally in the present case.

Plaintiff did not allege in his complaint that SOMA fraudulently induced him to enter into the agreement to arbitrate contained in the SOMA Employment Agreement. Rather, plaintiff's allegations of fraud are directed at the entire SOMA Employment Agreement. Based on *Prima Paint*, we hold that the issue of fraudulent inducement of the entire contract should have been submitted to arbitration. *But see Paramore v. Inter-Regional Financial*, 68 N.C. App. 659, 316 S.E.2d 90 (1984) (recognizing a contrary rule under the State's Uniform Arbitration Act).

SOMA next argues that plaintiff's claim that the SOMA Employment Agreement is an unconscionable contract must also be determined by an arbitrator. Where such claims are an attack on the formation of the contract generally, rather than just the arbitration clause itself, the FAA requires that the claims be heard by an arbitrator. *See Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 (5th Cir. 1996). Here, plaintiff's claim of unconscionability is not directed towards the arbitration provision itself, but rather the entire contract. Therefore, it is an issue for arbitration.

The final ground upon which the trial court based its refusal to enforce the parties' arbitration agreement is that the SOMA Employment Agreement is so vague and indefinite, and subject to amendment by SOMA at any time, that there was no meeting of the minds between the parties. As with the previous two issues, plaintiff's allegations concerning this issue go to the entire contract and not the arbitration agreement itself. Plaintiff does not specifically contend that there was no meeting of the minds between the parties concerning the arbitration agreement itself. Furthermore, it is undisputed that plaintiff signed the SOMA Employment Agreement certifying his willingness to submit "any controversy, dispute or disagreement arising out of or relating to [the SOMA Employment Agreement]" to binding arbitration. Plaintiff's execution of the SOMA Employment Agreement charges him with knowledge and assent to its contents, including the arbitration provision. *Martin*, 133 N.C. App. at 121, 514 S.E.2d at 309-10 (citing *Biesecker v. Biesecker*, 62 N.C. App. 282, 302 S.E.2d 826 (1983)).

In summary, we hold that a valid agreement to arbitrate exists between plaintiff and SOMA and that the grounds relied upon by the trial court in refusing to enforce this arbitration agreement are issues which are covered by the language of the parties' agreement to arbitrate and must be submitted to an arbitrator.

Accordingly, we reverse the trial court's grant of plaintiff's motion to stay arbitration and denial of SOMA's motion to compel arbitration and dismiss plaintiff's complaint, and remand for entry of an order granting SOMA's motion to compel arbitration and dismiss plaintiff's complaint and denying plaintiff's motion to stay the arbitration previously initiated by SOMA.

Reversed and remanded.

Judge BRYANT concurs.

Judge GREENE dissents in a separate opinion.

GREENE, Judge, dissenting.

I agree with the majority that under the Federal Arbitration Act (the FAA), "a claim for fraud in the inducement of the entire contract is an issue to be referred to arbitration." Because I believe, however, that it is impossible for this Court to initially determine whether the transaction in this case involves interstate commerce, thus making the FAA applicable, I respectfully dissent.

Before the FAA applies to a contract, the contract must either relate to a maritime transaction or evidence "a transaction involving commerce." 9 U.S.C. § 2 (2000). Whether a contract "evidenced 'a transaction involving commerce' within the meaning of § 2 of the [FAA]" is a question of fact which an appellate court should not initially decide. *Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Comm'n*, 387 F.2d 768, 772 (3d Cir. 1967).

In this case, neither of the parties argue the FAA applies to the SOMA Employment Agreement or the SOMA Employment Agreement evidences "a transaction involving commerce." With the exception of the fact plaintiff was in Tennessee before moving to Asheville to join AOA, there is no evidence in this case that the transaction involved multiple states. Indeed, the record to this Court is devoid of any evidence the SOMA Employment Agreement or plaintiff's employment

"involve[d] interstate commerce and [is] within the scope of the FAA." Although this Court "may speculate on what may have been the nature of the performance required by the contract, it is impossible for us to determine on appeal whether the [FAA] applies" due to the contract in question involving interstate commerce. *See id.* Accordingly, I would remand this case to the trial court for the initial determination of whether the SOMA Employment Agreement involved interstate commerce. If the trial court determines the SOMA Employment Agreement does not involve interstate commerce, state law governs the enforcement of the agreement and, thus, any allegations of fraud are to be determined by the trial court instead of by arbitration. *See Paramore v. Inter-Regional Fin. Group Leasing Co.*, 68 N.C. App. 659, 662-63, 316 S.E.2d 90, 92 (1984) (if the agreement was obtained by fraud, "there would be no contract to enforce by arbitration or otherwise," thus, the validity of the supporting contract should be determined by the courts before proceeding with arbitration).

STATE OF NORTH CAROLINA v. KAM RICHARD CARPENTER

No. COA00-1416

(Filed 4 December 2001)

1. **Evidence— prior crimes or acts—sexual misconduct—motive—intent—plan, scheme, system, or design**

Evidence of prior alleged acts of sexual misconduct by defendant were admissible in an indecent liberties and sexual offense case under N.C.G.S. § 8C-1, Rule 404(b) to show that defendant had a motive for the commission of the crime charged, defendant had the necessary intent, and there existed in the mind of defendant a plan, scheme, system, or design involved in the crime, where (1) there were numerous similarities between the crimes including that all three young boys were allegedly abused and defendant used ministry and church activities as an excuse for spending time with them, defendant did similar activities with the boys, the places where the sexual abuse occurred and the manner allegedly used by defendant were common factors, and defendant asked all three boys not to tell anyone about the incidents; and (2) the prior acts are not too remote in time.

2. Evidence— expert opinion testimony—child abuse—delayed and incomplete disclosures—continued association with abuser

The trial court did not abuse its discretion in an indecent liberties and first-degree sexual offense case by admitting expert opinion testimony stating that delayed and incomplete disclosures are not unusual in cases of child abuse and that children sometimes continue to associate with the alleged abuser, because: (1) the expert was adequately qualified in the area of child abuse evaluations and interviews based on her extensive experience, training, and education; (2) the expert's testimony was instructive and helpful to the jury in understanding the evidence; and (3) a proper foundation was established for the expert's opinion testimony.

3. Indecent Liberties; Sexual Offenses— jury instruction—symptoms and syndromes

Although the trial court erred in an indecent liberties and first-degree sexual offense case by instructing the jury on expert opinion testimony on symptoms and syndromes even though a review of the expert's testimony reveals that she never stated the victim's delayed and partial disclosures were symptoms of child abuse, the error was harmless because there is no reasonable possibility that the jury was misled to believe that the expert had testified that the victim showed symptoms of sexual abuse or that a different result would have been reached had the instruction not been given.

4. Indecent Liberties; Sexual Offenses— requested jury instruction—victim's failure to report conduct—credibility

The trial court did not err in an indecent liberties and first-degree sexual offense case by denying defendant's request for an instruction on the victim's failure to report the conduct in an attempt to question the victim's credibility as a witness, because: (1) the trial court properly charged the jury on the tests of truthfulness which should be applied to witnesses; and (2) the jury was instructed to apply a balancing test by considering whether the witness's testimony is reasonable and consistent with other believable evidence in the case.

5. Appeal and Error— preservation of issues—failure to object

Although defendant contends the trial court committed plain error in an indecent liberties and first-degree sexual offense case by entering the jury room with the jury after the verdict was recorded but before the sentencing hearing, defendant failed to properly preserve this issue for appellate review because: (1) defendant did not object to the judge's behavior at trial; (2) our Supreme Court has only elected to review unpreserved issues for plain error that involve instructional errors or the admissibility of evidence; and (3) this impropriety could not have prejudiced defendant's right to a fair trial since it occurred after the verdict had been reached.

6. Criminal Law— jury instruction—corroboration

The trial court did not commit plain error in an indecent liberties and first-degree sexual offense case by its jury instruction on corroboration according to a dictionary definition that was allegedly misleading and incomplete, because: (1) the dictionary definition merely aided the jury in understanding a word the jury had previously heard; and (2) the jury was made further aware of the proper purpose for which the corroborating evidence could be used through an instruction on the proper use of corroborative evidence provided during an expert's testimony.

7. Indecent Liberties; Sexual Offenses— sufficiency of evidence

The trial court did not err in an indecent liberties and first-degree sexual offense case by denying defendant's motion to dismiss the charges, because there was ample evidence to support the convictions.

Appeal by defendant from judgments entered 3 May 2000 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defenders Mark D. Montgomery and Anne M. Gomez, for defendant-appellant.

MARTIN, Judge.

Defendant was charged, in proper bills of indictment, with five counts of taking indecent liberties with children and with three counts of first degree sexual offense. A jury found him guilty as charged. Defendant appeals from the judgment entered upon the verdicts.

Briefly summarized, the State's evidence at trial tended to show that sometime after 1 August 1994, B.J.D., the alleged victim, (hereinafter "Bobby") accompanied his mother to her alcohol treatment classes and met defendant, his mother's fellow classmate. Defendant told Bobby's mother that he did ministry work and that he often spent time with children on the weekends taking them camping and doing various church activities with them. Shortly thereafter, Bobby, who was approximately eleven years old at the time, began spending weekends with defendant. When Bobby stayed at defendant's residence overnight, he would sleep with defendant in defendant's water bed. Bobby testified that on the second weekend that he stayed with defendant, defendant performed fellatio on him in defendant's bedroom. Bobby was lying on his back naked while defendant was kneeling on the floor. Bobby also testified that defendant rubbed KY Jelly on his penis and ejaculated on the floor.

After Bobby's mother had a violent fight with her boyfriend with whom she was living, she and Bobby moved in with defendant. Bobby slept with defendant in defendant's bed while his mother slept in the living room. Bobby testified that after he moved in with defendant, the sexual abuse became more frequent, occurring every night and every day. These acts of abuse included Bobby performing fellatio on defendant, defendant performing fellatio on Bobby in the shower, defendant performing anal intercourse on Bobby, and defendant kissing Bobby on the mouth with his tongue. Additionally, Bobby testified that while riding in defendant's vehicle, defendant would periodically put his hand into Bobby's pants and feel Bobby's penis. Defendant begged Bobby not to tell anybody about these acts of abuse so that he would not have to return to prison. Bobby did not report the alleged abuse until May 1997, during an interview with Mecklenburg County police officers.

Bobby testified that he thought of defendant as his father, especially since he had never met his biological father. Defendant apparently considered Bobby as his son since he introduced him as "Bobby Carpenter." During the relationship, defendant took Bobby camping,

to Carowinds, to the water park, to Celebration Station, and taught Bobby how to shoot a rocket.

Bobby and his mother lived with defendant for three or four months, until they moved out in 1995 to live with the mother's new boyfriend in Rock Hill, South Carolina. After moving to Rock Hill, Bobby continued to spend time with defendant on the weekends. Bobby, his mother, and her boyfriend lived in Rock Hill for about a year and then moved to Greensboro. Defendant remained in contact with Bobby after the move. Bobby described a specific incident in which defendant picked him up at his bus stop one morning in Greensboro and put him in the back of his van. Defendant drove to a wooded area, parked, and then, while in the back of the van, pulled Bobby's pants down and lay on top of Bobby placing his penis between Bobby's legs.

While living in Greensboro, Bobby's mother admitted Bobby into Charter Hospital three times for anger and behavior problems. While in Charter Hospital the first time in February 1997, Bobby was diagnosed as having unspecified psychosis with hallucinations and major depression. Prior to Bobby's second hospitalization at Charter Hospital in June 1997, Bobby had expressed suicidal wishes and had grabbed his stepfather by the throat. During this second hospitalization, the hospital became aware of and provided therapy to address the alleged sexual molestation. Bobby was diagnosed with recurrent major depression. He was admitted to Charter Hospital for a third time in July 1998 after taking an overdose of his medications; he was diagnosed again with recurrent major depression. After this third hospitalization, the Department of Social Services placed Bobby in foster care since his mother refused to pick him up.

There was evidence at trial that Bobby had a history of lying. Bobby testified that his mother wanted him to stay with defendant on weekends because she was having a hard time with him since he was lying and stealing. Bobby contacted the Department of Social Services and told them that his mother beat him up but he admitted at trial that he had lied about the incident. Additionally, Bobby testified that his mother made him go to Charter Hospital because he was lying and kept running away and was stealing. Bobby also admitted that he lied in group therapy several times while in Charter Hospital. In fact, one of his therapy goals was to ". . . discuss how [his] lies affect other people." In addition, Bobby admitted to lying under oath in juvenile court.

During the trial, Quentin Holton and Thomas Williams each testified that defendant had sexually abused them. Quentin lived with his mother, his mother's boyfriend and the boyfriend's family when the alleged sexual abuse occurred. Defendant, who was living nearby at the time, approached the family posing as a Bible student, and offered to take Quentin, Thomas, and Thomas's brother Ray to church. Defendant took the boys to church, took them to toy stores, and shot bottle rockets with them in the park.

Quentin described an incident that occurred while Quentin was at his older brother's home with defendant. According to Quentin, defendant took him by the arm and pulled him into defendant's bedroom. Defendant placed his hand down into Quentin's shorts and fondled his penis. Quentin testified regarding another act of abuse which occurred while he, defendant, and Holton's brother were at Celebration Station. While Quentin's brother went to the bathroom, defendant took Quentin outside to defendant's van, where he stuck his hand inside Quentin's shorts and felt his penis. Defendant told Quentin not to tell anyone. At the time of the alleged abuse, March 1996, Quentin was in the second grade and was eight years old.

Thomas Williams was living with his grandmother at the time he met defendant. Thomas testified that on several occasions defendant would stick his hand into Thomas' pants and touch his genitals. On trips to toy stores with Quentin, Thomas, and Ray, defendant would drop Quentin and Ray off while he and Thomas would go find a parking space. Thomas described one incident in particular when he and defendant were alone in the Toys 'R Us parking lot when defendant fondled his penis. On a different occasion, the evidence tended to show that defendant pulled Thomas into the back of his van when it was parked beside defendant's house and touched Thomas' genitals. Defendant told Thomas not to tell anybody about what had occurred. The alleged abuse took place during the summer before Thomas entered the second grade in 1995 or 1996.

Defendant did not offer evidence.

I.

[1] Defendant first assigns error to the admission of evidence concerning prior alleged acts of sexual misconduct by defendant. Evidence of prior acts is not admissible to prove the character of the accused in order to show that he had the propensity to act in conformity with the crime charged. 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.* The North Carolina Supreme Court has held that Rule 404(b) is a general rule of inclusion. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Additionally, North Carolina's appellate courts have been "markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b)." *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419 (1986) (citations omitted). However, in order for evidence of prior acts to be relevant and admissible under Rule 404(b), the acts must be sufficiently similar to and not too remote from the incident for which defendant is currently on trial. *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

In the present case, the State offered testimony from Quentin Holton and Thomas Williams regarding defendant's prior acts of sexual misconduct with them, to show that defendant had a motive for the commission of the crime charged, that defendant had the necessary intent, and there existed in the mind of defendant a plan, scheme, system or design involved in the crime charged in the case. There are numerous similarities between the testimony of Bobby, Quentin, and Thomas. For example, all three boys were in the custody of single women when they were allegedly abused and defendant used ministry and church activities as an excuse for spending time with them. Additionally, defendant did similar activities with the boys—shot off rockets in the park and visited amusement parks. The places where the sexual abuse occurred and the manner allegedly used by defendant were also common factors; defendant allegedly abused the children in either his bedroom or his vehicles. Further, defendant fondled all three boys' genitals by slipping his hand into their pants or shorts and defendant asked all three boys not to tell anyone about the incidents.

The prior acts admitted into evidence are not too remote in time since they occurred within two years of the incidents for which defendant is currently charged. Since the alleged sexual offenses committed against Bobby in this case are sufficiently similar and because the prior acts are not too remote in time, we hold that Quentin Holton's and Thomas Williams' testimonies were properly admitted under Rule 404(b).

II.

[2] Defendant next contends that the trial court erred in admitting expert opinion testimony by Susan Vaughn that delayed and incomplete disclosures are not unusual in cases of child abuse, and that children sometimes continue to associate with the alleged abuser. Defendant argues Vaughn's testimony should have been excluded because the State failed to show that there was any scientific foundation for this opinion testimony, that this expert testimony was improperly used to bolster Bobby's credibility, and that this expert testimony improperly suggested that Vaughn believed that Bobby was abused because of his delayed reporting. We reject these arguments.

An expert's opinion may be admitted into evidence "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." N.C. Gen. Stat. § 8C, Rule 702 (1999). "[A] witness [is] qualified as an expert by knowledge, skill, experience, training, or education . . . ." *Id.* Additionally, "[a] trial court is afforded wide latitude in applying Rule 702 and will be reversed only for an abuse of discretion." *State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989).

Defendant argues the State failed to show that there was any scientific foundation for Vaughn's opinion testimony. First, we note that Vaughn was adequately qualified in the area of child sex abuse evaluations and interviews based on her extensive experience, training, and education. Vaughn had received a masters degree in social work and later had an internship lasting two years at Duke University Medical Center where she interviewed suspected victims of child sexual abuse. At the time of trial, Vaughn was a licensed clinical social worker and her job involved evaluating and interviewing children and families when it was suspected that the children had been maltreated. Prior to this employment, Vaughn had several other jobs in which she interviewed and evaluated child victims of sexual abuse. In fact, Vaughn estimated that she had interviewed a couple thousand children throughout her career. Thus, Vaughn was properly qualified as an expert in the area of child sex abuse evaluations and interviewing.

Vaughn's testimony was clearly instructive and helpful to the jury in understanding the evidence since "[t]he nature of the sexual abuse of children . . . places lay jurors at a disadvantage." *State v. Oliver*, 85

N.C. App. 1, 11, 354 S.E.2d 527, 533, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 64 (1987). Though she did not specifically cite supporting texts, articles, or data, Vaughn testified on *voir dire* that she was basing her conclusions on literature, journal articles, training, and her experience. Thus, a proper foundation was established for her opinion testimony. In her testimony, Vaughn explained general characteristics of children who have been abused. Vaughn testified that an abused child often delays disclosing the abuse and offered various reasons an abused child would continue to cooperate with an abuser. Vaughn did not testify as to her opinion with respect to Bobby's credibility.

Evidence similar to that offered by Vaughn has been held admissible to assist the jury. *See State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988) (finding expert testimony as to why a child would cooperate with adult who had been sexually abusing child admissible); *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994) (concluding trial court did not err in admitting testimony describing general symptoms and characteristics of sexually abused children to explain the victim's behavior); *State v. Bowman*, 84 N.C. App. 238, 352 S.E.2d 437 (1987) (holding trial court was proper in admitting a doctor's testimony that a delay between the occurrence of an incident of child sexual abuse and the child's revelation of the incident was the usual pattern of conduct for victims of child sexual abuse). Thus, for the foregoing reasons we hold that the trial court did not abuse its discretion in admitting Vaughn's testimony.

III.

[3] Defendant also contends that the trial court erred in instructing the jury on evidence of symptoms and syndromes. Defendant notes that Vaughn testified that delayed and partial disclosures of abuse are common among abused children but never testified that this behavior was a symptom that he had been abused. Over defendant's objection the trial court instructed the jury as follows:

> Expert opinion testimony **that one exhibits symptoms of sexual abuse** may be considered by you only if you find that it does corroborate the victim's testimony at this trial. That is, if you believe this opinion testimony tends to support the testimony of the alleged victim.

> The testimony is admitted solely for the purpose of corroboration and not as substantive evidence. You may not convict the defendant solely on this opinion testimony.

(emphasis added). This instruction was taken from N.C.P.I.—Crim. 104.96.

Upon careful review of Vaughn's expert testimony, we agree with defendant that Vaughn never stated that Bobby's delayed and partial disclosures were symptoms of child abuse. Vaughn generally discussed common behaviors of children who have been abused. Therefore, the jury instruction stated above should not have been given. The instructional error does not entitle defendant to a new trial, however, since we discern no reasonable possibility that the jury was misled to believe that Vaughn had testified that Bobby showed symptoms of sexual abuse or that a different result would have been reached had the instruction not been given. *See* N.C. Gen. Stat. § 15A-1443(a). Therefore, this assignment of error is overruled.

IV.

[4] Defendant next argues that the trial court erred in denying his request for an instruction on the complainant's failure to report the conduct. Defendant requested that the jury be instructed that Bobby's failure to report the abuse could be considered on the question of Bobby's credibility as a witness. The requested jury instruction provided the following:

> The defense contends that Bobby [] contends that Bobby [] failed to make any out cry [sic] at the time of the alleged indecent liberties and sex offenses; in addition, the defense contends that [Bobby] failed to report the alleged indecent liberties and sex offenses until several years after he contends it occurred.
>
> If you find from the evidence that [Bobby] made no out cry [sic] at the time of the alleged indecent liberties and sex offense, or that he failed to report the alleged incidents until several years had passed, then those are factors that you can consider in determining the credibility of his testimony.

"It is well established that when a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance." *State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995),

cert. denied, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996). Defendant relies on *State v. Dill*, 184 N.C. 645, 113 S.E.2d 609 (1922) to support his argument that the requested instruction was required by law. His reliance on *Dill* is misplaced. In *Dill*, the prosecuting witness delayed for several days in reporting her rape. The trial court instructed the jury that the alleged victim's delay in reporting should be considered in determining her credibility but that " '[t]he mere fact that she delayed in making her statement does not itself discredit her testimony.' " *Dill*, 184 N.C. at 649, 113 S.E. at 612. Thus, in essence, the trial court instructed the jury to consider the evidence of the alleged victim's delay in reporting the crime when determining credibility but balancing that evidence with all circumstances which may explain such a delay. The North Carolina Supreme Court found no error in the trial court giving such an instruction.

Defendant seems to suggest that the holding in *Dill* should be interpreted to mean that if requested, a delayed reporting instruction is required in child sexual abuse cases. We disagree and find in the case *sub judice* that the trial court properly charged the jury on the "tests of truthfulness" which should be applied to witnesses. The jury was instructed to apply a balancing test similar to *Dill* by considering whether the witness's testimony is reasonable and consistent with other believable evidence in the case. Therefore, we conclude that the jury was adequately instructed in determining the credibility of the alleged victim and we find no error in the court's refusal of the instruction.

V.

[5] Defendant next contends that the trial court committed plain error by entering the jury room with the jury after the verdict was recorded, but before the sentencing hearing. However, defendant failed to properly preserve this issue for appellate review since he did not object to the judge's behavior at trial. *See* N.C.R. App. P. 10(b)(1). Defendant requests that we apply the plain error standard in reviewing this assignment of error. Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure provides

> [i]n criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

However, the North Carolina Supreme Court has only elected to review unpreserved issues for plain error that involve instructional errors or the admissibility of evidence. *See State v. Steen*, 352 N.C. 227, 536 S.E.2d 1 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001); *State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1996). Though we disapprove of the trial court's conduct in this regard, the error has been waived. Even so, this impropriety could not have prejudiced defendant's right to a fair trial since it occurred after the verdict had been reached. This assignment of error is overruled.

VI.

[6] In addition, defendant argues the trial court committed plain error in its instruction to the jury on "corroboration," because it was misleading and incomplete. Defendant acknowledges that he did not object to the jury instruction defining "corroboration" and therefore asks that we apply plain error review to this issue. Since this assignment of error alleges an instructional error, we will review it for plain error. *See State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1996).

Plain error is " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused . . . .' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). In order to prevail under the plain error analysis, the defendant must show that "(1) there was error and (2) without this error, the jury would probably have reached a different verdict." *State v. Najewicz*, 112 N.C. App. 280, 294, 436 S.E.2d 132, 141 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

In the present case, upon request of defendant, the jury was instructed numerous times that certain testimony was being admitted solely for corroborative purposes. The jurors requested a definition of "corroboration" and the trial judge provided the dictionary definition of "corroborate" from the *American Heritage College Edition*, 3rd edition. The trial judge instructed the jury as follows:

> Comes from the Latin corroborate, corroborat, meaning to strengthen. And corroborate is defined as to strengthen or support with other evidence. To make more certain, such as to corroborate my story.

Defendant contends this instruction did not distinguish corroborating from substantive evidence. However, we note that the foregoing dictionary definition was not the only instruction given the jury concerning the proper use of corroborative evidence. Further instruction on the proper use of corroborative evidence was provided during Susan Vaughn's testimony. The judge instructed as follows:

> Members of the Jury, the testimony you are about to receive, and any [of] the opinions of this witness, are admitted for the sole purpose of corroborating the testimony of [Bobby], that is if you believe this opinion testimony tends to support the testimony of him. It is not being admitted to prove that any sexual offense actually took place, and you are not to consider it for that purpose.

Therefore, when viewing all of the instructions concerning "corroboration," the dictionary definition merely aided the jury in understanding a word it had previously heard and the jury was made further aware of the proper purpose for which the corroborating evidence could be used. Thus, we hold that the trial court did not commit error, much less plain error, in instructing the jury on "corroboration."

VII.

[7] Finally, defendant assigns error to the trial court's denial of his motion to dismiss the charges. After thoroughly reviewing 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 first degree sexual offenses and taking indecent liberties with children. *See* N.C. Gen. Stat. §§ 14-27.4(a)1 and 14-202.1(a) (1999).

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

No error.

Judges WALKER and TYSON concur.

IN RE BEASLEY

[147 N.C. App. 399 (2001)]

IN THE MATTER OF: BRITTANY BEASLEY, PATRICIA BEASLEY, JUSTIN BEASLEY, TIMOTHY SAULS, MELISSA SAULS, JESSICA SAULS, MINOR CHILDREN

No. COA00-940

(Filed 4 December 2001)

1. Termination of Parental Rights— neglect—prior adjudications—likelihood of repetition

The trial court did not err in its determination that respondents were not fit to care for these children at the time of the termination proceeding and that the best interests of the children required that they be adjudged neglected at the time of the termination proceeding. Parental rights may be terminated when there is no evidence of neglect at the time of the termination proceeding if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile is returned to his or her parents.

2. Termination of Parental Rights— neglect—chronic problems—failure to improve parenting skills—best interests of children

The trial court did not err by concluding that it was in the best interests of these children that respondents' parental rights be terminated where the record showed parents who failed to provide a safe and healthy environment for their children over an extended period of time and who failed to prove that their parental abilities have significantly improved since the children were removed from their custody. There was overwhelming evidence supporting the trial court's conclusion that the probability of repetition of neglect was great and that the best interests of the children would be served by termination of respondents' parental rights.

Appeal by respondents from orders entered 9 February 2000 and signed 22 February 2000 and 7 March 2000 by Judge J. Patrick Exum in Wayne County District Court. Heard in the Court of Appeals 14 August 2001.

E.B. Borden Parker, for petitioner-appellee Wayne County Department of Social Services.

Nicholas E. Harvey, Sr. for respondent-appellants.

CAMPBELL, Judge.

Janet Beasley ("respondent-mother") and Timothy Beasley ("respondent-father") (collectively, "respondents") appeal from an order terminating their parental rights to minor children Brittany Beasley ("Brittany"), Patricia Beasley ("Patricia"), and Justin Beasley ("Justin"). Respondent-mother also appeals from an order terminating her parental rights to minor children Timothy Sauls ("Timothy"), Melissa Sauls ("Melissa"), and Jessica Sauls ("Jessica"). Upon finding that grounds existed to terminate respondents' parental rights on the basis of neglect, the trial court concluded that it was in the best interests of the children to terminate respondents' parental rights. Respondents contend (1) that the evidence was insufficient as a matter of law to establish grounds for termination of their parental rights, and (2) that the trial court erred in concluding that it was in the best interests of the children to terminate respondents' parental rights.

The record shows that the Wayne County Department of Social Services ("DSS") opened its first case involving the children of respondent-mother in 1989. On 21 May 1992, DSS filed a petition alleging that Timothy, Melissa and Jessica Sauls ("the Sauls children"), were neglected juveniles. The Sauls children were removed from the custody of respondent-mother and were adjudicated neglected in an order dated 9 June 1992. Respondent-mother subsequently attended mental health counseling sessions and parenting classes, purchased a two-bedroom trailer, and found a job. As a result, the children were returned to the custody of respondent-mother in an order dated 27 October 1992.

On 28 November 1994, a second juvenile petition was filed, alleging that Melissa Sauls was an abused juvenile, and that all three of the Sauls children were neglected juveniles. This petition further alleged that Brittany Beasley, the newborn daughter of respondents, was also a neglected juvenile. At that time, respondents had not married, but were living together. The petition alleged that respondent-father had inflicted physical injury on Melissa Sauls, and that all four of the children were "living in an environment injurious to their welfare." The Sauls children were removed from the custody of respondents, while Brittany remained in respondents' custody. Respondents entered into an intervention plan with DSS, which required them to attend parenting classes and domestic violence classes. Respondents attended parenting classes, but only attended one domestic violence class. Respondents married on 8 January 1995, and custody of the Sauls

children was subsequently returned to them, contingent on their full compliance with the DSS intervention plan. Respondents completed parenting classes in March 1995, but did not attend further domestic violence counseling sessions, as required by the DSS intervention plan. DSS expressed concern about Melissa and Timothy Sauls' failure to attend therapy sessions, as well as concern over an incident of domestic violence between respondents. On 10 October 1995, the juvenile petition was heard, the allegations of abuse were dismissed, and all four of the children were adjudicated neglected. However, the children were allowed to stay in the custody of respondents, subject to respondents' continued cooperation with a new intervention plan. Subsequent review hearings were held, by which the children were allowed to stay in the custody of respondents, and by order dated 9 July 1996, the case was removed from the active calendar.

On 16 June 1998, DSS filed yet another juvenile petition alleging that the Sauls children and Brittany Beasley, along with their new sibling Patricia Beasley, were neglected juveniles. This petition alleged that the respondent-mother had been drinking, the children had been exposed to domestic violence, the children regularly missed school due to a continuing problem with head lice, and respondent-mother had refused to cooperate with DSS. Pursuant to this petition, the children were removed from respondents' custody. The children have remained out of the custody of respondents since that time. On 14 July 1998, the children were once again adjudicated neglected, and respondents were ordered to attend parenting classes and marriage counseling. Respondents were also ordered to undergo psychological and substance abuse evaluations.

Following this neglect adjudication, respondents completed parenting classes and were evaluated for marriage counseling. The therapist at the Wayne County Mental Health Center determined that marriage counseling was not needed. Respondent-mother underwent psychological evaluation, after which it was recommended that she "be given increased access to her children which could include full custody." Respondent-father submitted to a substance abuse evaluation, whereupon it was determined that there was no need for more formal evaluation.

Upon subsequent review hearings, custody of the Sauls children remained with their maternal grandfather, while Patricia and Brittany Beasley remained in the custody of foster care, despite recommendations to the court that they be returned to respondents. Over the next several months, the children remained out of respondents' custody,

but respondents were granted unsupervised overnight visitation with Patricia and Brittany Beasley.

On 3 May 1999, respondent-mother gave birth to Justin Beasley. On 4 May 1999, a juvenile petition was filed alleging that Justin Beasley was a neglected and dependent juvenile, and custody of Justin Beasley was granted to DSS. On 8 June 1999, Justin Beasley was adjudicated neglected and dependent, and his custody was continued with DSS.

On 14 July 1999, DSS filed a petition to terminate respondents' parental rights to Brittany, Patricia and Justin Beasley on the grounds that the children were neglected juveniles within the meaning of N.C. Gen. Stat. § 7B-101(15). On 29 July 1999, DSS filed a petition to terminate respondent-mother's parental rights to the Sauls children on the grounds that the children were both neglected and abandoned. The petitions came on for hearing concurrently on 31 January 2000. The trial court entered orders on 9 February 2000 finding that all of the minor children had previously been adjudicated neglected, and "[t]hat there is a clear pattern of neglect and the probability of repetition of neglect is very great." Thereupon, the court concluded that the grounds existed to terminate respondents' parental rights. The court further concluded that no credible evidence existed to support a conclusion that the best interests of the children would not be served by termination of respondents' parental rights; in fact, the trial court expressly concluded that the children's best interests would be served by termination of respondents' parental rights. From the orders terminating their parental rights, respondents appeal.

Respondents bring forward five assignments of error on appeal; however, these assignments only present for review the following two issues: (1) whether the trial court erred in concluding that sufficient grounds existed authorizing termination of respondents' parental rights, and (2) whether the trial court erred in concluding it was in the best interests of the children to terminate respondents' parental rights. Based on our examination of the record, we must disagree with respondents' contentions on these issues.

We note initially that the North Carolina Juvenile Code, including the article entitled "Termination of Parental Rights," was extensively revised and renumbered as Chapter 7B of the General Statutes, effective 1 July 1999. 1998 N.C. Sess. Laws ch. 202, § 6. The petitions for termination of parental rights in the instant case were filed on 14 July

1999 and 29 July 1999. Therefore, this case falls under the provisions of Chapter 7B.

The termination of parental rights statute provides for a two-stage termination proceeding: N.C. Gen. Stat. § 7B-1109 (formerly N.C. Gen. Stat. § 7A-289.30) governs the adjudication stage, and N.C. Gen. Stat. § 7B-1110 (formerly N.C. Gen. Stat. § 7A-289.31) governs the disposition stage. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997); *In re Leftwich*, 135 N.C. App. 67, 71, 518 S.E.2d 799, 802 (1999). At the adjudication stage, the party petitioning for the termination of parental rights must show by clear, cogent, and convincing evidence that facts exist authorizing termination of parental rights on one or more of the grounds set forth in N.C. Gen. Stat. § 7B-1111 (formerly N.C. Gen. Stat. § 7A-289.32). N.C. Gen. Stat. § 7B-1109(e)-(f) (2000). "Once the court has determined that grounds for terminating parental rights are present, the court then 'moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights.' " *In re Leftwich*, 135 N.C. App at 71, 518 S.E.2d at 802 (quoting *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 615 (1997)).

Under N.C.G.S. § 7B-1111, the court may terminate parental rights upon a finding that the juvenile is a neglected juvenile. N.C. Gen. Stat. § 7B-1111(a)(1) (2000). The juvenile shall be deemed neglected if the court finds the juvenile to be a "neglected juvenile" within the meaning of N.C. Gen. Stat. § 7B-101. *Id.* N.C. Gen. Stat. § 7B-101(15) defines "neglected juvenile" 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. § 7B-101(15) (2000). To prove neglect in a termination case, there must be clear, cogent, and convincing evidence (1) the juvenile is neglected within the meaning of N.C.G.S. 7B-101(15), and (2) "the juvenile has sustained 'some physical, mental, or emotional impairment . . . or [there is] a substantial risk of such impairment' " as a consequence of the neglect. *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)).

"A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. at 248, 485 S.E.2d at 615.

> During a proceeding to terminate parental rights, the trial court must admit and consider evidence, find facts, make conclusions and resolve the ultimate issue of whether neglect authorizing termination of parental rights under N.C.G.S. 7A-289.32(2) [now N.C. Gen. Stat. 7B-1111(a)(1)] and 7A-517(21) [now N.C. Gen. Stat. 7B-101(15)] is present at that time. N.C.G.S. 7A-289.30(d)[now N.C. Gen. Stat. § 7B-1009(e)]. The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists at the time of the termination proceeding. N.C.G.S. 7A-289.30(e)[now N.C. Gen. Stat. § 7B-1109(f)].

In re Ballard, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984) (citations omitted). Consequently, "[t]ermination of parental rights for neglect may not be based solely on past conditions which no longer exist." *In re Young*, 346 N.C. at 248, 485 S.E.2d at 615.

However, the North Carolina Supreme Court has recognized that in most termination cases the children have been removed from the parents' custody before the termination hearing. *In re Ballard*, 311 N.C. at 714, 319 S.E.2d at 231. Consequently, "to require that termination of parental rights be based only upon evidence of events occurring after a prior adjudication of neglect which resulted in removal of the child from the custody of the parents would make it almost impossible to terminate parental rights on the ground of neglect." *Id.* at 714, 319 S.E.2d at 232. "Therefore, a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *Id.* at 713-14, 319 S.E.2d at 231. However, where the children have been removed from the parents' custody before the termination hearing, and the petitioner presents evidence of prior neglect, including an adjudication of such neglect, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232. "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.* (emphasis in original).

In summary, "[i]f there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be

terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents. *In re Reyes*, 136 N.C. App. at 815, 526 S.E.2d at 501. "Thus, the petitioner need not present evidence of neglect subsequent to the prior adjudication of neglect." *Id.*

[1] Respondents first argue that the evidence presented and the facts found do not support the trial court's conclusion of law that sufficient grounds existed authorizing termination of respondents' parental rights (i.e., that the children were neglected at the time of the termination proceeding). We first note that respondents have not specifically excepted to any of the trial court's findings of fact, and they are therefore conclusive on appeal. *In re Caldwell*, 75 N.C. App. 299, 301, 330 S.E.2d 513, 515 (1985). Respondents' broadside exception that the trial court's conclusion of law is not supported by the evidence, does not present for review the sufficiency of the evidence to support the entire body of the findings of fact. *Id.* Instead, the trial court's findings of fact are binding on appeal, and we are left to determine whether the trial court's findings support its conclusion of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dis'd and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). Having reviewed the trial court's order, we find that its findings of fact do support its conclusion of law that the children in the instant case were neglected.

In its orders terminating respondents' parental rights, the trial court indicated that it admitted into evidence without objection the previous court files showing prior instances of neglect of the children which resulted in previous adjudications of neglect.[1] Based on the evidence in these prior proceedings, the trial court made extensive findings of fact showing a clear pattern of neglect going back as far as 1992, and further found that "the probability of repetition of neglect is very great." The trial court also made findings of fact that indicated it had considered evidence presented by respondents that conditions had changed since the previous adjudications of neglect. Included among these findings were the following:

> That under repeated questioning in Court, Janet Beasley testified that she learned how to be a better mother, but the only specific

1. The Sauls children were adjudicated neglected on three prior occasions; Brittany Beasley was adjudicated neglected on two prior occasions; and Patricia and Justin Beasley were each adjudicated neglected on one prior occasion.

thing she could testify that she learned was how to properly discipline her children with "time out." That Janet Lindsey, who taught two of the parenting classes to Janet Beasley, testified that she was unaware of anyone who had been required to take the [parenting] courses three times. The courses are educational but not therapeutic.

. . .

Janet Beasley believes that the children were removed from her home in 1998 because she made a mistake and the only mistake she acknowledges making is "hanging out" with the wrong people. She testified, however, that there was nothing wrong with the people she was "hanging out" with when she was living in Calypso.

. . .

That Janet and Timothy Beasley live in the same trailer that they have lived in since November of 1999 in the same trailer park they have lived in for a year.

That Timothy Beasley is employed and has been employed at the same place for at least one year.

. . . .

These findings of fact clearly indicate that the trial court considered evidence of changed conditions and did not base its conclusion that the children were neglected solely on the prior adjudications of neglect. The trial court's order is sufficient to indicate that it considered the evidence of changed conditions in light of the clear pattern of neglect exhibited by respondents and the court's finding that there was a high probability of repetition of neglect in the future. Having done so, the trial court was required to determine whether grounds existed authorizing termination of respondents' parental rights at that time, based on the best interests of the children and the fitness of the respondents to care for the children at the time of the termination proceeding. Having reviewed the record, we cannot say that the trial court erred in its determination that respondents were not fit to care for the children at the time of the termination proceeding and that the best interests of the children required that they be adjudged neglected at the time of the termination proceeding. Therefore, respondents' first argument is overruled.

[2] Respondents also assign error to the trial court's determination that there was no credible evidence to support a conclusion that the best interests of the children would not be served by termination of respondents' parental rights, and, in fact, that the children's best interests would be served by termination of respondents' parental rights. Even where the trial court finds that one or more grounds exist which warrant termination of parental rights, the trial court is not required to order termination of parental rights if the trial court further concludes that it would be in the best interests of the children not to do so. N.C. Gen. Stat. § 7B-1110(a) (2000).

Respondents argue that the trial court erred in concluding it was in the children's best interests to terminate respondents' parental rights, because respondents had made significant strides at the time of the termination proceeding to allow them to care for the children.

In the instant case, the record shows parents who have failed over an extended period of time to provide a safe and healthy environment for their children, and who have failed to prove that their parental abilities have significantly improved since the children were removed from their custody. There was overwhelming evidence of the chronic nature of respondents' behavior to support the trial court's conclusion that the probability of repetition of neglect in the future was great. There was also overwhelming evidence that the best interests of the children would be served by termination of respondents' parental rights. Among the findings that support this conclusion are the following:

> That [] Brittany N. Beasley and Patricia Doris Beasley are now always happy, clean, and smiling since they are living with their maternal grandparents, James and Fannie Davis.
>
> That Justin Beasley is being properly and well cared for in the home of Patricia Sasser.
>
> . . .
>
> That both Timothy Sauls and Danielle Sauls have failed at least two grades, generally because they had not attended school on a regular basis when they were living with their mother, Janet Beasley. Both Timothy and Danielle Sauls are hyperactive and both are on medication. Danielle Sauls is ADD. Danielle Sauls was a very bright child until she was approximately four (4) years

old. She then lived with Janet Beasley and was possibly abused by a man.

. . .

That the children have spoken In Chambers to several different Juvenile Court Judges, stating that not only did they not want to be returned to the custody of their mother, but that they did not want to have anything to do with her.

That Patricia Johnson Dennis, who was the guardian ad litem for the children for approximately one year, stated that the pattern of treatment of the children by Janet and Timothy Beasley was detrimental to the children and would be detrimental to younger children. The former guardian ad litem, Patricia Johnson Dennis, strongly recommended that the parental rights of Janet Beasley and Timothy Beasley be terminated with respect to the children. She was of the opinion that the children had been badly neglected and abused for years.

That several social workers, called by respondents, testified that the respondents had not done much to improve their situation and that it was not in the best interest of the children to be returned to them.

. . .

That Angela Fox, current guardian ad litem of the children, testified that she had made substantial investigations concerning these children and that the best interest of the children would be served by terminating the parental rights of the parents. Angela Fox testified that the Beasleys have an unrealistic view of what it takes to care for children.

. . . .

Based on the foregoing findings, coupled with the clear pattern of neglect and the previous adjudications of neglect, we cannot say that the trial court erred in concluding that it was in the children's best interests to terminate respondents' parental rights. Therefore, we overrule respondents' argument.

In conclusion, we find no error in the proceedings to terminate respondents' parental rights. Therefore, the orders entered by the trial court are affirmed.

Affirmed.

Judges GREENE and BRYANT concur.

STATE OF NORTH CAROLINA v. SAMMY JO BUMGARNER, DEFENDANT

No. COA00-1219

(Filed 4 December 2001)

1. Burglary— attempted first-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree burglary, because: (1) defendant admitted to pulling a chair up to the victim's window, having a gun in his possession when it discharged, and shooting the victim, showing that the jury could have reasonably inferred that defendant moved the window screen; and (2) the jury could infer that defendant had the intent to commit larceny inside the home based on defendant's string of car break-ins and alleged attempted burglary earlier that evening.

2. Homicide— first-degree felony murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder, because: (1) the victim died during the commission of a felonious attempted burglary, meaning there was also substantial evidence to satisfy the elements of first-degree felony murder; and (2) the circumstances suggest that the victim was killed by someone shooting from his window or inside of his room, and nothing suggests otherwise.

3. Homicide— first-degree murder—instruction on lesser-included offenses—voluntary manslaughter—involuntary manslaughter

The trial court did not err in a first-degree murder case by refusing to instruct the jury on the lesser-included offenses of voluntary and involuntary manslaughter, because: (1) there was nothing in the evidence requiring an instruction on voluntary manslaughter, including defendant's statement, to indicate that

defendant was provoked, defending himself, or acting in a heat of passion; and (2) there was nothing in the evidence requiring an instruction on involuntary manslaughter when the alternatives presented to the jury for the underlying crime that defendant committed were both felonies.

Appeal by defendant from judgment entered 14 April 2000 by Judge James E. Lanning in Gaston County Superior Court. Heard in the Court of Appeals 12 September 2001.

Attorney General Roy Cooper, by Joan M. Cunningham, Assistant Attorney General, for the State.

The Law Firm of Charles L. Alston, Jr., by Charles L. Alston, Jr., for defendant-appellant.

HUDSON, Judge.

Defendant appeals his convictions for one count of first-degree murder, one count of attempted first-degree burglary, and one count of breaking and entering a motor vehicle. Defendant was found guilty by the jury on 13 April 2000 and was sentenced to one life sentence without parole for the murder, and a consolidated sentence of twenty-nine months to forty-four months for the attempted burglary and breaking and entering a motor vehicle. Defendant's two assignments of error are: (1) that the trial court committed reversible error by refusing to dismiss the charges, and (2) that the trial court committed reversible error by refusing to instruct the jury on lesser included offenses. We find no error.

On 8 August 1998, defendant was arrested for breaking and entering a motor vehicle. After waiving his Miranda rights, defendant was questioned about multiple break-ins that had occurred in the early morning hours of 7 August 1998. Defendant was also questioned about the death of Ted Hunt, a sixty-two year old man found shot to death in his bedroom, not far from the multiple automobile break-ins in Gaston County. According to the investigating officers, defendant broke down when asked about the "old man" and confessed to having "accidentally" shot him. Defendant also confessed to breaking into a car and taking a "shiny-looking" gun out of it. Defendant was charged with first-degree murder, first-degree burglary, two counts of breaking and entering a motor vehicle, and one count of misdemeanor larceny.

The testimony at trial indicated: Ted Hunt, the victim, was living with his ninety-four year old mother, Claudia, in her house when he was killed. He went to bed sometime after his mother retired on 6 August 1998. At some point in the night Claudia heard a thump, but returned to sleep without investigating further. She woke up the next morning and left the house for a hair appointment. When she returned to the house to find that her son was not yet up, she checked and found him dead on the floor of his bedroom, in a pool of blood. That morning, Claudia also noticed that a green plastic chair that she kept on the porch was under her son's window and she believed that no one in her family ever moved the chairs from the porch.

Several of the Hunts' neighbors also testified about the events in the late night and early morning of 7 August 1998. Some heard shots in the night and others woke to find that someone had broken into their cars. A neighbor, Thelma Hall, saw the defendant near her house at two in the morning. She later found that her cars had been broken into and ransacked, and that one of the windows to her house had been raised from the outside. The police matched defendant's fingerprint with one found on a compact disc (CD) case from one of Ms. Hall's cars.

Another neighbor, Joe Rhyne, was the landlord of the defendant's grandmother. Rhyne testified that he knew the defendant because the defendant stayed with his grandmother occasionally. Rhyne testified that when he woke up on the morning of 7 August 1998, he found that someone had broken into his cars and stolen his .32 caliber revolver from the console of one of the cars; the gun was not recovered. Rhyne testified that the gun was difficult to fire, because it had a "fairly strong trigger spring." Rhyne also found that someone had pried the lids off of the coin boxes on the washers and dryers in his apartment complex, but had not gotten to the money.

Several law enforcement investigators and experts also testified. SBI Agent David Santora, an expert in forensic firearm identification, testified that the bullet found at the crime scene was a .32 caliber bullet. SBI Agent Troy Hamlin, an expert in trace evidence, testified that the bullet from the crime scene could have come from a gun like Mr. Rhyne's, but he was unable to match it to the unfired bullets Mr. Rhyne provided. Gaston County Police crime scene investigator, Officer Clyde Putnam, testified that he believed that the screen in Ted Hunt's window had been moved, because it was not in its proper place in the tracks of the window. He found no holes in the screen, and he discovered blood on the bedroom window sill. Two SBI agents

testified that Ted Hunt's blood was on the sill, not the defendant's. SBI Agent Ricky Navarro, an expert in comparing and examining footwear impressions, matched a footprint found in the green chair outside of Ted Hunt's window to the shoe the defendant was wearing in the early morning hours of 7 August 1998. Dr. Cheryl Leone, a forensic pathologist, testified that Ted Hunt was killed by a gunshot at close range that entered Mr. Hunt's body straight on, and that a second bullet grazed his ear. Defendant presented no evidence during his trial or sentencing.

On appeal, defendant presents two arguments. First, the defendant contends that the trial court erred by denying his motion to dismiss based on an insufficiency of the evidence. The standard of review of a motion to dismiss is well-settled.

> When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.
>
> The issue of whether the evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

State v. Earnhardt, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citations omitted); s*ee also State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986) (finding that the trial court properly denied defendant's motion to dismiss). Our Courts have repeatedly noted that "[t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Smith*, 146 N.C. App. 1, 7, 551 S.E.2d 889, 893 (2001) (quoting *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (emphasis omitted) (citations omitted)); s*ee also State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585-86 (1994) (holding that the trial court properly denied defendant's motion to dismiss). Circumstantial evidence must also be considered by the court.

> It is immaterial that any individual piece of circumstantial evidence, taken alone, is insufficient to establish the identity of

> the perpetrator. If all the evidence, taken together and viewed in the light most favorable to the State, amounts to substantial evidence of each and every element of the offense and of defendant's being the perpetrator of such offense, a motion to dismiss is properly denied.

Mercer, 317 N.C. at 98, 343 S.E.2d at 892 (citations omitted).

Before reviewing the evidence presented in the record, we note that while defendant is appealing all of his convictions, he argues that the evidence was insufficient to sustain the two convictions: first-degree murder and attempted first-degree burglary. Therefore, we limit our review of the evidence to these two convictions.

In his brief, defendant contends: "[w]hat is clear from the evidence is 1) there is no eyewitness testimony placing the defendant inside of the Hunt home; 2) that the blood on the window sill belonged to the decedent not the defendant; 3) that the defendant had relatives that lived in the area; 4) the murder weapon was not recovered; and 5) that nothing was taken from the Hunt [home.]" Defendant questions the evidence illustrating his responsibility for the murder and the burglary, his intent to commit a larceny, and the validity of the confession defendant gave to police officers. We find that the evidence presented in the record is sufficient to support the trial court's denial of defendant's motion to dismiss.

Pursuant to N.C. Gen. Stat. § 14-17 (1999), "[a] murder which shall be perpetrated by means of . . . burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree." In accordance with this statute, the two elements of first-degree (felony) murder are: 1) a murder that was 2) committed in the perpetration of a felony. Here, the felony is the attempted burglary of the Hunt home. "Burglary is defined in North Carolina by the common law and [N.C. Gen. Stat. § 14-51 (1999)], as the breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with intent to commit a felony therein, whether such intent be executed or not." *State v. Goodman*, 71 N.C. App. 343, 345, 322 S.E.2d 408, 410 (1984), *disc. review denied*, 313 N.C. 333, 327 S.E.2d 894 (1985). Here, defendant was convicted of *attempted* first-degree burglary. "An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission." *Id.* Any murder committed in the commission of a felony or

attempted felony constitutes first-degree murder. Consequently, we must first examine whether there was sufficient evidence presented to support the conviction for attempted first-degree burglary. *See* N.C.G.S. § 14-17.

[1] As stated previously, the elements of first-degree burglary are: (1) the breaking and entering (2) of the dwelling house or sleeping apartment of another (3) in the nighttime (4) with the intent to commit a felony therein. *See Goodman*, 71 N.C. App. at 345, 322 S.E.2d at 410; *see also State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976) (upholding conviction for first-degree burglary). The Hunts' home was plainly a dwelling house belonging to someone other than defendant. The incident occurred at night, sometime after Claudia Hunt went to bed at ten o'clock.

Defendant contends that he did not break and enter the Hunts' home and that he did not have an intent to commit a felony therein. However, in *Goodman*, this Court found that a breaking and entering existed when defendant removed one corner of a window screen by loosening a peg. *See* 71 N.C. App. at 346, 322 S.E.2d at 410. Here, the evidence was similar. At trial, the investigating officer testified on this point:

> Q What did you notice about the window, if anything?
>
> A I noticed that the window was open and that the screen was out of place.
>
> Q Okay. When you say "out of place," would you describe to the jury what you mean by "out of place"?
>
> A The screen was out of the tracks from the storm window.

In addition to this testimony, the State offered defendant's statement to the police, which included the following:

> I had been at a friend's house partying Thursday night. . . . After that I went up to this house. I picked up a chair from somewhere in the yard and set it up against the house. The window on the back of the house was open. I was standing on the ground looking at the window. I could not see anything. It was pitch black. I saw a face in the window and it scared me. I started to fall backwards and the gun went off. I fell down on my back. . . . I did not intend to shoot that man that night. I'm sorry it happened. I did not even know the man.

In the chair outside and underneath Ted Hunt's bedroom window, the police found a footprint which matched the sole design, shape, and size of the shoe defendant wore.

As to whether or not defendant crawled through Ted Hunt's window, this Court has held that entry, for the purposes of burglary, is committed by the "insertion of any part [of the body] for the purpose of committing a felony. Thus, an entry is accomplished by inserting into the place broken the hand, the foot, or any instrument with which it is intended to commit a felony. . . ." *State v. Gibbs*, 297 N.C. 410, 418, 255 S.E.2d 168, 174 (1979) (quoting 13 Am. Jur. 2d, *Burglary* § 10, at 327). In *Gibbs*, the defendant shot a bullet through a pane of glass into a home, injuring one occupant of the house. Next, he pointed his gun at another occupant while requesting money; the victim put his wallet on the table, and the defendant reached his hand into the room through the shattered window and took the wallet. This reaching satisfied the entry element of burglary. *See id.* at 418, 255 S.E.2d at 174. In a more recent case, *State v. Surcey*, the Court determined that had the defendant been properly indicted, his conviction for burglary would have been appropriate because defendant had put a gun through a broken window pane of the victim's house and fired the gun. *See* 139 N.C. App. 432, 435-36, 533 S.E.2d 479, 481-82 (2000). This Court noted that the defendant had "effectively committed a burglary by virtue of the gun, which is considered to be an implement of his person, for entry into [the victim's] home." *Id.* (citations omitted).

The defendant admitted to pulling a chair up to Ted Hunt's window, to having a gun in his possession when it discharged, and shooting Mr. Hunt. The jury could have reasonably inferred that he moved the screen, because this inference "stand[s] upon some clear and direct evidence, and not upon some other inference or presumption." *State v. Ledford*, 315 N.C. 599, 610, 340 S.E.2d 309, 317 (1986) (citations omitted). Here, the jury could have reasonably inferred from the evidence presented that the defendant stood on the chair and removed the screen from Ted Hunt's window, which was sufficient to satisfy the elements of attempted first-degree burglary. From these acts the jury could and did infer that defendant acted with an intent to commit a crime, "carried beyond mere preparation to commit it, but falling short of its actual commission." *Goodman*, 71 N.C. App. at 345, 322 S.E.2d at 410.

The remaining element of burglary requires that a person who breaks and enters have the intent to commit a felony therein; defend-

ant challenges the sufficiency of the evidence of intent. The trial court instructed the jury that it could infer that defendant had the intent to commit larceny inside the Hunts' home, based on defendant's string of car break-ins and alleged attempted burglary earlier that evening. This approach is grounded in considerable case law. In *State v. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976), the defendant was seen standing in the open doorway of his victim's home. He contended that there was no proof that he intended to commit larceny at the time of the breaking and entering. *See id.* at 384, 230 S.E.2d at 535. The Court applied the established rule as follows:

> "The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the night time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent."

Id. (quoting *State v. McBryde*, 97 N.C. 393, 397, 1 S.E. 925, 927 (1887)). Similarly, in *State v. Accor and State v. Moore*, the Court discussed the presumption of intent on those who break and enter a dwelling house, not their own, during the night. *See* 277 N.C. 65, 72-74, 175 S.E.2d 583, 588-89 (1970), *aff'd*, 281 N.C. 287, 188 S.E.2d 332 (1972). The Court in *Accor and Moore* cited an older opinion, *State v. Thorpe*, in which the Court held that " '[t]he indictment having identified the intent necessary, the State was held to the proof of that intent. Of course, intent or absence of it may be inferred from the circumstances surrounding the occurrence, but the inference must be drawn by the jury.' " *Id.* at 73, 175 S.E.2d at 588 (quoting *State v. Thorpe*, 274 N.C. 457, 464, 164 S.E.2d 171, 176 (1968)). Here, the judge properly allowed the jury to decide whether the defendant satisfied all elements of attempted first-degree burglary.

[2] Considering the evidence in the light most favorable to the State, we find substantial evidence of each element of attempted first-degree burglary. *See State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). Because Ted Hunt died during the commission of the felonious attempted burglary, there is also substantial evidence to satisfy the elements of first-degree (felony) murder. *See* N.C.G.S.

§ 14-17. The circumstances suggest that Mr. Hunt was killed by someone shooting from his window or inside of his room, and nothing suggests otherwise. There "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169.

[3] In his second argument, the defendant contends that the trial court should have instructed the jury on the lesser included offenses of first-degree murder. *See State v. Shook*, 327 N.C. 74, 81, 393 S.E.2d 819, 823 (1990) (noting that involuntary manslaughter is a lesser included offense of first-degree murder). We do not agree.

> A trial court must give instructions on all lesser-included offenses that are supported by the evidence, even in the absence of a special request for such an instruction; and the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense. *See State v. Montgomery*, 341 N.C. 553, 567, 461 S.E.2d 732, 739 (1995); *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). The trial court may refrain from submitting the lesser offense to the jury only where the "evidence is clear and positive as to each element of the offense charged" and no evidence supports a lesser-included offense. [State v.] Peacock, [313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985)].

State v. Lawrence, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). If there is any evidence that indicates the absence of an important element of the primary offense and the existence of an element of a lesser offense, the jury must be instructed on the lesser offense as well. *See State v. Annadale*, 329 N.C. 557, 406 S.E.2d 837 (1991); *Peacock*, 313 N.C. at 558, 330 S.E.2d at 193. However, "[a] defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State's evidence but not all of it." *Annadale*, 329 N.C. at 568, 406 S.E.2d at 844.

Here, the jury was instructed on first-degree murder in the perpetration of a felony and second-degree murder. Defense counsel requested that the jury also be instructed on voluntary and involuntary manslaughter. The defendant renews this request in his appeal, based on his belief that "there was evidence presented at trial to support an instruction on this lesser charge." Defendant contends that the court's failure to so instruct was reversible error. "Generally

voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense . . . ." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978). There was nothing in the evidence, including defendant's statement, to indicate that he was provoked, defending himself, or acting in a heat of passion. The Court, in *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981), noted that "[t]he sole factor determining the judge's obligation to give such [a lesser included] instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." Here, there was no evidence to require submitting the offense of voluntary manslaughter.

Similar logic applies to involuntary manslaughter. "Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence." *State v. Wrenn*, 279 N.C. 676, 687, 185 S.E.2d 129, 136 (1971) (citing *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963)) (emphasis omitted), *cert. denied*, 282 N.C. 430, 192 S.E.2d 839 (1972). Here, defendant could have been found guilty of involuntary manslaughter if the underlying crime that he committed was a misdemeanor. However, the alternatives presented to the jury were to find the defendant guilty of the underlying offenses, first-degree burglary, attempted first-degree burglary, of which both are felonies, or not guilty. Consequently, there was no basis for instruction to the jury on involuntary manslaughter.

No error.

Judges WALKER and McGEE concur.

MARSHA JENKINS, EMPLOYEE, PLAINTIFF-APPELLEE v. PIEDMONT AVIATION SERVICES, EMPLOYER, KEMPER GROUP, CARRIER, DEFENDANT-APPELLANTS

No. COA00-119

(Filed 4 December 2001)

1. Workers' Compensation— Commission's authority to review deputy commissioner's decision—no appeal

The Industrial Commission had the authority to review and set aside a deputy commissioner's prior decision where plaintiff did not appeal from that decision. *Moore v. City of Raleigh*, 135 N.C. App. 332, held only that the plaintiff's actions did not constitute excusable neglect or any other of the grounds for setting aside a judgment, not that the Commission never had the power to set aside an otherwise final judgment. The power of the Commission to set aside former judgments is analogous to that conferred upon the courts by N.C.G.S. § 1A-1, Rule 60(b)(6).

2. Workers' Compensation— credit to defendant for plaintiff's outside income—not authorized

The Industrial Commission did not err in a workers' compensation action by setting aside a deputy commissioner's award of a credit for outside income received by plaintiff where the deputy commissioner's judgment was void. N.C.G.S. § 97-42 specifically authorizes the Commission to award credits for payments the employer has made which had not been ordered at the time of payment; the Commission is not granted the broad power to award any and all credits it may desire.

3. Workers' Compensation— credit to defendant—time of disability

A deputy commissioner exceeded his authority in a workers' compensation action, and the Industrial Commission properly set aside the award even without an appeal, where the deputy commissioner found that plaintiff was actively employed until 19 April 1988 and provided a credit to defendant, and the Commission found that plaintiff was not disabled until 15 December 1989. The Commission is not bound by the deputy commissioner's findings, there is competent evidence to support the Commission's finding and the Commission does not have jurisdiction to award credits for income plaintiff received before plaintiff became disabled.

4. Appeal and Error— preservation of issues—assignment of error—no citation of authority—abandoned

An assignment of error in a workers' compensation action regarding the amount of a credit awarded to defendants was deemed abandoned where defendants cited no case law or statutory authority in support of their argument. Furthermore, there was competent evidence in the record to support the Commission's findings of fact.

Appeal by defendants from an opinion and award entered 24 September 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 January 2001.

Tania L. Leon, P.A., by Tania L. Leon, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo, Erica B. Lewis and Shelley W. Coleman, for defendant-appellants.

McGEE, Judge.

Piedmont Aviation Services (employer) and Kemper Group (collectively defendants) appeal from an opinion and award of the North Carolina Industrial Commission filed 24 September 1999, in which the Commission reversed a deputy commissioner's decision that defendants were entitled to receive a credit of $125,321.39 against the award of compensation previously paid to Marsha Jenkins (plaintiff) and to suspend payment of workers' compensation benefits to her.

Plaintiff was injured on 28 July 1986 when she was struck on the back of her head and neck by a mirror that fell off the wall in a hotel where plaintiff was staying while she was serving as a sales representative for employer. Plaintiff suffered a cervical neck strain. She was initially informed by her supervisor that the injury was not work-related, and she was directed to file her claim for medical care with employer's health insurance carrier.

Plaintiff was told by another supervisor in July 1988 that her original neck injury was, in fact, work-related. The supervisor informed plaintiff that he would file all the necessary workers' compensation forms within the two-year statute of limitations period for workers' compensation claims. However, unknown to plaintiff, her employer's group health insurance carrier continued paying for plaintiff's medical treatment, not employer's workers' compensation carrier.

Plaintiff sustained a second work-related injury in April 1988 when boxes of supplies fell and hit her hand, injuring her wrist and thumb. Plaintiff missed some work due to her wrist injury from April 1988 until January 1989. Plaintiff had surgery in January 1989 on her wrist and was unable to return to work until 10 April 1989.

Employer changed its group health insurance carrier to Blue Cross/Blue Shield in December 1989. Blue Cross refused to pay for plaintiff's further tests and treatment of the cervical strain because Blue Cross determined plaintiff's injury was work-related. Plaintiff ended her job with employer on 15 December 1989. On 6 March 1990, she filed a Form 33 request for hearing concerning her cervical strain. Employer responded arguing that plaintiff's claim was barred by N.C. Gen. Stat. § 97-24 for plaintiff's failure to file her claim within two years following the accident.

An opinion and award filed 27 November 1990 by Deputy Commissioner William L. Haigh held that plaintiff's neck injury sustained on 28 July 1986 was compensable and that plaintiff last worked for employer on 15 December 1989. Deputy Commissioner Haigh concluded that, based on the facts, employer was estopped from asserting the two-year statute of limitations as a bar to plaintiff's claim for workers' compensation. Employer appealed to the Commission. The Commission filed an opinion and award on 7 October 1991 holding that employer had failed to file a Form 19 report of injury with its workers' compensation carrier on behalf of plaintiff in violation of N.C. Gen. Stat. § 97-92 and affirmed the order of the deputy commissioner.

Plaintiff filed a Form 33 request for hearing on 11 May 1992 because employer's workers' compensation carrier refused to pay her workers' compensation benefits. A hearing was held by Deputy Commissioner Richard B. Ford to determine if "the disabilities which the plaintiff suffers since January 5, 1990 [are] the result of and due to the injury which she sustained on July 28, 1986" and "to what further compensation, if any, is the plaintiff entitled[.]" An opinion and award was filed on 7 January 1994 by Deputy Commissioner Ford in which he concluded that (1) plaintiff was entitled to temporary total disability compensation benefits and payment for past, present and future medical expenses resulting from the 28 July 1986 injury, and (2) defendants were entitled to a credit for both compensation paid to plaintiff and for royalties collected by plaintiff for musical compositions in which she had collaborated subsequent to 19 April 1988. The opinion and award did not determine the amount of credit owed

to defendants or how the credit was to be applied against plaintiff's future workers' compensation payments. The opinion and award also cited no statutory provision or authority for awarding the credit. At the time of plaintiff's hearing before Deputy Commissioner Ford, defendants had not paid plaintiff any workers' compensation payments for her 28 July 1986 cervical injury. Plaintiff received a disability payment on 30 April 1994 for accrued benefits for a period beginning 15 December 1989.

Following a hearing to determine "what amount of credit [] the Defendants [are] entitled to take from the compensation awarded to the Plaintiff by [Deputy Commissioner Ford]," Deputy Commissioner Mary Moore Hoag filed an opinion and award on 6 August 1996 finding that the evidence presented thus far established that defendants were entitled to a credit from the compensation previously paid to plaintiff because of royalty income earned by plaintiff since April 1988 and allowing defendants to cease further workers' compensation payments to plaintiff. Deputy Commissioner Hoag also ordered that the record remain open for further documentary evidence to determine the amount of the credit to which defendants were entitled.

A second opinion and award was filed by Deputy Commissioner Hoag on 16 October 1997 deciding only whether defendants were entitled to a credit as previously stated by Deputy Commissioner Ford and, if so, the amount of the credit. The 16 October 1997 opinion and award incorporated Deputy Commissioner Ford's 7 January 1994 opinion and award. Deputy Commissioner Hoag found that, beginning in 1992, plaintiff earned royalty income and concluded, based on N.C. Gen. Stat. § 97-30 and on Deputy Commissioner Ford's previous opinion, that defendants were entitled to a credit in the amount of $125,321.39. In addition, Deputy Commissioner Hoag concluded that defendants were entitled to suspend payments to plaintiff until the total credit for royalty income was exhausted. She further found that plaintiff had a presumption of continuing disability and ordered an independent medical examination.

Plaintiff appealed to the Commission. In an opinion and award dated 24 September 1999, the Commission reversed the 16 October 1997 opinion and award of Deputy Commissioner Hoag. The Commission concluded that plaintiff's disability began on 15 December 1989 and that defendants were not entitled to a credit for plaintiff's royalty payments. The Commission found that Deputy

Commissioner Ford did not have the authority "to give defendants [a] credit for earnings from intellectual work or property rights acquired at a time when plaintiff was working and earning her regular wages from defendant[.]" The Commission also found that Deputy Commissioner Ford's award of a credit was void and unenforceable. However, the Commission concluded defendants were entitled to a credit for plaintiff's earnings from her home-based jewelry making business for 1992 and 1993. The Commission further concluded defendants had not rebutted plaintiff's presumption of continuing disability. Defendants appeal the decision of the Commission.

I.

[1] Defendants first argue the Commission lacked the authority to review and set aside Deputy Commissioner Ford's award and opinion because plaintiff did not appeal from that decision. The record before us shows neither party appealed Deputy Commissioner Ford's decision of 7 January 1994. Plaintiff did file a timely appeal to the Commission of the 16 October 1997 decision of Deputy Commissioner Hoag.

Our Supreme Court has stated that the "statutes creating the Industrial Commission have by implication clothed the Commission with the power to provide this remedy [to set aside one of its former judgments], a remedy related to that traditionally available at common law and equity and codified by Rule 60(b)." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985). The Commission, "in the exercise of supervision over its own judgments," may utilize this remedy "when the paramount interest in achieving a just and proper determination of a claim requires it." *Id.* at 129, 337 S.E.2d at 478.

While defendants acknowledge the holding in *Hogan*, they specifically argue that our Court's decision in *Moore v. City of Raleigh*, 135 N.C. App. 332, 520 S.E.2d 133 (1999), *cert. denied*, 351 N.C. 358, 543 S.E.2d 131 (2000), prohibits the Commission from setting aside Deputy Commissioner Ford's opinion and award because an application for review of that opinion and award was not filed by plaintiff within fifteen days pursuant to N.C. Gen. Stat. § 97-85. In *Moore*, the Commission "waived the fifteen day rule on the basis that plaintiff's *pro se* representation before the deputy commissioner constituted excusable neglect[.]" *Moore* at 334, 520 S.E.2d at 135. As a result of the excusable neglect, the Commission determined it had authority to set aside the judgment. Our Court reversed the Commission, stating

the plaintiff's actions did not constitute excusable neglect; consequently, the Commission did not have the authority to review or set aside a final order of the deputy commissioner. The order became final because the plaintiff had failed to follow the proper channels of appeal under N.C.G.S. § 97-85. However, our Court did not rule the Commission never had the power to set aside an otherwise final judgment. Our Court acknowledged the Commission has the power to set aside a judgment when there is "[m]istake, inadvertence, surprise, or excusable neglect[,]" or "on the basis of newly discovered evidence," or "on the grounds of mutual mistake, misrepresentation, or fraud." *Moore* at 336, 520 S.E.2d at 137 (citations omitted). In *Moore*, the plaintiff's actions did not constitute excusable neglect, nor any of the other reasons required to set aside a judgment.

While it is true plaintiff did not appeal Deputy Commissioner Ford's award or file a motion with the Commission to set aside Deputy Commissioner Ford's award, such acts are not required. Again, the power of the Commission to set aside former judgments is "analogous to that conferred upon the courts by N.C.R. Civ. P. 60(b)(6)" and the remedy the Commission may provide is "related to that traditionally available at common law and equity and codified by Rule 60(b)." *Hogan* at 137, 337 S.E.2d at 483. This power includes the ability to set aside judgments even when a party has not made a motion to do so. Although "Rule 60 says that the court is to act 'on motion,' it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion." *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 717, 220 S.E.2d 806, 811 (1975), *cert. denied*, 289 N.C. 619, 223 S.E.2d 396 (1976).

[2] N.C. Gen. Stat. § 1A-1 Rule 60(b) (1999) confers upon the Commission the ability to set aside a judgment where it finds

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

In the case before us, the Commission made specific findings of fact that Deputy Commissioner Ford's judgment was void because the Commission did not have the power to award a credit for property rights acquired by plaintiff for the lyrics to the two songs prior to the date of her disability. If in fact the deputy commissioner did not have authority to enter the judgment, the judgment is void and the Commission has the authority under N.C.G.S. § 1A-1 Rule 60(b)(4) to set aside the judgment.

Defendants argue the Commission erred by setting aside the deputy commissioner's judgment when that judgment was not void. When a "court acts in excess of its authority . . . 'its judgment . . . is void and of no effect. A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted, without any special plea.' " *Allred v. Tucci*, 85 N.C. App. 138, 143, 354 S.E.2d 291, 295, *cert. denied*, 320 N.C. 166, 358 S.E.2d 47 (1987) (quoting *Hanson v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952)). In the case before us, the Commission was correct in asserting that the deputy commissioner had "no jurisdiction over earnings, investments or property rights obtained prior to an employee's disablement due to a work-related injury or prior to the time defendant's obligation to pay indemnity or wage loss compensation arises."

Under the Workers' Compensation Act, the only statutes which allow the Commission to award credits are N.C. Gen. Stat. § 97-42 (1999) and N.C. Gen. Stat. § 97-42.1 (1999). These statutes allow for a credit for amounts voluntarily paid by the employer before the workers' compensation benefits are awarded. The "laudable purpose" of this section is "to encourage voluntary payments to workers while their claims to compensation are being disputed and they are receiving no wages." *Evans v. AT&T Technologies*, 103 N.C. App. 45, 48, 404 S.E.2d 183, 185 (1991), *rev'd on other grounds*, 332 N.C. 78, 418 S.E.2d 503 (1992).

A "credit" is a deduction by the employer of a prior payment made to an injured employee from the compensation benefit that

> is now due the employee. The only statute in North Carolina authorizing a credit is N.C.G.S. § 97-42. It provides, in order to encourage voluntary payments by the employer while the worker's claim is being litigated and he is receiving no wages, that any payments made by the employer to the injured employee which were not due and payable when made, may in certain cases be deducted from the amount of compensation due the employee.

Gray v. Carolina Freight Carriers, 105 N.C. App. 480, 484, 414 S.E.2d 102, 104 (1992). This credit applies to payments made by the employer, not to any and all other payments the employee may receive from outside sources.

In the case before us, the royalties plaintiff may have received were not payments the employer made; therefore, the Commission did not have the authority under N.C.G.S. § 97-42 to offset these amounts against any future payment the employer is required to make. Our Supreme Court has interpreted the provisions of N.C.G.S. § 97-42 as

> typically limited to situations where . . . an employer pays a disabled employee wages intended as compensation (and not as a gratuity) throughout the period of the latter's absence from work, or where the employer pays the employee a lump sum in settlement of an anticipated award but a change in the latter's condition causes the award to be diminished.

Moretz v. Richards & Associates, 316 N.C. 539, 541, 342 S.E.2d 844, 846 (1986). Plaintiff's uncontested testimony was that

> I was intermittently working from August of '89 until November of '89. And they made me use my sick time so I still got paid. Once my sick time was exhausted, which was November of '89, the company made me go on leave in January of '90, and it was medical leave with no pay[.]

Therefore, the opinion and award of Deputy Commissioner Ford stated that defendants were owed a credit, when defendants had not paid any disability payments to plaintiff, but rather had required plaintiff to use her sick leave which she had earned by working overtime. Fringe benefits, such as sick leave time, are not disability payments. *See Moretz*, 316 N.C. at 541, 342 S.E.2d at 846 (fringe benefits are of a contractual nature rather than proceeds that are grounded in the workers' compensation law).

The Commission can only credit the employer with payments the employer itself has previously made. In addition, defendants did not show a change in plaintiff's medical condition in order to reduce the compensation owed and were ordered by Deputy Commissioner Ford to begin disability compensation payments to plaintiff for her work-related injury. There is evidence in the record tending to show that Deputy Commissioner Ford's opinion exceeded statutory authority under N.C.G.S. § 97-42 in that (1) defendants had made no compensation disability payments to plaintiff and (2) defendants had not shown a change in condition of plaintiff to cause the ordered compensation payments to be reduced. Defendant's argument that N.C.G.S. § 97-42 grants the Commission the broad power to award any and all credits the Commission may desire is without merit. N.C.G.S. § 97-42 specifically authorizes the Commission to award credits for payments the *employer* has made which at the time of payment had not been ordered payable by the Commission.

[3] Furthermore, the Commission found that plaintiff was not disabled until 15 December 1989. While Deputy Commissioner Ford stated in his findings of fact that plaintiff was actively employed until 19 April 1988, the Commission is not bound by the deputy commissioner's findings.

> The deputy commissioner's findings of fact are not conclusive; only the Full Commission's findings of fact are conclusive. The Commission may "weigh the evidence [presented to the deputy commissioner] and make its own determination as to the weight and credibility of the evidence." The Commission may strike the deputy commissioner's findings of fact even if no exception was taken to the findings.

Keel v. H & V Inc., 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992) (quoting *Hobgood v. Anchor Motor Freight*, 68 N.C. App. 783, 785, 316 S.E.2d 86, 87 (1984)). There is competent evidence to support the Commission's finding that plaintiff in fact became disabled in December 1989. Plaintiff continued to work for defendant until 15 December 1989. While she missed some periods of work from April 1988 until December 1989, there is competent evidence in the record which shows she missed this time due to the injury to her wrist. The first evidence of any workers' compensation payment for plaintiff's cervical strain injury is on 30 April 1994. Any disability payments plaintiff may have received from April 1988 until December 1989 were due to her wrist injury. Defendants did not even recognize plaintiff's

cervical neck injury as a compensable injury until the opinion and award filed 27 November 1990 by Deputy Commissioner Haigh in which he held that plaintiff's neck injury on 28 July 1986 was compensable. Plaintiff's wrist injury was not before Deputy Commissioner Ford. The only injury at issue before him was plaintiff's 1986 neck injury. As a result of the Commission's finding that plaintiff became disabled on 15 December 1989, Deputy Commissioner Ford's award was again without jurisdiction, as the Commission does not have jurisdiction to award credits for income plaintiff received before plaintiff became disabled. The credit defendants claim and the credit the deputy commissioner awarded do not fall within the language of N.C.G.S. § 97-42 or its intended purpose. We overrule this assignment of error.

II.

[4] Defendants next argue the Commission erred in determining the amount of credit defendants were entitled to receive for payments they made during weeks that plaintiff earned income from her home-based jewelry making business. However, defendants have cited no case law or statutory authority in support of their argument. Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure requires the appellant's argument to "contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(5). *See State v. Thompson*, 110 N.C. App. 217, 222, 429 S.E.2d 590, 592 (1993); *Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987). Furthermore, there is competent evidence in the record to support the Commission's findings of fact. We deem this assignment of error abandoned.

In review, the Commission's opinion and award voiding Deputy Commissioner Ford's determination of a credit against plaintiff's royalty income and reversing Deputy Commissioner Hoag's opinion and award is affirmed. The Commission's opinion and award granting defendants a week by week credit totaling $2,586.00 for plaintiff's income from her jewelry making business is affirmed.

Affirmed.

Judges WYNN and JOHN concur.

STEPHENS v. DORTCH

[147 N.C. App. 429 (2001)]

K. MARK STEPHENS AND WIFE, DENISE BUFF STEPHENS AND V. KEN PFAHL AND WIFE, SUSAN C. PFAHL, PLAINTIFFS v. MICHAEL J. DORTCH AND WIFE, ELYN SIKES DORTCH, DEFENDANTS

No. COA00-1430

(Filed 4 December 2001)

1. **Easements— appurtenant—withdrawal of dedication—ingress and egress**

The trial court did not err by granting partial summary judgment in favor of plaintiffs and concluding that defendants' filing of a declaration of withdrawal of dedication under N.C.G.S. § 136-96 did not operate to terminate plaintiffs' right to use an easement over a portion of defendants' property, because: (1) plaintiffs have an easement appurtenant since the agreement states the easement was dedicated to the grantees, their heirs, and assigns; (2) once an easement appurtenant is properly created, it runs with the land and is not personal to the landowner; (3) plaintiffs as owners of an easement appurtenant have rights to the easement above and beyond those of the general public; and (4) N.C.G.S. § 136-96 has no application and a street may not be withdrawn from dedication, over objection of one owning a lot or lots within the subdivision, if the street is necessary to afford convenient ingress or egress to such lot or lots.

2. **Easements— right to ingress and egress—description of distance**

The trial court did not err by determining that plaintiffs have a right to ingress and egress from their property to Belvedere Avenue by means of an easement over a portion of defendants' property even though defendant alleges the evidence shows that the easement falls short of the street by thirty feet, because: (1) the trial court's finding that the street existed as a specifically dedicated right of way that was staked in November 1930 and is in the same location today is supported by competent evidence; (2) although the description of distance in the agreement fell short of the street, the call in the agreement to a stake in the northerly edge of the street as now laid out serves as a call to a monument and prevails over the stated footage; and (3) the agreement intended the easement to extend to the street as it exists today for the purpose of providing ingress and egress to appurtenant lot owners.

Appeal by defendants from judgment entered 24 August 2000 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2001.

Kennedy Covington Lobdell & Hickman, LLP, by Roy H. Michaux, Jr., for plaintiff-appellees.

Ervin & Gates, by Winfred R. Ervin, Jr., for defendant-appellants.

HUNTER, Judge.

Michael J. Dortch and Elyn Sikes Dortch ("defendants") appeal the entry of judgment in favor of K. Mark Stephens, Denise Buff Stephens, V. Ken Pfahl and Susan C. Pfahl ("plaintiffs"). We affirm.

On 20 November 1930, an easement was created among owners of various lots in the Club Acres subdivision of Charlotte. The easement was created by an agreement ("the agreement") wherein the owners of a portion of lots 28 and 30 of Club Acres dedicated to the public and to the owners of the remainder of lots 28 and 30, and lots 6, 25, 26, 29, and 31 of Club Acres, their heirs and assigns, a tract of land on the westerly edge of lot 28 to be used as a roadway. The easement was described in the agreement as beginning at the common point of lots 6, 28 and 30 of Club Acres, and extending "to a stake in the Northerly edge of Belvedere Avenue as now laid out."

On 4 October 1993, defendants acquired the westerly portion of lot 28 of Club Acres fronting on Belvedere Avenue and over which the 1930 easement passes. The defendants knew of the easement at the time they purchased the property. On 15 May 1996, defendants filed a Declaration of Withdrawal of Dedication with the Mecklenburg County Register of Deeds in which they sought to extinguish the easement over lot 28. Plaintiffs are owners of a portion of lots 6 and 28 of Club Acres. Plaintiffs maintain the easement is their only means of access to nearby Belvedere Avenue.

On 7 May 1999, plaintiffs filed this action seeking a declaration that defendants' Withdrawal of Dedication was void, and that they are entitled to use the easement described in the November 1930 agreement. Defendants filed a counterclaim, seeking a determination that plaintiffs are not entitled to use the easement, nor any other portion of defendants' property as a means of access to plaintiffs' property. Both parties filed motions for summary judgment.

On 11 August 2000, the trial court entered partial summary judgment in favor of plaintiffs. The trial court found: (1) the easement established by the agreement is an easement appurtenant to those properties for which the easement was created, including lots 6, 25, and 28 of Club Acres in which plaintiffs have an interest; and (2) the easement area has never been accepted for maintenance by a governmental entity, has never been used by the general public, and therefore, the Withdrawal of Dedication was effective as to members of the general public. The trial court concluded plaintiffs have an easement appurtenant for ingress and egress to their property, and that the easement is only available to and enforceable by the landowners of lots 6, 25, and 28 of Club Acres.

The trial court further concluded the easement extends from the common corner of all three lots to Belvedere Avenue as laid out at the time the agreement was entered. The court determined there remained an issue of material fact as to whether Belvedere Avenue is in the same location today as it was when the agreement was entered, and whether the easement extends to Belvedere Avenue as it exists today.

On 14 August 2000, the trial court conducted a bench trial on the remaining issue of the easement's location. The trial court found that when plotted upon the ground, the easement as described in the agreement did not extend from the common boundary of lots 6, 28, and 30 all the way to the northern margin of Belvedere Avenue. The trial court determined the easement fell short of Belvedere Avenue by thirty feet. The trial court determined, however, that Belvedere Avenue exists today in the same location as it existed in November 1930, and that the call to "a stake in the Northerly edge of Belvedere Avenue as now laid out" was a call to a monument that governs over the distance stated in the agreement. The trial court concluded the easement extends to Belvedere Avenue as it exists today, and that it provides plaintiffs a means of ingress and egress to and from Belvedere Avenue. Defendants appeal.

Defendants argue: (1) the trial court erred in concluding the Withdrawal of Dedication did not terminate plaintiffs' right to use the easement; and (2) the trial court erred in determining plaintiffs have a right to ingress and egress from their property to Belvedere Avenue by means of the easement.

I.

[1] In their first argument, defendants contend the trial court erred in determining their Withdrawal of Dedication did not operate to terminate plaintiffs' right to use the easement. The trial court concluded the Withdrawal of Dedication was not effective as to plaintiffs in its order for partial summary judgment. A review of the granting of summary judgment involves a two-part analysis of whether "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000), *cert. denied*, — U.S. —, — L. Ed. 2d — (No. 01-69 filed 9 October 2001).

Defendants argue the trial court's conclusion that the Withdrawal of Dedication did not terminate plaintiffs' easement is inconsistent with the plain language of N.C. Gen. Stat. § 136-96 (1999). That statute provides that when any piece of land dedicated to public use as a roadway has not been opened for and used by the public within fifteen years from its dedication, it shall be presumed to be abandoned by the public for the purpose for which it was dedicated. N.C. Gen. Stat. § 136-96. The statute states that upon the proper filing of Withdrawal of Dedication, "no person shall have any right, or cause of action thereafter, to enforce any public or private easement therein." N.C. Gen. Stat. § 136-96. Defendants argue this language operates to terminate any rights plaintiffs had in the easement area. We disagree.

The trial court found that plaintiffs' easement is appurtenant to lots 6, 25, and 28 of Club Acres, in which they have an interest as landowners. An easement appurtenant is " 'an easement created for the purpose of benefitting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land.' " *Harry v. Crescent Resources, Inc.*, 136 N.C. App. 71, 74, 523 S.E.2d 118, 120 (1999) (citation omitted). Although defendants do not assign error to this particular finding of the trial court, we note the evidence supports the trial court's determination that plaintiffs have an easement appurtenant.

In *Brown v. Weaver-Rogers Assoc.*, 131 N.C. App. 120, 505 S.E.2d 322 (1998), *disc. review denied*, 350 N.C. 92, 532 S.E.2d 523 (1999), this Court determined that a grant of an easement is reasonably interpreted to be an easement appurtenant where the grant includes such

language as " 'his heirs and assigns.' " *Id.* at 123, 505 S.E.2d at 325. We noted the use of such words "indicates an intent that the grant was not personal to [the grantee], but would extend beyond the life of [the grantee] and would run with the land." *Id.* We stated that more significantly, the grant did not mention the term " '. . . "in gross[,]" ' " nor did it ". . . 'qualify the grantee's rights by the use of such terms as "personally" or "in person." ' " *Id.* at 123-24, 505 S.E.2d at 325 (citation omitted).

Likewise, the agreement at issue here states the easement was dedicated to the grantees, "their heirs and assigns." As in *Brown,* the agreement in this case does not include the term "in gross," nor does it contain language such as "personally," "in person," or any other language suggesting the grantors intended to limit the easement rights to the named grantees. A reasonable interpretation of the agreement supports the trial court's finding that the easement is appurtenant to plaintiffs' land.

"Once an easement appurtenant is properly created, it runs with the land and is not personal to the landowner." *Id.* at 123, 505 S.E.2d at 324. "An appurtenant easement is an incorporeal right attached to the land and incapable of existence separate and apart from the particular land to which it is annexed." *Yount v. Lowe,* 288 N.C. 90, 97, 215 S.E.2d 563, 567 (1975). Such an easement "adheres to the land" and "can be conveyed only by conveying the land involved." *Frost v. Robinson,* 76 N.C. App. 399, 400, 333 S.E.2d 319, 320 (1985).

In *Butler Drive Property Owners Assn. v. Edwards,* 109 N.C. App. 580, 427 S.E.2d 879 (1993), the petitioners filed a declaratory judgment action seeking a determination that the respondents had no right to ingress and egress over an easement which abutted respondents' property because the easement had never been dedicated to the general public. This Court drew a distinction between the issue of dedication to the general public and the issue of an easement appurtenant. We stated:

> [P]etitioners have failed to address the fact that respondents are not merely members of the 'general public' or purchasers of a lot outside of the subdivision possessing no interest in [the easement area]. On the contrary, respondents are owners of a parcel of land with an appurtenant easement that gives them the right of ingress and egress over [the easement area].

Id. at 584, 427 S.E.2d at 881. Likewise, in the instant case, plaintiffs are owners of an easement appurtenant, and thus have rights to the easement above and beyond those of the general public.

Further, our Supreme Court has specifically held that N.C. Gen. Stat. § 136-96 "has no application and a street may not be withdrawn from dedication, over objection of one owning a lot or lots within the subdivision, if the street 'be necessary to afford convenient ingress or egress to' such lot or lots." *Janicki v. Lorek*, 255 N.C. 53, 59, 120 S.E.2d 413, 418 (1961) (citations omitted). When it is established that a lot in a subdivision abuts the street sought to be withdrawn,

> it will be conclusively presumed that the street is 'necessary to afford convenient ingress or egress' to or from the lot, and, in the absence of consent by the lot owner to the withdrawal, G.S. § 136-96 has no application and the dedication may not be withdrawn irrespective of lapse of time or whether or not the street has been opened and used.

Id. at 60, 120 S.E.2d at 418.

Defendants have not argued on appeal that plaintiffs do not need the easement for convenient ingress and egress to their property; therefore, under *Janicki*, the conclusive presumption is that the easement is necessary to provide convenient ingress and egress for plaintiffs' property, and any withdrawal under N.C. Gen. Stat. § 136-96 has no application to plaintiffs' easement appurtenant. The trial court correctly determined under N.C. Gen. Stat. § 136-96 that defendants' Withdrawal of Dedication did not extinguish plaintiffs' rights in the appurtenant easement as owners of the adjoining property. This argument is therefore overruled.[1]

II.

[2] In their next argument, defendants maintain the trial court erred in determining plaintiffs have a right to ingress and egress over the easement to and from Belvedere Avenue. Specifically, they argue the evidence shows the easement falls short of Belvedere Avenue by

1. Neither party assigns error to the trial court's determination that defendants' Withdrawal of Dedication was effective as to the general public; however, we note that under *Janicki*, where an appurtenant landowner needing the easement for convenient ingress and egress objects to the withdrawal, as was the case here, N.C. Gen. Stat. § 136-96 "*has no application and a street may not be withdrawn from dedication*" absent the consent of the landowner. *Janicki*, 255 N.C. at 59, 120 S.E.2d at 418 (emphasis added).

thirty feet, and that the trial court erred in concluding the easement extends to Belvedere Avenue as it exists today. The trial court determined the exact location of the easement during the bench trial which followed the entry of partial summary judgment for plaintiffs. " 'It is well established that where the trial court sits without a jury, the court's findings of fact are conclusive if supported by competent evidence, even though other evidence might sustain contrary findings.' " *Goodson v. Goodson*, 145 N.C. App 356, 361, 551 S.E.2d 200, 204 (2001) (citation omitted).

The trial court's pertinent findings of fact are:

> 3. The description of the area set aside in the Easement Agreement . . . called for a beginning point at the common boundary of Blocks 6, 28 and 30 of Club Acres and ran from the beginning point to a stake in Highland Road. The description then extended from the stake in Highland Road two courses and distances "to a stake in the northerly edge of Belvedere Avenue as now laid out."
>
> 4. When plotted upon the ground, the Easement Area . . . does not extend from the common boundary of Blocks 6, 28, and 30 of Club Acres to the northern margin of Belvedere Avenue as it exists today; the Easement Area falls approximately 30 feet short of Belvedere Avenue.
>
> 5. Belvedere Avenue was dedicated prior to November 20, 1930, by a map of Midwood Subdivision dated 1914 and recorded in Book 230 at pages 96 and 97, Mecklenburg County Registry and a Map of St. Andrews Place dated August 1926 recorded in Map Book 3 at page 343, Mecklenburg County Registry.
>
> 6. The description to Lots 1 and 2 of Midwood contained in a deed dated May 30, 1930 and recorded in Book 777 at page 417, Mecklenburg County Registry calls for "an iron stake in the northerly margin of Belvedere Avenue, said point being the southeastern corner of Lot No. 1 as shown on the Map of Midwood . . . ."
>
> 7. The eastern boundary of Lot No. 1 of Midwood is the western boundary of the defendant's [sic] property and includes the western boundary of the Easement Area.
>
> 8. The Court cannot determine if Belvedere Avenue was actually constructed or paved in November of 1930, but based upon

the other exhibits and testimony presented, Belvedere Avenue existed as a specifically dedicated right-of-way that had been staked in November of 1930 and it is still in the same location today.

We hold these findings conclusive on appeal, as they are supported by competent evidence. Findings of fact numbers three and four are undisputed. The agreement clearly states the easement was intended to run "to a stake in the Northerly edge of Belvedere Avenue as now laid out." The trial court's finding that Belvedere Avenue was dedicated prior to the agreement is also supported by the evidence. A 1914 map of neighboring Midwood Subdivision clearly locates Belvedere Avenue. The description of Belvedere Avenue in finding of fact number six is supported by the 30 May 1930 deed to Midwood lots one and two contained in the record. Maps in the record also support the finding that the eastern boundary of lot number one in Midwood is also the western boundary of defendants' property, or lot 28.

Most significantly, the court's finding that Belvedere Avenue existed as a specifically dedicated right of way that was staked in November 1930 and is in the same location today is supported by competent evidence. The agreement itself states that the easement area, "a road opened down the Westerly edge of Lot 28," was in use at the time of the dedication, and the 30 May 1930 recorded deed to Midwood lot one contains a description of the northerly margin of Belvedere Avenue. Moreover, Clifford Clark Nielson ("Nielson"), who testified as an expert in land surveying, opined that Belvedere Avenue today is in the same location as it was in November 1930.

Nielson testified that a comparison of the 1926 map of St. Andrew's Place and a recent tax map shows Belvedere Avenue is now in the same location as it was in 1926. He stated it was his opinion that Belvedere Avenue was never moved from the location depicted on the maps dated 1914 and 1926 referenced in the court's findings of fact. Nielson testified Belvedere Avenue has not been widened from its original sixty-foot right of way that was platted in 1926. He further testified that although Belvedere Avenue may not have been paved at the time of the agreement, it had been platted, and therefore existed as a right of way which was at some point paved in the same location as Belvedere Avenue today.

We hold this evidence to be competent evidence supporting the trial court's findings of fact, particularly the finding that Belvedere

Avenue existed as a specifically dedicated right of way in 1930 and is still in the same location today. Although there may be evidence in the record to the contrary, where the trial court sits as a finder of fact, its findings must simply be supported by competent evidence. *See Goodson*, 145 N.C. App. at 361, 551 S.E.2d at 204.

The trial court concluded that although the description of distance in the agreement fell short of Belvedere Avenue, the call in the agreement to "a stake in the Northerly edge of Belvedere Avenue as now laid out" serves as a call to a monument and prevails over the stated footage. The trial court further concluded the agreement intended the easement to extend to Belvedere Avenue as it exists today for the purpose of providing ingress and egress to appurtenant lot owners.

Defendants argue a stake is not sufficiently permanent to serve as a monument. However, the trial court found the call to a monument was a stake "in the Northerly edge of Belvedere Avenue," which the court found to be in the same location today as at the time of the agreement in 1930. Thus, Belvedere Avenue, which has remained the same, may serve as a monument that governs over the distances described in the agreement. " 'Where the calls are inconsistent, the general rule is that calls to natural objects control courses and distances. A call to a wall, or to another's line, if known or established, is a call to a monument within the meaning of this rule, as is a call to a highway.' " *Highway Comm. v. Gamble*, 9 N.C. App. 618, 623-24, 177 S.E.2d 434, 438 (1970) (citation omitted) (emphasis omitted).

We further noted in *Gamble* that our Supreme Court has held that a roadway is "of such permanent character as to become a monument of boundary." *Id.* at 624, 177 S.E.2d at 438 (citing *Brown v. Hodges*, 232 N.C. 537, 61 S.E.2d 603 (1950), *Franklin v. Faulkner*, 248 N.C. 656, 104 S.E.2d 841 (1958)). An artificial monument of boundary, such as a roadway, "in case of conflict, is considered the superior call in reference to course and distance, and controls the same when it is properly identified and placed and called for in the deed as a corner of the land." *Nelson v. Lineker*, 172 N.C. 330, 333, 90 S.E. 251, 252 (1916).

The call in the agreement to the northerly edge of Belvedere Avenue governs over course and distance. We have previously held the trial court's finding that Belvedere Avenue exists today as it did in 1930 to be supported by competent evidence. Thus, Belvedere Avenue is a sufficiently permanent monument upon which the court could

base its conclusion that the easement must extend to that roadway as it exists today. We note that with respect to the location of an easement, " '[t]he law endeavors to give effect to the intention of the parties, whenever it can be done consistently with rational construction.' " *Parrish v. Hayworth*, 138 N.C. App. 637, 642, 532 S.E.2d 202, 206 (2000) (citation omitted), *disc. review denied*, 353 N.C. 379, 547 S.E.2d 15 (2001). We agree with the trial court that the agreement intended to provide the owners of the appurtenant lots with convenient ingress and egress for Belvedere Avenue. Having determined the trial court's findings are supported by competent evidence, and its findings support its conclusions of law, we affirm the entry of judgment for plaintiffs.

Affirmed.

Judges GREENE and THOMAS concur.

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY AND LUMBERMENS MUTUAL CASUALTY COMPANY, PLAINTIFFS v. ELIZABETH W. MORGAN, DEFENDANT

No. COA00-1359

(Filed 4 December 2001)

Insurance— homeowners—personal catastrophe liability endorsement—duty to defend or indemnify—alienation of affections—criminal conversation

The trial court did not err in a declaratory judgment action by holding that plaintiff insurance companies did not have a duty to defend or indemnify defendant under defendant's homeowner's or personal catastrophe liability (PCL) endorsement policies for alienation of affections and criminal conversation claims, because: (1) coverage for an accident under a homeowner's policy does not include an injury that is intentional or substantially certain to result from an intentional act, and competent evidence supports the fact that defendant engaged in intentional sexual activities with another woman's husband and that defendant intended to injure the other woman; (2) plaintiffs had no duty to defend or indemnify defendant under the 1995-96 PCL endorse-

ment policy since there was competent evidence supporting the trial court's finding of fact that the married woman's injuries did not occur during the endorsement period; and (3) plaintiffs had no duty to defend or indemnify defendant under the 1996-97 PCL endorsement policy since defendant has failed to allege any injury arising out of any of the offenses listed in the policy under personal injury, and the claims are not for bodily injury as the term is defined in the policy.

Appeal by defendant from judgment entered 24 March 2000 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 18 September 2001.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr. and Amanda L. Fields, for plaintiffs-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jeffrey E. Oleynik, John W. Ormand, III, and S. Kyle Woosley, for defendant-appellant.

TYSON, Judge.

Elizabeth W. Glidewell ("defendant") appeals from a declaratory judgment entered against her after a bench trial. We affirm the trial court's judgment.

I. Facts

In October 1997, Martha Glidewell ("Martha") filed a complaint against defendant alleging alienation of affection and criminal conversation. Martha alleged that she and Powell W. Glidewell ("Pete") were married in 1967, and continued to enjoy a "relationship of love and affection" until defendant invaded their lives. Defendant, whose name was Elizabeth Wooten Morgan at that time, was alleged to have engaged in a sexual relationship with Martha's husband, Pete. According to defendant's deposition testimony, she and Pete engaged in sexual relations during December 1996. Defendant also admitted that she knew Pete was married to Martha. On 15 October 1998, defendant and Pete were married.

After defendant was served with Martha's complaint, she timely filed notice with American Manufacturers Mutual Insurance Company and Lumbermens Mutual Casualty Company (collectively "plaintiffs"). Defendant requested defense and payment of judgment, if any, from either her homeowner's policy or her personal catastro-

phe liability endorsement ("PCL Endorsement") in effect at relevant times. Plaintiffs declined to defend and subsequently brought this declaratory judgment action to determine whether they had a duty to defend or indemnify defendant for damages. The trial court entered its findings of fact, conclusions of law, and judgment on 28 April 2000. The trial court determined that plaintiffs were not obligated to defend or to indemnify defendant and denied defendant's counterclaim for breach of contract and declaratory judgment. Defendant appeals.

II. Issues

Defendant assigns as error the trial court's holding that the homeowner's policy and the 1995/1996 and 1996/1997 PCL Endorsements do not require plaintiffs to defend nor indemnify defendant for alienation of affection and criminal conversation claims. "The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction." *Allstate Ins. Co. v. Runyon Chatterton*, 135 N.C. App. 92, 94, 518 S.E.2d 814, 816 (1999), *disc. rev. denied*, 351 N.C. 350, 542 S.E.2d 205 (2000). "[O]n appellate review of a declaratory judgment, a trial court's findings of fact in a trial without a jury will be upheld if supported by any competent evidence." *North Carolina Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 702, 412 S.E.2d 318, 322 (1992). We are "to determine whether the record contains competent evidence to support the findings; and whether the findings support the conclusions." *Nationwide Mut. Ins. Co. v. Allison*, 51 N.C. App. 654, 657, 277 S.E.2d 473, 475, *disc. rev. denied*, 303 N.C. 315, 281 S.E.2d 652 (1981). "If the trial court's findings are supported by competent evidence and, in turn, support its conclusions, the declaratory judgment must be affirmed on appeal." *Stox*, 330 N.C. at 703, 412 S.E.2d at 322. However, if the conclusions from the facts found involve legal questions, they are subject to review on appeal. *Davidson v. Duke University*, 282 N.C. 676, 712, 194 S.E.2d 761, 783 (1973).

III. Homeowner's Policy

Defendant argues that the "bodily injury" suffered by Martha was caused by an "occurrence" that triggered coverage.

The homeowner's policy provides that:

> If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:

1. pay up to our limit of liability for the damages for which the **insured** is legally liable and

2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the *occurrence* equals our limit of liability. (emphasis supplied)

. . . .

The policy defines "occurrence" as follows:

5. '**occurrence**' means an accident, including exposure to conditions, which results, during the policy period, in:

   a. **bodily injury**; or

   b. **property damage**.

The homeowner's policy provides coverage for defending and indemnifying claims for damages caused by an "occurrence," defined as an "accident" during the policy period. The homeowner's policy does not define "accident." "Our Supreme Court has held that when the term 'accident' is not defined in an insurance policy, 'accident' includes 'injury resulting from an intentional act, *if the injury is not intentional or substantially certain to be the result of the intentional act.*' " *Russ v. Great American Ins. Companies*, 121 N.C. App. 185, 188, 464 S.E.2d 723, 725 (1995) (emphasis in the original) (quoting *Stox*, 330 N.C. at 709, 412 S.E.2d at 325). "[A]n injury that is intentional or *substantially certain to be the result of an intentional act* is not an 'accident.' " *Id.* (emphasis in the original) (citing *Stox*, 330 N.C. at 709, 412 S.E.2d at 325). "[I]f an intentional act is either intended to cause injury or substantially certain to result in injury, it is not an occurrence under the policy definitions . . . and no coverage is provided." *Henderson v. U.S. Fidelity & Guar. Co.*, 124 N.C. App. 103, 110, 476 S.E.2d 459, 464 (1996).

In *Russ* we discussed whether the "bodily injury" complained of was covered by the policy which required that the "bodily injury" be caused by an "occurrence." The policy defined an "occurrence" as an accident but failed to define accident. After concluding that an accident does not include an injury that is intentional or substantially cer-

tain to result from an intentional act, we concluded "that since sexual harassment is substantially certain to cause injury to the person harassed, intent to injure may be inferred as a matter of law from the intent to act for the purpose of determining coverage under an insurance policy." *Russ*, 121 N.C. App. at 189, 464, S.E.2d at 725; *see also Henderson*, 124 N.C. App. at 111, 476 S.E.2d at 464 ("Notwithstanding . . . assertions that he did not intend or anticipate his misrepresentations to injure or damage plaintiffs, such purposeful and intentional acts were so substantially certain to cause injury and damage as to infer an intent to injure as a matter of law" and was not an occurrence). In *Nationwide Mut. Ins. Co. v. Abernethy*, 115 N.C. App. 534, 445 S.E.2d 618 (1994), we construed an exclusionary clause in an insurance policy, and determined that even though a predator did not intend injury by performing certain sexual acts on children, the intentional sexual acts necessarily implied intentional injury. In *Eubanks v. State Farm Fire and Cas. Co.*, 126 N.C. App. 483, 487, 485 S.E.2d 870, 872 (1997), we stated that the act of solicitation to commit murder is so certain to result in emotional injury to the intended victim, spouse, or parent that intent to commit such injury may be inferred from the solicitous act. In all these cases, the insured's intent to injure was inferred from insured's intent to act and precluded coverage under their policies.

A. Criminal Conversation

Criminal conversation protects a spouse's interest in " 'the fundamental right of exclusive sexual intercourse between spouses, and also on the loss of consortium.' " *Sebastian v. Kluttz*, 6 N.C. App. 201, 209, 170 S.E.2d 104, 108 (1969) (quoting 42 C.J.S., Husband and Wife, § 698). In determining damages a jury "may consider the loss of companionship, loss of services, mental anguish, humiliation, and fear of sexually transmitted disease. In addition, there may be recovery for the injury to health and family honor . . . ." David A. Logan and Wayne A. Logan, *North Carolina Torts*, § 20.20 at 442 (1996) (citing *Bryant v. Carrier*, 214 N.C. 191, 198 S.E. 619 (1938); *Cottle v. Johnson*, 179 N.C. 426, 102 S.E. 769 (1920); *Gray v. Hoover*, 94 N.C. App. 724, 381 S.E.2d 472 (1989); *Sebastian*, 6 N.C. App. 201, 170 S.E.2d 104). "[T]he loss of marital rights is a species of mental distress . . . ." W. Page Keeton, *Prosser and Keeton on Torts*, § 124 at 923 (1988). " 'The plaintiff is entitled to recover for emotional distress resulting from the fact that the defendant has had sexual relations with [her husband].' " *Sebastian*, 6 N.C. App. at 218, 170 S.E.2d at 114 (quoting Restatement of Torts § 685 cmt. e).

B. Alienation of Affection

Similarly, alienation of affection "involves a wrongful act that deprives a married person of the affection, love, society, companionship, and comfort of the spouse." *North Carolina Torts* § 20.30 at 443. The tort protects a spouse's interest in having a peaceful and uninterrupted marriage. *Sebastian*, 6 N.C. App. at 206, 170 S.E.2d at 106. " '[D]amages may include recovery for emotional distress caused by an invasion of such interests.' " *Id.* at 218, 170 S.E.2d at 114 (quoting Restatement of Torts § 690 cmt. b).

In claims for criminal conversation and alienation of affection, the law protects a spouse's interests in the exclusivity of the marital relationship, and affords an injured spouse a remedy against a third party's conduct which affects those protected interests. Our Court has held that certain intentional actions, in other contexts, may raise an inference of an intent to injure, if injury is substantially certain to follow.

Here, paragraph 1 of the trial court's conclusions of law provides that:

> To the extent any of the foregoing Findings of Fact may be deemed more properly to be Conclusions of Law, the same are incorporated herein. Likewise, to the extent that any of the following Conclusions of Law may be deemed more properly to be Findings of Fact, the same are incorporated into the above Findings of Fact.

Paragraph 16 of the trial court's findings of fact states that "The conduct engaged in by [defendant] . . . as alleged in the complaint . . . was intentional and volitional and that conduct . . . gives rise to the inference that [defendant] intended the harm alleged to have been sustained by Martha Glidewell, that is, the inference that Elizabeth Glidewell knew to a substantial certainty that Martha Glidewell would be injured . . . ."

We have carefully reviewed the entire record and conclude that competent evidence supports the fact that defendant engaged in intentional sexual activities with Pete, who was married to Martha at that time. We also conclude that this finding supports the conclusion, as a matter of law, that defendant intended to injure Martha, considering the interests protected by the torts of criminal conversation and alienation of affection. We hold that when a defendant engages in conduct that is sufficient to constitute alienation of affection or crim-

inal conversation tort actions, intent to injure the marriage and the non-consenting spouse may be inferred, as a matter of law, from such conduct when interpreting the term "accident" if the policy fails to define it.

IV. Personal Catastrophe Liability Endorsement

Defendant argues that either the 1995-1996 or the 1996-1997 PCL Endorsement requires plaintiffs to defend and indemnify defendant in the underlying action. We disagree.

Generally an "insurer's duty to defend the insured is broader than its obligation to pay damages . . . ." *Waste Management v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). "An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial." *Id.*; *see also Strickland v. Hughes*, 273 N.C. 481, 487, 160 S.E.2d 313, 318 (1968) (an obligation to defend becomes absolute when the allegations in the complaint bring the claim within the coverage of the policy). "Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend." *Waste Management*, 315 N.C. at 691, 340 S.E.2d at 377.

A. 1995-1996 PCL Endorsement

Defendant argues that the 1995-1996 ("95-96") PCL Endorsement's definition of "personal injury" includes the injuries that Martha alleged, and under North Carolina's "comparison test" her allegations satisfy the coverage provisions thereby necessitating a duty to defend and indemnity by plaintiffs. *See e.g. Waste Management*, 315 N.C. at 693, 340 S.E.2d at 378.

Defendant's 95-96 PCL Endorsement provides coverage for "personal injury." The policy defines "personal injury" as:

> Bodily injury, sickness, disease, death, disability, shock, mental anguish and mental injury;
>
> False arrest, false imprisonment, wrongful entry, wrongful eviction, wrongful detention, malicious prosecution or humiliation;
>
> Libel, slander, defamation of character, or invasion of privacy;
>
> Assault and battery not committed or directed by a covered person.

The 95-96 policy was effective from 14 November 1995 to 14 November 1996. The trial court found that "[t]he allegations in the complaint . . . establish that Martha Glidewell had no knowledge of this affair until sometime in 1997." It also found that the complaint provided no basis to determine when the alleged injuries occurred. After review of the entire record, we conclude that there was competent evidence supporting the trial court's finding of fact that Martha's injuries did not occur, and that Martha's complaint did not allege that her injuries occurred, during the 95-96 PCL Endorsement period. This finding supports the trial court's conclusion of law that plaintiffs had no duty to defend or indemnify defendant under the 95-96 PCL Endorsement policy.

Defendant also contends that the 95-96 policy remained in effect because plaintiffs never gave defendant valid notice of any reduction in coverage in the renewal of the 1996-1997 ("96-97") PCL Endorsement policy. Despite defendant's argument, we find that the record contains sufficient evidence that plaintiffs communicated valid legal notice to defendant. We hold that the defendant's alleged injury, as pled and as supported by the evidence, occurred after the expiration of the 95-96 PCL Endorsement policy, and that plaintiffs had no duty to defend or indemnify defendant under that policy.

B. 1996-1997 PCL Endorsement

Defendant additionally contends plaintiffs had a duty to defend under the 96-97 PCL Endorsement policy arguing that Martha's complaint alleges "bodily injury" as defined by that endorsement. Defendant's 96-97 PCL Endorsement policy defines "personal injury" differently from the 95-96 policy. "Personal injury" and "bodily injury" were separated in the definition section.

'Bodily injury' means:

Bodily harm, sickness, disease, death or disability, *including shock mental anguish and mental injury arising therefrom.* (emphasis supplied)

'Personal injury' means injury arising out of one or more of the following offenses:

a) False arrest, detention or imprisonment, or malicious prosecution;

b) Libel, slander or defamation of character, or

c) Invasion of privacy, wrongful eviction or wrongful entry.

Defendant has failed to allege any injury arising out of any one of the offenses listed under "personal injury." With respect to "bodily injury," the trial court found that "Martha['s] . . . alleged humiliation, mental anguish and injuries to her feelings and her health, as alleged . . . and the claims for alienation of affection and criminal conversation . . . do not present claims for 'bodily injury' as that term is defined . . . in the [96-97 PCL Endorsement]."

A careful review of the entire record shows competent evidence to support the trial court's finding of fact. This finding supports the trial court's conclusion of law that plaintiffs had no duty to defend or indemnify under the 96-97 PCL Endorsement.

V. Summary

We hold that plaintiffs did not have a duty to defend or indemnify defendant under defendant's homeowner's policy, or under either PCL Endorsement policies. In view of our holding, it is unnecessary to consider the parties' other arguments concerning various policy "exclusions."

The judgment of the trial court is affirmed.

Affirmed.

Judges MARTIN and WALKER concur.

SUNSCRIPT PHARMACY CORPORATION, PETITIONER v. NORTH CAROLINA BOARD OF PHARMACY, RESPONDENT

No. COA00-1089

(Filed 4 December 2001)

Pharmacists— discipline of permit holder for pharmacist's conduct—statutory authority

The trial court erred by reversing the Board of Pharmacy's decision suspending petitioner's pharmacy permit due to mistakes in filling prescriptions by petitioner's pharmacist. Although there is an ambiguity in the statutes concerning the authority of the Board to discipline a permit holder for the conduct of its licensed pharmacist, the legislature intended the Board to have that authority and the Board in this case cited statutes that place

duties on a pharmacy permit holder. However, it was stressed that a permit holder's responsibility for the conduct of its licensed pharmacists extends only to the licensed pharmacist's conduct while engaged in the operation of the permit holder's pharmacy and that the conduct must result in the breach of a duty imposed on the permit holder. N.C.G.S. §§ 90-85.30, 90-85.38(a), (b), and 106-134.1.

Appeal by respondent from order entered 13 June 2000 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 21 August 2001.

Yates, McLamb & Weyher, L.L.P., by Michael C. Hurley, for petitioner-appellee.

Bailey & Dixon, L.L.P., by Carson Carmichael, III, for respondent-appellant.

CAMPBELL, Judge.

Respondent North Carolina Board of Pharmacy ("the Board") appeals from the trial court's order reversing the Board's final agency decision suspending the pharmacy permit of Sunscript Pharmacy Corporation ("petitioner") pursuant to N.C. Gen. Stat. § 90-85.38(b). We disagree with the trial court's interpretation of the applicable statutes and reverse the order under review.

The Board is the occupational licensing agency responsible for licensing pharmacists and issuing pharmacy permits throughout North Carolina. N.C. Gen. Stat. §§ 90-85.15, -85.21 (1999). The Board is also responsible for enforcing the laws pertaining to the distribution and use of drugs. N.C. Gen. Stat. § 90-85.6(a) (1999). Petitioner is a foreign corporation authorized to do business in North Carolina and is engaged in operating pharmacies in this State that are not open to the general public, but rather provide pharmaceutical services to long-term care facilities owned and operated by Sun Healthcare. The pharmacy at issue in these proceedings is petitioner's pharmacy located in Pink Hill, North Carolina. At all times relevant hereto, petitioner's pharmacy in Pink Hill was being operated pursuant to a pharmacy permit (Permit No. 6467) duly issued by the Board, and was subject to the full regulatory authority of the Board.

On 28 August 1998, the Board received information indicating that an error had been committed in the dispensing of a prescription

for the drug Dilantin at petitioner's Pink Hill pharmacy. The Board's investigation revealed that on 27 July 1998 petitioner received a doctor's prescription for a long-term care facility patient which called for "Dilantin 100 mg capsules BID and Dilantin 50 mg BID." Petitioner did not have the Dilantin 50 mg, so John Conrad Hunt ("Hunt"), a licensed pharmacist and employee of petitioner, dispensed liquid Dilantin with instructions on the label that read "10 cc = 50 mg." However, for the patient to receive the correct dosage, the label should have read "2 cc = 50 mg." Although the patient was administered the Dilantin between 29 July 1998 and 1 August 1998, and the patient died on 11 August 1998, it could not be determined whether the incorrect dosage of Dilantin caused or contributed to the patient's death. The Board's investigation further revealed that Hunt had committed four other dispensing errors between 21 July 1998 and 4 August 1998, including dispensing the wrong drug, dispensing the wrong strength of drug, and using the wrong patient name on a prepared drug order.

On 8 October 1998, the Board issued a "Notice of Hearing" to petitioner and Hunt regarding the five dispensing errors uncovered by the Board's investigation. The purpose of the hearing was to determine whether the alleged dispensing errors committed by petitioner and Hunt violated the laws governing the practice of pharmacy and the distribution of drugs, thereby subjecting petitioner and Hunt to the Board's disciplinary authority under N.C.G.S. § 90-85.38. Specifically, the Board alleged that the dispensing errors committed by petitioner and Hunt violated N.C. Gen. Stat. §§ 90-85.30, 90-85.38(a)(6), 90-85.38(a)(9), 90-85.38(b) and 106-134.1.

The hearing was held on 27 October 1998, at the commencement of which petitioner and Hunt stipulated to the allegations concerning the five dispensing errors. The evidence presented at the hearing indicated that all of the errors had been initially committed by pharmacy technicians who worked under the supervision of Hunt. The evidence also indicated that Hunt was terminated from employment by petitioner on 28 August 1998. On 25 January 1999, the Board issued a final agency decision making findings of fact consistent with the parties' stipulations and the evidence presented at the hearing and concluding that the dispensing errors committed by petitioner and Hunt constituted violations of N.C.G.S. §§ 90-85.30, 90-85.38(a)(6), 90-85.38(a)(9) and 106-134.1.

As a result, the Board suspended Hunt's pharmacist license (License No. 14427) for seven days, with the suspension stayed for

two years upon Hunt complying with several conditions. Likewise, the Board suspended petitioner's pharmacy permit (Permit No. 6467) for seven days, with the suspension also stayed for two years upon petitioner complying with restrictions on the number of prescriptions it could fill, more stringent requirements for reporting future dispensing errors to the Board, and other conditions.

On 23 February 1999, petitioner filed a petition in Wake County Superior Court seeking judicial review of the Board's final agency decision pursuant to N.C. Gen. Stat. § 150B-45.[1] Petitioner alleged that the Board's decision prejudiced the substantial rights of petitioner, in that the decision was "void for want of jurisdiction, violate[d] provisions of the constitution of this State and the United States, exceed[ed] the statutory authority and jurisdiction of the Board, [was] unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted, [was] arbitrary and capricious, and [was] otherwise affected by errors of law." Included among petitioner's listed exceptions to the Board's final agency decision was the following:

> (h) In excess of Respondent's statutory authority and jurisdiction and in violation of the guarantees of due process in the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution, Respondent has improperly imputed to Petitioner the findings of negligence made against another subject of its investigation.
>
> . . . .

On 26 May 2000, the trial court entered a Memorandum of Decision reversing the Board's decision to suspend petitioner's pharmacy permit, reasoning:

> [The] Board does not have the authority to discipline permittee pharmacy for the negligence of a pharmacist employee who is also licensed by the Board. Also[,] the techs [pharmacy technicians] who were negligent were being supervised by the same pharmacist licensee. As Petitioner argues[,] [the] Board has no authority to discipline on a theory of vicarious liability. If the legislature intended this then it must expressly say so and G.S. 90-85.38(b) does not.

1. Hunt subsequently withdrew from this judicial review proceeding. Therefore, the Board's decision insofar as it pertains to Hunt is not at issue in this appeal.

On 13 June 2000, the trial court entered an order reversing respondent's decision. Respondent now appeals the trial court's ruling.

The dispositive issue on appeal is whether the trial court erred in its determination that the Board lacks the statutory authority to discipline a pharmacy permit holder for the negligence of a licensed pharmacist who is employed by the permit holder. In so holding, the trial court ruled that the Board's final agency decision was based on an error of law. Thus, the trial court was required to exercise de novo review. *See Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994) (stating that when petitioner argues that an agency's decision was based on an error of law, de novo review is required). Our review of the trial court's Memorandum of Decision and its order indicates that the trial court appropriately exercised de novo review in making its determination on this issue. However, we must determine whether the trial court did so properly. *See Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 597, 446 S.E.2d 383, 388 (1994) (stating that this Court's reviewing process of a superior court order regarding an agency decision is twofold: (1) determining whether the trial court exercised the appropriate scope of review, and, if appropriate, (2) deciding whether the court did so properly).

In making this determination, we start by examining the disciplinary authority of the Board, which is set forth in N.C.G.S. § 90-85.38. Pursuant to N.C.G.S. § 90-85.38(a), the Board may discipline[2] a licensee or an applicant for a license to practice pharmacy, if the licensee or applicant has:

> (1) Made false representations or withheld material information in connection with securing a license or permit;
>
> (2) Been found guilty of or plead guilty or nolo contendere to any felony in connection with the practice of pharmacy or the distribution of drugs;
>
> (3) Indulged in the use of drugs to an extent that renders him unfit to practice pharmacy;
>
> (4) Made false representations in connection with the practice of pharmacy that endanger or are likely to endanger the health or safety of the public, or that defraud any person;

2. This discipline may include a letter of reprimand, a suspension, restriction, revocation or refusal to grant or renew a license, or a requirement that the licensee successfully complete remedial education. N.C. Gen. Stat. § 90-85.38(a) (1999).

(5) A physical or mental disability that renders him unfit to practice pharmacy with reasonable skill, competence and safety to the public;

(6) Failed to comply with the laws governing the practice of pharmacy and the distribution of drugs;

(7) Failed to comply with the rules and regulations of the Board;

(8) Engaged in, or aided and abetted an individual to engage in, the practice of pharmacy without a license; or

(9) Was negligent in the practice of pharmacy.

N.C. Gen. Stat. § 90-85.38(a)(1)-(9) (1999). Pursuant to N.C.G.S. § 90-85.38(b), the Board is authorized to suspend, revoke, or refuse to grant or renew any pharmacy permit[3] for the same conduct as stated in N.C.G.S. § 90-85.38(a).

In its final agency decision, the Board concluded that the dispensing errors committed by Hunt and petitioner violated both N.C.G.S. § 90-85.38(a)(6) (failure to comply with the laws governing the practice of pharmacy and the distribution of drugs) and N.C.G.S. § 90-85.38(a)(9) (negligence in the practice of pharmacy). In support of its determination that petitioner and Hunt had failed to comply with the laws governing the practice of pharmacy and distribution of drugs in violation of N.C.G.S. § 90-85.38(a)(6), respondent cited N.C.G.S. §§ 90-85.30[4] and 106-134.1.[5]

In reversing the decision of the Board, the trial court simply stated that the Board did not have the authority to discipline a pharmacy permit holder for the negligence of one of its pharmacists who is also licensed by the Board. The trial court further stated that if the Legislature had intended for the Board to have such disciplinary authority it would have expressly granted it in N.C.G.S. § 90-85.38(b).

3. Pursuant to N.C. Gen. Stat. § 90-85.21, every pharmacy, i.e., any place where prescription drugs are dispensed or compounded, must register and obtain a permit from the Board.

4. N.C.G.S. § 90-85.30 requires that "[t]he pharmacy file copy of every prescription shall include the brand or trade name, if any, or the established name and the manufacturer of the drug product dispensed." N.C. Gen. Stat. § 90-85.30 (1999). As a result of the dispensing errors that were made, the pharmacy's file copy of the prescriptions involved did not contain all of the correct information required by N.C.G.S. § 90-85.30.

5. N.C. Gen. Stat. § 106-134.1 establishes requirements for the dispensing of prescription drugs which, if not followed, result in the drug being deemed to be misbranded while held for sale.

In support of its decision, the trial court relied on *Federgo Discount Center v. Department of Professional Regulation, Board of Pharmacy*, 452 So.2d 1063 (Fla. App. 1984), in which the Florida Court of Appeals concluded that if the Legislature wished to hold community pharmacy permit holders strictly liable for the acts of pharmacists who are separately licensed by the state, then it should have done so in uncertain terms. We find the trial court's reliance on *Federgo* misplaced and we disagree with the trial court's conclusion on this issue.

It is a well-established rule of statutory construction that it is the function of the judiciary to construe a statute when the meaning of a statute is in doubt. *In re Declaratory Ruling by N.C. Comm'r of Ins.*, 134 N.C. App. 22, 27, 517 S.E.2d 134, 139, *disc. review denied*, 351 N.C. 105, 540 S.E.2d 356 (1999).

> "In construing the laws creating and empowering administrative agencies, as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished. The best indicia of that legislative purpose are 'the language of the statute, the spirit of the act, and what the act seeks to accomplish.' "

Id. (quoting *Comr. of Insurance v. Rate Bureau*, 300 N.C 381, 399, 269 S.E.2d 547, 561 (1980) (citations omitted)). However, "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning. . . ." *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998), *superseded by statute on other grounds as stated in In re J.L.W.*, 136 N.C. App. 596, 525 S.E.2d 500 (2000).

The plain language of N.C.G.S. 90-85.38(b) provides that the Board "may suspend, revoke, or refuse to grant or renew any permit [i.e., discipline the permit holder] for the same conduct as stated in [N.C.G.S. 90-85.38(a) (setting out the conduct for which a licensed pharmacist may be disciplined)]." N.C. Gen. Stat. § 90-85.38(b) (1999). However, the statute does not make it clear whether N.C.G.S. § 90-85.38(b) is limited in its application to conduct actually committed by a permit holder, or whether a permit holder can be disciplined for conduct falling within N.C.G.S. § 90-85.38(a) that is committed by a licensed pharmacist employed by the permit holder. This ambiguity requires this Court to examine the spirit of the

act and what the act seeks to accomplish to determine the meaning of N.C.G.S. § 90-85.38(b).[6]

N.C. Gen Stat. § 90-85.2 sets forth the purpose of the North Carolina Pharmacy Practice Act ("the Act") to "insure minimum standards of competency and to protect the public from those who might otherwise present a danger to the public health, safety and welfare." N.C. Gen. Stat. § 90-85.2 (1999). In order to fulfill this purpose, the Legislature created the North Carolina Board of Pharmacy and charged it with responsibility for enforcing the provisions of the Act and the laws pertaining to the distribution and use of drugs. N.C. Gen. Stat. § 90-85.6 (1999). The Board was also granted responsibility over the licensing of all pharmacists throughout the State, and the permitting of all pharmacies seeking to operate in the State. In order to enforce its regulations and protect the public health, safety and welfare, the Board was granted disciplinary authority over licensees and permit holders by N.C.G.S. § 90-85.38. In light of the purpose of the Act to insure minimum standards of competency and to protect the public health, safety and welfare, we conclude, contrary to the decision of the trial court, that the Legislature did intend for the Board to have authority to discipline a permit holder for the conduct of one of its licensed pharmacists.

Further, we find the trial court's reliance on *Federgo* to be misplaced because the court in *Federgo* did not hold that a permit holder can never be disciplined for the conduct of a licensed pharmacist employed by it. Rather, the court held that in order for a permit holder to be disciplined for the conduct of one of its licensed pharmacists, that conduct must result in a breach of duty imposed on the permit holder. In fact, the court in *Federgo* specifically stated that "[h]ad the licensed pharmacist failed to adequately maintain records, or had he otherwise compromised the security of the drugs in the prescription department [duties which the statutes expressly imposed on the permit holder], a different result could be indicated . . . ." *Federgo*, 452 So.2d at 1066. For this reason, we find *Federgo* to be consistent with our holding.

We further find the reasoning of the California Court of Appeals in *Arenstein v. California State Board of Pharmacy*, 265 Cal. App.

6. This ambiguity is most obvious in a situation such as the one in the instant case, where the permit holder is a corporation which can only act through its employees, some of whom have to be licensed pharmacists in order to allow the pharmacy to operate.

2d 179, 71 Cal. Rptr. 357 (1968) to be consistent with our holding. There the court affirmed the suspension of a pharmacy permit based upon the conduct of its pharmacist employees in refilling prescriptions without authorization. In so affirming, the court stated:

> If a licensee elects to operate his business through employees, he must be responsible to the Licensing Authority for their conduct and the exercise of his license and he is responsible for the acts of his agents or his employees *done in the course of his business in the operation of the license.* One permitted to maintain and conduct the pharmacy may be disciplined by the Pharmacy Board for the unlawful acts of his employees *while engaged in the conduct and operation of the pharmacy*, although the permitee does not authorize the unlawful acts and did not have actual knowledge of the activities. This would be particularly true of a corporate permitee which could act only through its officers, agents, or employees.

Id. at 192-93, 71 Cal. Rptr. at 365-66 (citations omitted) (emphasis added). We stress that a permit holder's responsibility for the conduct of its licensed pharmacists only extends to the licensed pharmacists' conduct while engaged in the conduct and operation of the permit holder's pharmacy. Furthermore, in order for the conduct of a licensed pharmacist to subject a permit holder to discipline, that conduct must result in the breach of a duty that is imposed on the permit holder.

In the instant case, the Board supported its discipline of petitioner's permit by citing violations of N.C.G.S. §§ 90-85.30 and 106-134.1, which place duties on a pharmacy permit holder. Therefore, we hold that the Board's discipline of petitioner's permit for the conduct of Hunt was within the Board's statutory authority.

For the foregoing reasons, the trial court's order is reversed and this cause is remanded to the trial court for entry of an order reinstating respondent's final agency decision.

Reversed and remanded.

Judges GREENE and BRYANT concur.

CRAWFORD v. COMMERCIAL UNION MIDWEST INS. CO.

[147 N.C. App. 455 (2001)]

BARRETT L. CRAWFORD, TRUSTEE IN THE BANKRUPTCY OF JETER EDWARD GREENE AND JETER EDWARD GREENE, PLAINTIFFS v. COMMERCIAL UNION MIDWEST INSURANCE COMPANY, GERALD BENFIELD, AND BENFIELD INSURANCE ENTERPRISES, DEFENDANTS

No. COA00-1334

(Filed 4 December 2001)

1. Insurance— fire—application—information—not willful

Summary judgment was erroneously granted for the insurance company (defendant) in an action arising from the destruction of a house in a fire where defendant contended that it should be permitted to void the policy because the submitted application omitted deeds of trust on the property but there was no evidence that plaintiff knowingly or willfully made any misrepresentations. N.C.G.S. § 58-44-15, the controlling statute for a fire/homeowners policy, provides that the policy shall be void if the insured willfully concealed or misrepresented any material fact or circumstance.

2. Insurance— fire—application—omitted deeds of trust—materiality

Summary judgment for defendant-insurance company was not proper where defendant sought to void a homeowners/fire insurance policy because deeds of trust were omitted from the application, but there were material issues of fact about whether knowledge of the deeds of trust would have influenced defendant's judgment in providing the insurance or in fixing the premium. Cases relied upon by defendant which held that encumbrances are material as a matter of law date from the early 1900's and were in the context of a statutory requirement which no longer exists.

3. Appeal and Error— preservation of issues—assignments of error—no argument or authority—abandoned

Assignments of error for which there was no argument or authority were deemed abandoned.

Judge CAMPBELL dissenting.

Appeal by plaintiffs from orders filed 22 March 2000 and 24 May 2000 by Judge Jerry Cash Martin in Burke County Superior Court. Heard in the Court of Appeals 18 September 2001.

Daniel Law Firm P.A., by Stephen T. Daniel and Warren T. Daniel, for plaintiff-appellants.

Young Moore and Henderson P.A., by Walter E. Brock, Jr. and Christopher A. Page, for defendant-appellee Commercial Union Midwest Insurance Company.

GREENE, Judge.

Barrett L. Crawford, trustee in the bankruptcy of Jeter Edward Greene (Greene), and Greene (collectively Plaintiffs) appeal a 22 March 2000 order granting summary judgment in favor of Commercial Union Midwest Insurance Company (Defendant) and a 24 May 2000 order denying Plaintiffs' motion to reconsider summary judgment.

In January 1995, Greene approached several insurance companies and requested quotes on homeowners insurance. On 17 January 1995, Greene obtained a favorable quote for insurance on his house from Benfield Insurance Enterprises (Benfield Insurance). Gerald Benfield (Benfield), an agent for Benfield Insurance, filled out the insurance application for Greene: Benfield would ask questions and then fill in Greene's answers on the application. The section on the application designated "additional interest," inquiring as to possible mortgagees with an interest in the property to be insured, was left blank, even though there were three deeds of trusts on Greene's property.[1] Greene, who does not read well, briefly looked over the application and signed it. Benfield Insurance then submitted the application to Defendant who issued a homeowners policy to Greene. However, when signing the application, Greene was aware of a deed of trust made out to the person who had sold him the property. There was also a second deed of trust in the name of Greene's sister. No money has ever changed hands in respect to the second deed, and it appears the deed was a scam to protect Greene's assets. A third deed of trust was made out to someone who had installed a pool on Greene's property, but Greene, who was unaware such a deed of trust existed, claims it to be a forgery.

On 31 January 1995, Greene's house was destroyed by a fire that started when a kerosene heater presumably ignited curtains in its vicinity. Greene duly gave notice of his loss and submitted proof of

1. Benfield claims to have specifically asked Greene if there were any mortgages on the property to be insured and that Greene responded "No." Greene, however, asserts he did disclose the first of the three deeds of trust.

loss statements to Defendant. While his claim was being investigated, Greene received roughly $3,000.00 in living expenses from Defendant. On 24 April 1995, however, Defendant denied Greene's claim in its entirety on the grounds that Greene had made material misrepresentations in his insurance application and proof of loss statements.

On 29 January 1998, Plaintiffs filed a complaint against Benfield, Benfield Insurance, and Defendant. On 17 March 1998, Plaintiffs filed an amended complaint asserting claims for breach of contract and bad faith against Defendant and for negligence against Benfield as the agent of Benfield Insurance and Defendant. Defendant filed a motion for summary judgment on 4 November 1999 on the basis that material misrepresentations made by Greene on his insurance application voided the homeowners policy. The trial court granted the motion on 22 March 2000. On 3 April 2000, Plaintiffs filed a motion to reconsider summary judgment, which the trial court denied in an order filed 24 May 2000, thereby dismissing all of Plaintiffs' claims against Defendant. Plaintiffs gave their notice of appeal on 5 June 2000.[2]

The issues are whether: (I) an insurance company can void a homeowners insurance policy solely on the grounds the insured made material and false representations on the policy application; and (II) an insured's failure to disclose on a homeowners insurance application the existence of encumbrances on the property to be insured is a material misrepresentation, as a matter of law.

I

[1] Defendant argues it is permitted to void a homeowners insurance policy upon a showing the applicant for that policy provided false and material representations in the policy application. Plaintiffs argue the insurance company can void the policy only if it can also show that the misrepresentations were willful and knowing. We agree with the Plaintiffs.

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2. The summary judgment did not dispose of Plaintiffs' claims against Benfield and Benfield Insurance, thus presenting this Court with an interlocutory appeal. We are also faced with the issue of the timeliness of Plaintiffs' appeal. Without deciding whether the appeal affects a substantial right, as contended by Plaintiffs, or whether it was timely filed (and assuming it was not), we grant *certiorari* and address the merits of this appeal. *See* N.C.R. App. P. 21(a)(1) (right of appellate court to grant certiorari if appeal not timely or no right of appeal from an interlocutory order exists); *Coleman v. Interstate Cas. Ins. Co.*, 84 N.C. App. 268, 270, 352 S.E.2d 249, 251 (1987) (granting certiorari to an interlocutory appeal).

The General Assembly has promulgated N.C. Gen. Stat. § 58-44-15 specifically regulating fire insurance policies.[3] Section 58-44-15 provides, in pertinent part, as follows: "Th[e] entire policy shall be void if, whether before or after a loss, the insured has wil[l]fully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof." N.C.G.S. § 58-44-15 (1999). Defendant argues this section does not apply to the application process, even if the application involves a request for fire/homeowners insurance. Instead, Defendant contends section 58-3-10 controls with respect to any material misrepresentations made in an application for fire/homeowners insurance. This statute contains no requirement the insurance company show the misrepresentation was willful. N.C.G.S. § 58-3-10 (1999); *see Inman v. Woodmen of the World*, 211 N.C. 179, 181, 189 S.E. 496, 497 (1937) (where life insurance policy declared void upon showing of material misrepresentation during application process and there was no requirement company show misrepresentation was fraudulent). Defendant further argues section 58-44-15 and section 58-3-10 must be read *in pari materia*. Read together, Defendant contends the "before . . . a loss" language in section 58-44-15 must be construed to include only that period of time *after* the application has been submitted and before any loss has been sustained within the meaning of the policy.

We acknowledge this Court has held a material misrepresentation in the application of a fire/homeowners policy is governed by section 58-3-10 and thus is void upon a showing the misrepresentation is material, regardless of whether the misrepresentation was willful or knowing. *Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 799, 487 S.E.2d 157, 159-60 (1997). In 1903, however, our Supreme Court applied section 58-176[4] (the predecessor statute

3. A homeowners policy provides, among other coverages, insurance against fire loss and thus section 58-44-15 is applicable to homeowners policies.

4. Section 58-176 provided in pertinent part:

> This entire policy shall be void if the insured has concealed or misrepresented . . . any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in the case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

N.C.G.S. § 58-176 (1899). This statute, governing fire insurance policies, was amended in 1945 to add the requirement that a material misrepresentation or concealment be willful. 1945 N.C. Sess. Laws ch. 378, § 1. The pertinent provisions of section 58-176

to section 58-44-15) to a dispute involving an alleged misrepresentation in the procurement of a fire/homeowners insurance policy. *See Hayes v. United States Fire Ins. Co.*, 132 N.C. 702, 44 S.E. 404 (1903). Thus, *Hayes* necessarily construed "before . . . a loss" to include the application process. *See id.* Accordingly, we reject Defendant's contention that section 58-44-15 does not apply to the application process and that any material misrepresentations made in the application process must be governed by section 58-3-10.[5] In the context of a fire/homeowners policy, section 58-44-15 is the controlling statute and any misrepresentation or concealment made in the application process is governed by that statute, not section 55-3-10.

Because there was no evidence offered at the summary judgment hearing that Greene knowingly or willfully made any misrepresentations to Benfield Insurance about encumbrances on his property, summary judgment cannot be sustained for Defendant.

II

[2] In any event, summary judgment must be reversed because the evidence shows a genuine issue of fact on whether the failure to provide the requested information (listing of deeds of trust) was material.

Defendant contends our Supreme Court has held that encumbrances (including deeds of trust) are material as a matter of law and the failure to disclose this information on a homeowners insurance application necessarily voids that policy. The decisions relied upon by Defendant, holding the insurance policies void for failure to disclose encumbrances on the insured property, were written in the early 1900's and in the context of a statute which specifically required the applicant to disclose he had an unconditional interest in the property to be insured. *See Roper v. Nat. Fire Ins. Co.*, 161 N.C. 151, 154, 76 S.E. 869, 870 (1912); *Hayes*, 132 N.C. 702, 703, 44 S.E. 404, 404. The current statutes include no such specific mandate. *See* N.C.G.S. §§ 58-3-10, 58-44-15 (1999). Consequently, we reject the contention that *Roper* and *Hayes* stand for the continuing proposition that the

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have not been modified since 1945, although the statute has been re-codified as section 58-44-15.

5. When there is a conflict in the opinions of this Court and opinions of our Supreme Court, we are bound by the Supreme Court opinion. *See Mahoney v. Ronnie's Rd. Serv.*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997). Thus, we are not bound by *Metropolitan*, 126 N.C. App. 795, 487 S.E.2d 157.

failure to disclose encumbrances on property to be insured constitutes a material misrepresentation or omission.[6]

Instead, a "representation in an application for an insurance policy is material 'if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of the premium.' " *Metropolitan*, 126 N.C. App. at 799, 487 S.E.2d at 160 (quoting *Tharrington v. Sturdivant Life Ins. Co.*, 115 N.C. App. 123, 127, 443 S.E.2d 797, 800 (1994)). Generally, materiality presents a question of fact and is therefore reserved for the jury. *Id.* In this case, there are genuine issues of fact whether knowledge by Defendant about the deeds of trust on the insured property would have influenced Defendant's judgment in providing insurance or fixing the rate of the premium. Thus, summary judgment was not proper on this issue.

[3] Plaintiffs further assign error to the granting of summary judgment for Defendant on Plaintiffs' bad faith and unfair and deceptive trade practices claims. There is no argument or authority in Plaintiffs' brief to support this assignment of error and thus it is deemed abandoned. *See* N.C.R. App. P. 28(b)(5). Plaintiffs finally argue the trial court erred in denying several of their discovery requests. We have reviewed each of these arguments and see no abuse of discretion by the trial court. *See Wagoner v. Elkin City Sch.' Bd. of Educ.*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123 (applying abuse of discretion standard to trial court's denial of a party's motion to compel discovery), *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994).

Reversed and remanded.

Judge THOMAS concurs.

Judge CAMPBELL dissents.

CAMPBELL, Judge dissenting.

I respectfully dissent from the majority opinion because Plaintiffs' notice of appeal from the trial court's 22 March 2000 order granting Defendant's motion for summary judgment was not timely

6. We also reject Defendant's argument that *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985) supports their argument.

filed, and, therefore, Defendant's motion to dismiss Plaintiffs' appeal should be granted. Further, I dissent from the majority's holding that N.C. Gen. Stat. § 58-3-10 does not apply to the application process for a fire/homeowners insurance policy. Finally, I dissent from the majority's determination that genuine issues of fact exist concerning the materiality of the misrepresentations made by Greene on his insurance application.

The record shows that the trial court entered summary judgment in favor of Defendant on 22 March 2000. On 3 April 2000, Plaintiffs filed their "Motion to Reconsider Summary Judgment." Rule 3 of the North Carolina Rules of Appellate Procedure requires that an appeal from a judgment or order in a civil action must be "taken within 30 days after its entry." N.C. R. App. P. 3(c) (2001). The running of this thirty-day period to file and serve notice of appeal is tolled by any one of the following timely motions: (1) a motion for judgment notwithstanding the verdict under N.C. R. Civ. P. 50(b), (2) a motion under N.C. R. Civ. P. 52(b) to amend or make additional findings of fact, (3) a motion under N.C. R. Civ. P. 59 (Rule 59) to alter or amend a judgment, or (4) a motion under Rule 59 for a new trial. N.C. R. App. P. 3(c)(1)-(4).

In this case Plaintiffs' "Motion to Reconsider Summary Judgment" does not properly recite the rule number under which it is being sought. However, in denying Defendant's 21 August 2000 motion to dismiss Plaintiffs' appeal, the trial court found that Plaintiffs' motion to reconsider was a proper motion under Rule 59 and, therefore, tolled the running of the time allotted for filing notice of appeal.[7]

To qualify as a Rule 59(e) motion within the meaning of Rule 3, the motion must be based on one of the grounds listed in Rule 59(a). *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997). Having reviewed Plaintiffs' motion to reconsider, I find no allegations in the motion to support any of the grounds listed in Rule 59(a). It appears that Plaintiffs' motion is merely a request that the trial court reconsider its earlier decision granting summary judgment in favor of Defendant. However, a motion which simply reargues matters that have already been argued or puts forth arguments which were not

7. Since Plaintiffs were not seeking a new trial, this determination by the trial court was necessarily a determination that Plaintiffs' motion to reconsider was a proper motion to alter or amend the judgment under Rule 59(e).

made but could have been made cannot be treated as a proper Rule 59(e) motion. *Id.*

Because Plaintiffs' motion to reconsider is not a proper Rule 59 motion, the time to file an appeal from the 22 March 2000 order was not tolled. Therefore, Plaintiffs' 5 June 2000 notice of appeal from the order was not timely and must be dismissed.[8]

However, the majority has chosen to address the merits of Plaintiffs' appeal, and, in so doing, the majority holds that N.C.G.S. § 58-3-10 does not apply to applications for fire/homeowners insurance policies. I disagree with the majority's conclusion on this issue.

N.C.G.S. § 58-3-10 states:

> All statements or descriptions in *any* application for a policy of insurance . . . shall be deemed representations and not warranties, and a representation, unless material fraudulent, will not prevent a recovery on the policy.

N.C. Gen. Stat. § 58-3-10 (1999) (emphasis added). By its terms, N.C.G.S. § 58-3-10 applies to all applications for insurance, and is not precluded from applying in the context of an application for a fire/homeowners policy. However, the majority construes our Supreme Court's decision in *Hayes v. Ins. Co.*, 132 N.C. 702, 44 S.E. 404 (1903) as standing for the proposition that N.C. Gen. Stat. § 58-44-15 (which states that any misrepresentation or concealment of material fact must be willful in order to void a fire insurance policy) applies to an application for fire/homeowners insurance, thereby precluding application of N.C.G.S. § 58-3-10. I disagree.

Rather, I believe that this issue has never been squarely addressed by the Supreme Court and that this Court's decision in *Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 799, 487 S.E.2d 157, 159-60 (1997) (holding that a material misrepresentation in the application for a fire/homeowners insurance policy is governed by N.C.G.S. § 58-3-10 and thus is void upon a showing that the misrepresentation is material, without a showing that the

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8. Further, although Plaintiffs have timely appealed from the denial of their "Motion to Reconsider Summary Judgment," having determined that it does not qualify as a Rule 59(e) motion, and because there are no other provisions for motions for reconsideration in our Rules of Civil Procedure, the motion to reconsider was properly denied. In addition, Plaintiffs did not properly assign error to the trial court's denial of their motion to reconsider. *See* N.C. R. App. P. 10(c).

misrepresentation was willful) is the law in North Carolina. Likewise, I agree with Defendant's argument that, when construed in *pari materia* with N.C.G.S. 58-3-10, the proper interpretation of the phrase "before . . . a loss" in N.C.G.S. § 58-44-15 is that N.C.G.S. § 58-44-15 applies to misrepresentations that are made after the insurance policy has actually been issued, while N.C.G.S. § 58-3-10 applies to misrepresentations that are made in the insurance application itself.

Further, I disagree with the majority's conclusion that there are genuine issues of material fact as to the materiality of Greene's misrepresentations concerning the number of mortgages on the property. Therefore, I respectfully dissent and would affirm the trial court's entry of summary judgment.

WADE S. DUNBAR INSURANCE AGENCY, INC., PLAINTIFF v. JAMES ALEX BARBER, DEFENDANT

No. COA01-345

(Filed 4 December 2001)

1. Appeal and Error— appealability—preliminary injunction—covenant not to compete—substantial right

Although the grant of a preliminary injunction is generally in the nature of an interlocutory order, defendant employee has an immediate right to appeal a preliminary injunction enforcing a covenant not to compete, because: (1) defendant would lose a substantial right to practice his livelihood since defendant has been prevented from engaging in the general insurance business in the territory where he has been employed for the past eleven months; and (2) the covenant not to compete is two years, and essentially a year will have passed in appealing this interlocutory order.

2. Employer and Employee— employment agreement—preliminary injunction—covenant not to compete—consideration—scope—equitable estoppel

The trial court did not err by granting plaintiff insurance agency a preliminary injunction enforcing a covenant not to compete against defendant employee as provided in the parties' employment agreement stating that defendant is restricted for

two years from soliciting any customers having an active account with plaintiff at the time of his termination or prospective customer whom defendant himself had solicited within the six months immediately preceding his termination even though defendant did not sign the agreement until after he began employment, because: (1) the agreement signed by defendant states that he acknowledges and agrees that the terms of the provision not to compete were fully discussed and agreed upon prior to the date of the agreement and prior to the entry by the employee into plaintiff's employment; (2) covenants not to compete which were part of the original verbal employment contract are founded on valuable consideration, and the fact that the written contract was executed after defendant started work is insignificant; (3) our Supreme Court has recognized the validity of similar time and territory restrictions; and (4) a party cannot rely on equitable estoppel if he was put on inquiry as to the truth and had available the means for ascertaining them, and the record contains a memorandum of the agreement between plaintiff and defendant which reflects that defendant agreed to sign an employment contract with a non-compete provision.

Appeal by defendant from order entered 26 January 2001 by Judge Robert F. Floyd, Jr. in Scotland County Superior Court. Heard in the Court of Appeals 7 November 2001.

Williamson, Dean, Williamson, Purcell & Sojka, L.L.P., by William R. Purcell, II and Andrew G. Williamson, Jr., for plaintiff-appellee.

Van Camp, Meacham & Newman, P.L.L.C., by Thomas M. Van Camp, for defendant-appellant.

TYSON, Judge.

Wade S. Dunbar Insurance Agency, Inc. ("plaintiff") instituted an action seeking to enforce a covenant not to compete against James Alex Barber ("defendant"). The trial court granted plaintiff a preliminary injunction, and defendant appeals. We affirm.

I. Facts

In March 1994, plaintiff and defendant agreed that plaintiff would purchase defendant's existing insurance agency and that defendant would become an employee of plaintiff. Defendant also

agreed to sign an employment agreement including a covenant not to compete. The agreement and purchase were to become effective on 1 April 1994.

Wade S. Dunbar ("Mr. Dunbar"), president of plaintiff agency, testified that he and defendant had discussed the terms of the employment agreement and covenant not to compete during their negotiation meetings. On 1 April 1994, Mr. Dunbar presented defendant with the employment agreement. Mr. Dunbar further testified that defendant wished to look over the agreement and six months later, he asked defendant again about the employment agreement. Defendant stated he was still looking it over and then finally signed the employment agreement about a year later. Defendant did not request any changes to either the employment agreement or the covenant not to compete.

The covenant not to compete provides in pertinent part: (1) that defendant will not, during employment or after termination of employment, reveal or disclose any confidential information, including but not limited to, business secrets of plaintiff, or the names, addresses and requirements of any customers of plaintiff; (2) that defendant will not engage, directly or indirectly, in the same or similar business of plaintiff for two full years in Scotland County or any other county where plaintiff has an office in which defendant worked for at least sixty days within one year preceding the date of termination; (3) that defendant will not solicit any customers of plaintiff who have an active account with plaintiff at the time of termination or any prospective client whom defendant has solicited within six months preceding the date of termination; (4) that all the terms of the employment agreement, including the covenant not to compete, were fully discussed prior to defendant's employment with plaintiff; and (5) that defendant expressly recognizes that any breach of the covenant will result in irreparable injury to plaintiff.

Sometime in October 2000, defendant gave Mr. Dunbar a note stating his resignation as of 31 October 2000. Mr. Dunbar rejected this resignation date as it was not in conformance with the thirty day notice requirement and set defendant's termination effective 30 November 2000. Plaintiff paid defendant his full salary through this date. Defendant testified that his employment with plaintiff terminated on 31 October 2000.

Defendant was subsequently employed by The Cannady Group, another insurance agency in Moore County. Defendant and his cur-

rent employer both testified that defendant solicited business from one of plaintiff's largest clients. Another client testified by affidavit that she contacted plaintiff for life insurance and was sold a policy by defendant through another underwriter on 16 November 2000.

Defendant testified that he was not aware of the covenant not to compete. Defendant claims that the terms of the covenant were not discussed prior to his employment with plaintiff, and that he was not presented with the employment agreement until May 1995.

II. Issues

We note that defendant incorrectly referenced those assignments of error pertinent to his first question presented. Assignments of error number two and three relating to trade secrets were not addressed or argued in defendant's brief and are deemed abandoned. N.C.R. App. R. 28(b)(5) (1999).

The ultimate issue to be determined is whether the trial court properly granted the preliminary injunction against defendant.

III. Substantial Right

[1] A preliminary injunction is interlocutory in nature and no appeal lies from such order unless it deprives the appellant of a substantial right which he would lose absent immediate review. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983); *see also*, N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (1999).

In determining what is a "substantial right," our Supreme Court has stated that "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978); *see also Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 334, 299 S.E.2d 777, 780 (1983). "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters*, 294 N.C. at 208, 240 S.E.2d at 343; *see also Blackwelder*, 60 N.C. App. at 334, 299 S.E.2d at 780.

This Court must consider whether defendant has a right of appeal "even though the question of appealability has not been raised by the parties themselves." *Waters*, 294 N.C. at 201, 240 S.E.2d at 340. We determine that defendant would lose a substantial right, that of practicing his livelihood.

The inability to practice one's livelihood has been recognized as a substantial right by our courts. *See Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984); *Triangle Leasing Co. v. McMahon*, 96 N.C. App. 140, 146, 385 S.E.2d 360, 363 (1989), *rev'd on other grounds*, 327 N.C. 224, 393 S.E.2d 854 (1990); *Seaboard Industries, Inc. v. Blair*, 10 N.C. App. 323, 331, 178 S.E.2d 781, 786 (1971). As a result of the preliminary injunction, defendant has been prevented from engaging in the general insurance business in the territory where he is currently employed for the past eleven months. *Robins*, 70 N.C. App. at 540, 320 S.E.2d at 696.

We would like to emphasize that the parties generally should proceed to a determination on the merits in the interest of time. In this case, the covenant not to compete is two years and essentially a year will have passed in appealing this interlocutory order. Our Supreme Court has stated that "where time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time." *A.E.P. Industries*, 308 N.C. at 401, 302 S.E.2d at 759.

IV. Standard of Review

The scope of appellate review in the granting or denying of a preliminary injunction is essentially *de novo*. "[A]n appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Industries*, 308 N.C. at 402, 302 S.E.2d at 760. There is a presumption, however, that the trial court was correct and the burden is on the defendant to show that the trial court erred in granting the preliminary injunction. *See The Western Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) (citation omitted).

[2] A preliminary injunction is an extraordinary measure, and will be issued only if (1) plaintiff is able to show a likelihood of success on the merits of his case and (2) plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of his rights during the course of litigation. *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Defendant specifically assigns as error that plaintiff failed to show a likelihood of success on the merits of its claim. Defendant supports this contention by arguing: (1) the covenant is not supported by adequate consideration, (2)

the covenant is too broad in scope, and (3) that plaintiff is equitably estopped from alleging breach of the employment agreement and covenant not to compete.

V. Covenant not to compete

Covenants not to compete are enforceable if: (1) in writing, (2) made part of a contract of employment, (3) based on valuable consideration, (4) reasonable both as to time and territory, and (5) not against public policy. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 649-50, 370 S.E.2d 375, 380 (1988). This Court will not determine whether the covenant is in fact enforceable, but will review the evidence and determine whether plaintiff has met its burden of showing a likelihood of success on the merits. *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 26-27, 373 S.E.2d 449, 452 (1988). After review of the record, we conclude that plaintiff has shown a likelihood of success on the merits.

1. Adequate consideration

Defendant argues that the terms of the covenant not to compete were not discussed prior to his acceptance of employment and since the employment agreement was not signed until after he began working for plaintiff, the covenant is not supported by adequate consideration.

Mr. Dunbar testified that he and defendant discussed the terms of the non-compete provision and the memorandum of their agreement reflects that defendant agreed to sign an employment agreement to include a non-compete provision. Further, the agreement signed by defendant states that he acknowledges and agrees that the terms of the provision not to compete were fully discussed and agreed upon prior to the date of the agreement and *prior to the entry by the employee into the employ of plaintiff.*

This Court has held that covenants not to compete which were part of the original verbal employment contract, are founded on valuable consideration. The fact that the written contract was executed after defendant started work is insignificant. *Robins*, 70 N.C. App. at 542, 320 S.E.2d at 697. We conclude that there was sufficient evidence of consideration and the credibility of the parties will be determined by the trier of fact.

2. Scope of the covenant

Defendant argues that the covenant not to compete is too broad in scope since he is prohibited from soliciting any of plaintiff's customers, whether he had contact with them or not.

Our Courts have recognized client-based restrictions as a factor in determining the enforceability of covenants not to compete. *See Kuykendall*, 322 N.C. 643, 370 S.E.2d 375; *Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 393 S.E.2d 854 (1990); *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 530 S.E.2d 878 (2000). In evaluating the reasonableness of the time and territory restriction, we must consider each element in tandem and not independently. *Hartman v. Odell and Assoc., Inc.*, 117 N.C. App. 307, 311-12, 450 S.E.2d 912, 916 (1994).

Defendant relies on *Farr* and *Hartman* to support his proposition that a covenant prohibiting contact with all of plaintiff's customers is unreasonable and thus unenforceable. We find these cases distinguishable. In *Farr*, 138 N.C. App. 276, 530 S.E.2d 878, the employee was prohibited from working for any of employer's clients, for five years, encompassing employer's approximately 461 offices, in forty-one states, and four foreign countries. Similarly, in *Hartman*, 117 N.C. App. 307, 450 S.E.2d 912, the covenant prohibited employee from providing similar or the same services in eight states for five or more years.

At bar, the covenant restricts defendant, for two years, from soliciting any customers having an active account with plaintiff at the time of his termination or prospective customer whom defendant himself had solicited within the six months immediately preceding his termination.

Our Supreme Court has recognized the validity of similar time and territory restrictions. *See Triangle Leasing*, 327 N.C. 224, 393 S.E.2d 854 (employment contract does not restrict all competition throughout the State of North Carolina but rather only prohibits the direct or indirect solicitation of Triangle's customers and accounts for the specified two year period).

We conclude that the restrictions in *Farr* and *Hartman* are far broader than and inapposite to this case. Plaintiff has shown a likelihood that the covenant is reasonable and enforceable.

3. Equitable estoppel

Defendant contends that representatives of plaintiff made misrepresentations to the effect that he did not have a non-compete agreement and that he reasonably relied on the misrepresentations. Defendant asserts that he was given approval by Mr. Dunbar to accept employment with The Cannady Group and that he was informed by Ms. Adcock, the corporate secretary, that he did not have a non-compete agreement.

In determining whether the doctrine of estoppel applies, "the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less than the party sought to be estopped must conform to fixed standards of equity." *Hawkins v. M & J Finance Corp.*, 238 N.C. 174, 177, 77 S.E.2d 669, 672 (1953). The essential elements of equitable estoppel relating to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; and (3) knowledge, actual or constructive, of the real facts. *Hawkins*, 283 N.C. at 177-78, 77 S.E.2d at 672. The elements relating to the party claiming estoppel are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially. *Id.* We find sufficient evidence to present a question as to whether defendant lacked knowledge and the means of knowledge as to whether he had agreed to a covenant not to compete.

A party cannot rely on equitable estoppel if it "was put on inquiry as to the truth and had available the means for ascertaining it." *Hawkins*, 238 N.C. at 179, 77 S.E.2d at 673 (citation omitted). Mr. Dunbar testified that he gave defendant the employment agreement with a non-compete provision on 1 April 1994. While defendant maintains that he did not receive the agreement at the beginning of his employment, defendant signed the agreement in May 1995. The record also contains a memorandum of the agreement between plaintiff and defendant which reflects that defendant agreed to sign an employment contract with a non-compete provision.

Additionally, Yolanda Chavis, an employee with plaintiff, testified that she prepared a customer list for defendant at his request just prior to his leaving the company and that the list is no longer with plaintiff. " 'He who comes into equity must come with clean hands,' is a well-established foundation principle upon which the equity powers of the courts of North Carolina rest." *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998) (quoting *Tobacco Growers Co-op Ass'n v. Bland*, 187 N.C. 356, 360, 121 S.E.2d 636, 638 (1924)).

We conclude that plaintiff met its burden of showing a likelihood of success on the merits as to the enforceability of the covenant not to compete and the breach of said covenant by defendant. We hold that the trial court correctly granted a preliminary injunction enforcing the non-compete, non-solicitation, and non-disclosure provisions of the employment agreement.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

SHARON CREECH AND TRAVIS CREECH, GUARDIANS AD LITEM OF JUSTIN CREECH, PLAINTIFFS V. EVELYN H. MELNIK, M.D., DEFENDANT

No. COA00-717

(Filed 4 December 2001)

1. Appeal and Error— contract on behalf of a minor—law of the case doctrine

The law of the case doctrine does not preclude the Court of Appeals' consideration of the issues of whether plaintiff's attorney had authority to contract on behalf of the minor and whether the alleged contract on behalf of the minor required court approval in a medical malpractice action, because: (1) neither of the two prior appellate opinions in this same case addressed either of these issues; and (2) the prior appellate decisions only established that defendant doctor was not entitled to summary judgment.

2. Minors— implied contract—covenant not to sue—medical malpractice—court approval required

The trial court erred in a medical malpractice action by allowing the jury to find that there was a valid contract on behalf of a minor not to sue defendant doctor, because: (1) neither the record on appeal nor the brief on behalf of the doctor points to any evidence showing that the alleged implied contract on behalf of the minor was reviewed or approved by the trial court; and (2) it is well-established in North Carolina that a covenant not to sue negotiated for a minor is invalid without investigation and approval by the trial court.

Appeal by plaintiffs from judgment entered 4 August 1999 by Judge Henry V. Barnette, Jr. in Superior Court, Columbus County. Heard in the Court of Appeals 25 April 2001.

Wade E. Byrd for the plaintiffs-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P. by James Y. Kerr, II, Samuel G. Thompson, William H. Moss for the defendant-appellee.

WYNN, Judge.

Previously, our courts discussed the facts of this case in *Creech v. Melnik*, 347 N.C. 520, 495 S.E.2d 907, (1998) (*Creech II*); *Creech v. Melnik*, 124 N.C. App. 502, 477 S.E.2d 680 (1996) (*Creech I*). In brief, Sharon and Travis Creech, in their capacities as guardians *ad litem*, brought a medical malpractice action against Dr. Evelyn H. Melnik, M.D., alleging that she provided negligent birthing treatment to their son, Justin, on 12 October 1980.

Dr. Melnik, a neonatologist, directed the newborn nursery at the hospital where Justin was born. Justin's birth began with unstable vital signs necessitating care in the intensive care nursery. Indisputably, oxygen deprivation caused Justin to suffer brain damage, blindness, quadriplegia, cerebral palsy, profound mental retardation, and microcephaly. Plaintiffs alleged that after Justin's admission to intensive care, his condition was significantly worsened by Dr. Melnik's failure to properly care for him from 2:30 p.m. to 4:30 p.m. on 23 September 1980.

Before filing this action, W. Paul Pulley, Jr., plaintiffs' attorney, talked with Dr. Melnik on several occasions. Dr. Melnik contended

that during those conversations, Mr. Pulley assured her that if she spoke with him concerning the events surrounding Justin's birth, plaintiffs would not sue her. She stated that with that assurance, she gave information and opinions concerning the care provided for Justin.

Based on evidence of that assurance, the trial court granted summary judgment in favor of Dr. Melnik under the affirmative defenses of equitable estoppel and breach of implied contract not to sue. This Court affirmed, *see Creech I*; however, our Supreme Court remanded the action for trial to resolve genuine issues of material fact that precluded summary judgment. *See Creech II*. This appeal by plaintiffs arises from the resulting jury verdict in favor of Dr. Melnik on the grounds that plaintiffs breached their implied contract not to sue her.[1]

Plaintiffs challenge the jury's verdict of breach of an implied contract on the grounds that (1) no evidence showed that Mr. Pulley had authority to contract on behalf of the minor with Dr. Melnik, and (2) no evidence showed that a court reviewed and approved the alleged contract on behalf of the minor.

[1] Preliminarily, we address the issue of whether the earlier decisions in *Creech I* and *II* set forth a doctrine of law that decides the issues in this appeal—whether Mr. Pulley had authority to contract on behalf of the minor, and whether the alleged contract on behalf of the minor required court approval. We conclude that they do not.

> As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case . . . .

Tennessee-Carolina Transp. Inc. v. Strick Corp., 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974); *see also North Carolina Nat. Bank v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983); *Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997); *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994). Under the law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a

1. The jury found against Dr. Melnik on her alternative defense of equitable estoppel; that issue is not before us.

subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal. *See Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. at 417, 438 S.E.2d at 753. However, the law of the case doctrine does not apply to *dicta*, but only to points actually presented and necessary for the determination of the case. *See Southland Assoc. Realtors, Inc. v. Miner*, 73 N.C. App. 319, 321, 326 S.E.2d 107, 108 (1985) (holding that the doctrine did not apply because the prior appellate decision established "only that plaintiff was not entitled to summary judgment; it did not establish that plaintiff was not entitled to present its evidence with regard to the disputed issues.").

In this case, neither *Creech I* nor *Creech II* addressed issues concerning the attorney's authority to act on behalf of the minor, and whether the contract made on behalf of the minor required court approval. Indeed, in *Creech I*, this Court observed that "[s]ince neither party addresses the question of whether the attorney under the facts of this case could lawfully bind his clients to a contract, we need not reach that issue in this appeal." *Creech I*, 124 N.C. App. at 505, 477 S.E.2d at 682. Likewise, *Creech II* did not address whether the attorney had authority to enter into a contract with Dr. Melnik and whether the contract on behalf of a minor would require court approval. As in *Southland*, the sole question before our Supreme Court in *Creech II* was whether the pleadings, depositions, admissions and affidavits contained in the record proper showed that there were genuine issues of material fact. *See Creech II.* The case was not before our Supreme Court for a decision on the merits; accordingly as in *Southland*, the doctrine of law of the case does not preclude our consideration of these issues.[2] We therefore hold that the prior appellate decisions of *Creech I* and *II* established only that Dr. Melnik was not entitled to summary judgment; they did not establish whether Mr. Pulley had authority to contract on behalf of the minor,

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2. Astutely, during the *Creech II* oral arguments, Justice Whichard recognized the issue of whether court approval was required in a minor's covenant not to sue:

> JUSTICE WHICHARD: We're dealing with a minor here too which makes this a much more troubling case to me. You would—Mr. Pulley could not have settled this case without court approval.
>
> MR. BYRD: No, sir, he could not.
>
> JUSTICE WHICHARD: So how can he contract it away without some sort of court approval? And yet in the posture the case is in—tell me if I'm right—it looks to me like the very best thing this court could do for you would be to send it back for a trial on issues of fact . . . .

nor did they uphold the validity of a contract made on behalf of a minor without court approval.

[2] Although plaintiff brings forth two issues, we need only address the one that disposes of this appeal: Whether court approval was required to find a valid contract involving a minor. We answer, yes; the failure to present proof of court approval of a contract on behalf of a minor is fatal at any stage of a proceeding seeking to enforce such a contract. Since the record shows no evidence that the "implied" contract with the subject minor was approved by a court, we must reverse the jury verdict finding a breach of an implied contract not to sue.

Historically, courts have long provided special protections for minors in general contractual relationships. "Recognized at common law as early as 1292, and little changed in this century, the . . . infancy doctrine allows the minor to avoid or disaffirm contracts . . . The common law's view has traditionally been that children are naive and unsophisticated, especially in the marketplace." Robert E. Richards, *Children and the Recorded-Message Industry: The Need for a New Doctrine*, 72 VA. L.R. 1325, 1332-33 (1986). "From our earliest history infants have been regarded as entitled to the especial protection of the State and as wards of the court. In a sense courts . . . are the supreme guardians of all infants and are charged with the protection alike of their personal and property rights." *Latta v. Trustees of Gen. Assembly of Presbyterian Church in United States*, 213 N.C. 462, 469, 196 S.E. 862, 866 (1938). Consequently, the judiciary's role in protecting the "interest of infants is broad, comprehensive and plenary. In all suits or legal proceedings of whatever nature, in which the personal or property rights of a minor are involved, the protective powers of a court . . . may be invoked whenever it becomes necessary to fully protect such rights." *Id.*

The general rule is that the contract of an infant is not binding on him. *See Freeman v. Bridger*, 49 N.C. 1 (1856).

> [S]o careful is the law to guard the rights of infants, and to protect them against hasty, irregular and indiscreet judicial action. Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory only. Those who venture to act in defiance of them must take the risk of their action being declared void, or set aside.

Moore v. Gidney, 75 N.C. 34, 39 (1876). " 'By the fifteenth century it seems to have been well settled that an infant's bargain was in general void at his election (that is voidable), and also that he was liable for necessaries.' " *Gastonia Personnel Corp. v. Rogers*, 276 N.C. 279, 281, 172 S.E.2d 19, 20 (1970) (quoting 2 Williston, Contracts § 223 3rd ed. 1959). " 'The law considers his contract a voidable one on account of its tender solicitude for his rights and the fear that he may be imposed upon in his bargain.' " *Weeks v. Wilkins*, 134 N.C. 516, 522, 47 S.E. 24, 26 (1904) (quoting Devlin on Deeds, Vol. I, sec. 91).

"Consequently, ancient common-law rules regarding an infant's lack of contractual capacity have endured in the United States and in North Carolina with considerable vitality." John N. Hutson, Jr. & Scott A. Miskimon, North Carolina Contract Law § 1-26, 30 (2001).[3] In North Carolina, agreements or contracts, except for those dealing with necessities and those authorized by statute, "are voidable at the election of the infant and may be disaffirmed by the infant during minority or within a reasonable time of reaching majority." *Bobby Floars Toyota, Inc. v. Smith*, 48 N.C. App. 580, 582, 269 S.E.2d 320 (1980). *See also Jackson v. Beard*, 162 N.C. 105, 78 S.E. 6 (1913). "[W]hat is a reasonable time depends upon the circumstances of each case, no hard-and-fast rule regarding precise time limits being capable of definition." *Nationwide Mut. Ins. Co. v. Chantos*, 25 N.C. App. 482, 490, 214 S.E.2d 438, 444, *disc. review denied*, 287 N.C. 465, 215 S.E.2d 624 (1975).

Our courts continue to afford special safeguards to minors and incompetents when it comes to contracting away their interests. The rationale for allowing minors to avoid contracts is that until they are adults "they are not supposed to have the mental capacity to make them." *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 443, 238 S.E.2d 597, 605 (1977). The avoidability of the contract can be asserted defensively when an adult brings an action to enforce the contract or offensively based on his infancy, when the infant is, for whatever reason, dissatisfied. *See* Hutson, *supra*, § 1-26 at 30-31. However, "if the infant elects to enforce the contract it is binding on the other party." *Id.* § 1-25 at 29. "Because of the need to protect chil-

3. "Under the common-law, persons, whether male or female, are classified and referred to as Infants until they attain the age of twenty-one years." *Gastonia Personnel Corp. v. Rogers*, 276 N.C. 279, 281, 172 S.E.2d 19, 20 (1970). The General Assembly enacted Chapter 585 of the Session Laws of 1971 which abrogated the common law definition of minor. A minor under N.C. Gen. Stat. § 48A-1 (1999) "is any person who has not reached the age of 18 years."

dren, in a contractual dispute between an infant and an adult, the law comes down squarely on the side of the infant." *Id.*

In contrast, when competent adults are conducting business, a binding contract is created by an agreement involving mutual assent of two parties who are in possession of legal capacity, where the agreement consists of an exchange of legal consideration (mutuality of obligation). Richard A. Lord, Williston on Contracts § 1:20 (4th ed. 1993). "Infancy, fraud, mistake, duress and some kinds of illegality all afford grounds for rescinding or refusing to perform a contract." *Id.* However, because a minor lacks legal capacity there cannot be a valid contract in most transactions, unless it is for necessaries or the statutes make the contract valid. *See Nationwide Mutual Ins. Co. v. Chantos*, 293 N.C. at 443, 238 S.E.2d at 605.

Therefore, courts have "inherent authority over the property of infants and will exercise this jurisdiction whenever necessary to preserve and protect children's estates and interests. The court looks closely into contracts or settlements materially affecting the rights of infants [.]" *Sigmund Sternberger Foundation, Inc. v. Tannenbaum*, 273 N.C. 658, 674, 161 S.E.2d 116, 128 (1968). Thus, in addressing the impropriety of a covenant not to sue on behalf of a minor, our Supreme Court in *Sell v. Hotchkiss*, 264 N.C. 185, 191, 141 S.E.2d 259, 264 (1965), stated:

> Although this point was not addressed in the briefs, we note that, irrespective of what construction is put on the covenant signed by Marguerite M. Hotchkiss, mother and natural guardian of plaintiff Barbara Sell, minor, defendant could not use it as a defense to the minor's suit against such a covenant as the one we have here. The settlement of an infant's tort claim became effective and binding upon him only upon judicial examination and adjudication.

Id. (citations omitted); *see also, Gillikin v. Gillikin*, 252 N.C. 1, 113 S.E.2d 38 (1960) (holding that a minor could not be bound by a compromise or settlement of his personal injury claim except in a manner provided by law); *Payseur v. Rudisill*, 15 N.C. App. 57, 63, 189 S.E.2d 562, 566 (holding that "the settlement of a minor's tort claim becom[e]s effective and binding upon him only upon judicial examination and adjudication"), *cert. denied*, 281 N.C. 758, 191 S.E.2d 356 (1972); *In re Reynolds Guardianship*, 206 N.C. 276, 173 S. E. 789, 795 (1934) (holding that "In the case of infant parties, the next friend,

guardian *ad litem*, or guardian cannot consent to a judgment or compromise without the investigation and approval by the Court.").

In the present case, neither the record on appeal nor the brief on behalf of Dr. Melnik points to any evidence showing that the alleged implied contract on behalf of the minor was reviewed or approved by the trial court. Since it is well established in North Carolina that a covenant not to sue negotiated for a minor is invalid without investigation and approval by the trial court, we must reverse the jury's finding of a contract on behalf of the minor not to sue Dr. Melnik, and remand for a new trial.

Reversed and remanded.

Judges TIMMONS-GOODSON and HUDSON concur.

PATRICIA R. HODGES, PLAINTIFF v. ARMSTEAD HODGES, DEFENDANT

No. COA00-1293

(Filed 4 December 2001)

1. **Child Support, Custody, and Visitation— support—payment to mother during pregnancy**

   The trial court did not err in a child support action by finding that a $5,000 payment was to provide compensation to plaintiff during a difficult pregnancy rather than defendant's half of medical expenses incurred in the birth of the child and child support.

2. **Child Support, Custody, and Visitation— support—calculation of father's income—prior year's part-time earnings**

   The trial court erred in a 2000 child support action by including defendant's part-time earnings in 1999 where defendant was not earning any part-time income at the time of the hearing. Child support obligations should be determined by a party's actual income at the time the order is made; a party's earning capacity may be used to calculate the award only if defendant deliberately depressed his income or deliberately acted in disregard of his obligation to provide support.

3. Child Support, Custody, and Visitation— support—insurance for father's other children

The trial court erred in a child support action by failing to include defendant's payments for insurance for his other children when determining his monthly adjusted gross income. Any payments for medical insurance premiums made pursuant to either an order or a private agreement constitute child support within the Child Support Guidelines and should be deducted from the party's gross income to determine his monthly adjusted gross income.

4. Child Support, Custody, and Visitation— support—father's standard of living—no request for deviation from Guidelines

The trial court was not required to deviate from the Child Support Guidelines to ensure that defendant was able to maintain a minimum standard of living where defendant did not request a deviation from the Guidelines.

Appeal by defendant from order filed 2 June 2000 by Judge Pattie S. Harrison in Person County District Court. Heard in the Court of Appeals 6 November 2001.

Ramsey, Ramsey & Long, by Julie A. Ramsey, for plaintiff-appellee.

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

GREENE, Judge.

Armstead Hodges (Defendant) appeals an order filed 2 June 2000 (the order) ordering Defendant pay $434.00 per month to Patricia R. Hodges (Plaintiff) for support of Plaintiff and Defendant's minor child, Casey Alexis Hodges (Casey). The order also ordered Defendant pay arrears in the amount of $1,379.00 and pay one-half of Plaintiff's uncovered medical expenses incurred during Plaintiff's pregnancy and Casey's birth.

Plaintiff and Defendant were married on 19 July 1995, and Casey was born on 8 October 1999. On 6 December 1999, Plaintiff filed a complaint against Defendant requesting: sole custody and control of Casey; Defendant be ordered to pay child support to Plaintiff in accordance with the North Carolina Child Support Guidelines (the

Guidelines); and Defendant be ordered to reimburse Plaintiff for "his proportionate share of her expenses for prenatal care, the birth of [Casey], and the care of [Casey] between [8 October 1999] and the filing of [Plaintiff's] complaint." On 5 May 2000, Plaintiff was granted custody of Casey through a consent order entered into by the parties, and a trial proceeded on the remaining issues.

At trial, Defendant testified he had been employed with the North Carolina Department of Corrections (the DOC) for eleven years. Because Defendant was working first shift, he did not have the potential for overtime. In 1999, Defendant had also worked part-time for Danville Distributing Company and earned approximately $367.00 (an average of $30.58 monthly); however, because Defendant was working first shift at the DOC, he would be unable to work for Danville Distributing Company in 2000. Defendant did not expect to earn income in 2000 from his former part-time employment as a "wrecker driver."

On cross-examination, Defendant testified he did not provide either daycare or insurance for Casey. Defendant also is the father of two other children from previous relationships (the other children), and he pays child support in the amount of $307.50 for one child and $325.00 for the other child pursuant to voluntary support agreements. In addition, Defendant was paying a total of $175.00 monthly in health insurance premiums for the other children pursuant to voluntary support agreements. Defendant testified his monthly gross income from the DOC was $2,277.33. In addition to Defendant's employment with the DOC, Defendant was the fire chief for the Providence Fire and Rescue Department. Defendant earned no income from his position as fire chief, which required him to "put in about four to five hours a day at the fire department."

Plaintiff testified she was employed with the DOC and earned approximately $2,195.75 in monthly gross income. From September 1999 through the end of December 1999, Plaintiff earned no income as she was out of work due to Casey's premature birth and other health complications. During the period Plaintiff was out of work, she received $5,000.00 from Defendant shortly after Casey's birth. The $5,000.00 was pursuant to an agreement the parties had made prior to Casey's birth whereby Defendant would give Plaintiff the money to "keep [her] afloat." Plaintiff testified Defendant gave her the money because "he felt a little guilty [and] he was trying to help [her]" as Defendant had engaged in a relationship with another woman during

the course of the marriage of Plaintiff and Defendant and had conceived a child with the other woman.

Prior to and shortly after Casey's birth, Plaintiff had a lapse in insurance. Consequently, Plaintiff's "out-of-pocket medical expenses" total $3,300.00. Plaintiff pays approximately $75.00 per week in day-care expenses for Casey, and she provides health insurance for Casey totaling $117.16 a month. Plaintiff, however, received information from the DOC that as of 1 July 2000, the insurance would cost $149.00. On cross-examination, Plaintiff denied Defendant paid her $300.00 in February 2000 for support of Casey.

During the course of the trial, Defendant testified again and stated his "take-home pay" would be approximately $600.00 per month after deducting the child support payments and a monthly automobile payment of $225.00. Defendant testified Plaintiff started asking him about the $5,000.00 after Casey was born; and his purpose in giving Plaintiff the $5,000.00 was because "[s]he needed the money for expenses when [Casey] was born, and [Plaintiff] had expenses that had to be paid. [Plaintiff] owed the hospital bill and doctor's bill and her other bills." Defendant testified he gave Plaintiff, in support of Casey: $350.00 in December 1999; $250.00 in January 2000; $300.00 in February 2000; $325.00-$350.00 in March 2000; and $350.00 in April 2000. Plaintiff, when recalled to testify, stated the $5,000.00 was to assist her in keeping her job and paying her bills, and she believed the $5,000.00 was for her living expenses.

The trial court filed its order on 2 June 2000 and found as fact, in pertinent part, that: Defendant "has monthly gross income from his employment with the [DOC] and from secondary income in a monthly amount of $2,308.00"; Plaintiff has monthly gross income in the amount of $2,196.00; Plaintiff provides health insurance for Casey in the amount of $150.00 and "child care for [Casey] at an actual cost of $325.00 per month, 75% of which is $244.00 per month"; "Defendant has two additional children with two different mothers for whom he is paying child support in a total amount of $633.00 per month"; Defendant's $5,000.00 payment to Plaintiff "compensated her for the period of time that she was out of work due to her pregnancy"; "the $5,000.00 payment constituted support for . . . Plaintiff during a difficult pregnancy" and did not constitute payment for support of Casey; under the Guidelines, Defendant should pay $434.00 monthly in support of Casey; "[s]ince the filing of the complaint in this matter on December 6, 1999, . . . Defendant had paid . . . $1,225.00 [in support of

Casey]. The total amount owed would have been $2,604.00 as of May 6, 2000[]"; considering the total amount of child support owed for Casey, Defendant is in arrears in the amount of $1,379.00; and each party should be responsible for one-half of the $3,300.00 in medical expenses not covered by insurance and incurred by Plaintiff and Casey.

The trial court then concluded the matter was properly before it "for a determination of child support and payment of medical expenses" and Defendant was required to pay Plaintiff the sum of $434.00 per month in child support. Consistent with its findings of fact and conclusions of law, the trial court ordered: Defendant pay to Plaintiff $434.00 per month as child support on or before the first day of each month; Defendant pay his total arrears to Plaintiff before 1 June 2000; Defendant and Plaintiff "shall be responsible for one[-]half of all reasonable and necessary medical, dental, orthodontic, optometric, and other health care expenses incurred on behalf of [Casey] and not covered by insurance"; and Defendant should pay one-half of the approximately $3,300.00 in uncovered medical expenses incurred during the pregnancy and birth of Casey.

The issues are whether: (I) there is competent evidence to support the trial court's finding of fact that the $5,000.00 payment constituted support for Plaintiff and not support for the child or reimbursement for medical expenses; and (II) the trial court properly computed Defendant's child support obligation for Casey, taking into account Defendant's child support payments, including payments for medical insurance, for the other children.

"Child support set consistent with the Guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Buncombe County ex rel. Blair v. Jackson*, 138 N.C. App. 284, 287, 531 S.E.2d 240, 243 (2000); *see* N.C.G.S. § 50-13.4(c1) (1999). Thus, absent a timely and proper request by the parties, the trial court is not required to either deviate from the Guidelines or "take any evidence, make any findings of fact, or enter any conclusions of law 'relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support' " in setting the amount of support. *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991) (citation omitted). This Court's review of a trial court's child support order is limited to whether there is competent evidence to support the findings of fact, despite the fact

that different inferences may be drawn from the evidence. *Cauble v. Cauble*, 133 N.C. App. 390, 395-96, 515 S.E.2d 708, 712 (1999).

I

[1] Defendant first argues that because there were no allegations in Plaintiff's complaint she was either seeking or entitled to postseparation support or alimony, the trial court erred in finding the $5,000.00 payment "was for spousal support and not for [support of Casey] or for payment toward medical expenses incurred by . . . Plaintiff for the birth of [Casey]." We disagree.

In this case, Plaintiff was neither seeking nor did the trial court award either postseparation support, within the meaning of N.C. Gen. Stat. § 50-16.2A, or alimony, within the meaning of N.C. Gen. Stat. § 50-16.3A. Although there was conflicting evidence surrounding the circumstances of the $5,000.00 payment, there was evidence the parties contemplated the payment prior to Casey's birth and, thus, prior to Plaintiff incurring medical bills due to Casey's birth. Plaintiff testified Defendant gave her the $5,000.00 to "keep [her] afloat" and to provide her with money for living expenses. Accordingly, the trial court did not err in failing to find the $5,000.00 was payment for Defendant's one-half share of the medical expenses and/or support for Casey, as there was competent evidence to support the trial court's finding the $5,000.00 payment was to provide compensation to "Plaintiff during a difficult pregnancy." *See id.*

II

Defendant next argues the trial court erred in finding and concluding Defendant's amount of monthly child support for Casey to be $434.00.

A

[2] Defendant specifically contends the trial court erroneously included in his gross income,[1] his 1999 earnings from Danville Distributing Company ($30.58 monthly). We agree.

Child support obligations should be "determined by a party's actual income *at the time the order is made*" and a "party's earning

1. We note the record to this Court fails to include the Guidelines worksheet used by the trial court in determining the child support. Thus, we are unable to determine with certainty the amount placed in the Defendant's gross income column. The better practice is for an appellant to include the Guidelines worksheet in the record on appeal.

capacity may be used to calculate the award [only] if he deliberately depressed his income or deliberately acted in disregard of his obligation to provide support." *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997) (emphasis added). In this case, the only income Defendant had at the time the order was entered was from the DOC, as he was not earning any income from Danville Distributing Company. To the extent the trial court believed Defendant had the capacity to earn an additional $30.58 in June 2000 (the date the order was entered), this earning capacity could be considered only upon a finding Defendant was deliberately depressing his income and there is no such finding in this record. Accordingly, the trial court erred in including this additional income in Defendant's gross income.

B

[3] Defendant next argues the trial court erred in failing to consider his payment of premiums to maintain medical insurance on the other children when determining his monthly adjusted gross income. We agree.

Child support payments made pursuant to "any pre-existing court order(s) or separation agreement(s) should be deducted from the party's gross income." N.C. Child Support Guidelines, 2001 Ann. R. (N.C.) 33, 35 [hereinafter Support Guidelines]. Thus, any payments for medical insurance premiums made pursuant to either an order or a private agreement constitute child support within the meaning of the Guidelines and should be deducted from the party's gross income to determine his monthly adjusted gross income. *See id.*

In this case, the findings entered by the trial court do not reveal it considered payments for medical insurance premiums for the other children. Accordingly, the trial court erred in failing to include these payments when determining Defendant's monthly adjusted gross income.

C

[4] Defendant finally contends the trial court erred in failing to ensure any order entered for child support left him with "sufficient income to maintain a minimum standard of living." We disagree.

Proper application of the Guidelines presumptively "ensures that obligors [are left with] sufficient income to maintain a minimum standard of living based on the 1997 federal poverty level for one person." *Id.* at 34. If an obligor contends an order entered consistent with the Guidelines does not leave him with "sufficient income to maintain

a minimum standard of living," he is obligated to timely request a deviation from the Guidelines. *See Buncombe*, 138 N.C. App. at 289-90, 531 S.E.2d at 244 (obligor had requested a deviation); *see also Browne*, 101 N.C. App. at 624, 400 S.E.2d at 740. The trial court then is required to follow the four-step procedure outlined in *Buncombe*. Whether the presumptive child support amount (as determined pursuant to the Guidelines) places the obligor below the federal poverty level is a matter properly considered in the context of his "abilit[y] . . . to provide support." *See Buncombe*, 138 N.C. App. at 287, 531 S.E.2d at 243 (step 2).

In this case, Defendant did not request a deviation from the Guidelines and thus cannot now be heard to complain he is left without sufficient income to maintain a standard of living at or above the poverty level. Accordingly, the trial court is not required to deviate from the Guidelines to ensure Defendant was able to maintain a minimum standard of living.

On remand in this case, the trial court is to re-compute Defendant's monthly gross income consistent with section II(A) of this opinion and re-compute Defendant's monthly adjusted gross income consistent with section II(B) of this opinion to redetermine Defendant's child support obligation for Casey.

Affirmed in part, reversed in part, and remanded.

Judges McCULLOUGH and CAMPBELL concur.

STATE OF NORTH CAROLINA v. TOMMIE PARKS

No. COA00-1394

(Filed 4 December 2001)

1. Crimes, Other; Sexual Offenses— submitting information under false pretenses to the sex offender registry—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of submitting information under false pretenses to the sex offender registry where there was evidence that defendant knowingly and intentionally gave an address he knew

to be false when he registered the address in Cabarrus County where he had lived with his wife, who was seeking a divorce; he resided in Mecklenburg County with his sister; his personal belongings were at the Mecklenburg County address; when challenged by his wife about registering a false address, defendant replied, "Well, they don't know that"; defendant did not have a key to his wife's house and forcibly entered; and, when arrested for breaking and entering, defendant listed his sister's house as his address.

2. Appeal and Error— preservation of issues—failure to object—plain error not asserted

Defendant waived his right to appellate review of the instructions given by the trial court where defendant did not object at trial and did not assert plain error in an assignment of error.

3. Evidence— fingerprint evidence—foundation

The trial court did not abuse its discretion in a prosecution for submitting information under false pretenses to the sex offender registry by allowing a detective's testimony concerning fingerprint analysis. Fingerprinting is an established and scientifically reliable method of identification and the witness was recognized as an expert; moreover, this fingerprint identification served only to buttress testimony that a detective had compared the names and aliases used by defendant, his date of birth, tattoos, and social security number to determine that defendant was the person convicted of the registered offense.

4. Appeal and Error— preservation of issues—constitutionality of act—not brought before trial court

An argument concerning the constitutionality of the N.C. Sex Offender and Public Protection Registration Program was not brought before the trial court and was not addressed on appeal.

Appeal by defendant from judgment entered 22 March 2000 by Judge Kimberly S. Taylor in Cabarrus County Superior Court. Heard in the Court of Appeals 17 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General John J. Aldridge, III, for the State.

William D. Arrowood for defendant appellant.

TIMMONS-GOODSON, Judge.

On 22 March 2000, a jury found Tommie Parks ("defendant") guilty of submitting information under false pretenses to the North Carolina Sex Offender and Public Protection Registration Program. The trial court subsequently sentenced defendant to a minimum term of twenty-seven (27) months' and a maximum term of thirty-three (33) months' imprisonment. On 29 June 2000, this Court allowed defendant's petition for writ of *certiorari* in order to review defendant's trial and resulting judgment.

The evidence before the trial court tended to show the following: On 25 January 1991, defendant pled guilty to two counts of attempted first-degree sexual offense and two counts of taking indecent liberties with children and was sentenced to a term of eighteen years' imprisonment. On 1 January 1996, the North Carolina Sex Offender and Public Protection Registration Program ("the Registration Program") went into effect. *See* 1995 N.C. Sess. Laws ch. 545, § 3. The Registration Program requires, *inter alia*, persons convicted of certain sexual offenses and offenses against minors "to maintain registration with the sheriff of the county where the person resides." N.C. Gen. Stat. § 14-208.7(a) (1999). Reportable convictions under the Registration Program include first-degree sexual offenses and taking indecent liberties with children. *See* N.C. Gen. Stat. § 14-208.6(4)-(5) (1999). Accordingly, when the Department of Correction released defendant on parole in 1997, he registered as a sexual offender with the Sheriff's Department in Cabarrus County. At that time, defendant registered his address as 2611 Heidelberg Drive, Concord, North Carolina. Defendant resided at the Concord address with his wife, Kay Parks ("Parks"), from his initial release in 1997 until 23 August 1998, at which time defendant was arrested and imprisoned for violating his parole. He subsequently served a fifteen-month sentence.

While defendant was in prison, Parks informed him by letter that she was obtaining a divorce, and that her home in Concord would no longer be his residence. Parks then installed new locks on the doors to her house and transported defendant's personal property to his sister's home in Mecklenburg County, North Carolina. Parks did not visit defendant while he was incarcerated. Upon his release from prison on 30 October 1999, defendant returned to the Cabarrus County Sheriff's Department to update his address on the sexual offender registry. Although defendant was living at his sister's home in Mecklenburg County at the time, defendant registered his address as 2611 Heidelberg Drive, Concord, North Carolina.

Shortly thereafter, defendant contacted Parks by telephone. During one of their phone conversations, defendant informed Parks that he had registered in Cabarrus County. Parks stated, "But don't you mean Mecklenburg County . . . you don't live in Cabarrus County." Defendant responded, "Well, they don't know that." On 9 November 1999, defendant went to 2311 Heidelberg Drive in order to visit Parks, but she locked the front door and refused to allow defendant to enter her home. Defendant then kicked the door open, and Parks called for 911 emergency assistance. Responding law enforcement officers soon arrived and arrested defendant. When questioned about the incident, defendant explained that, "I and my wife haven't been together because I pulled time. I went to her house . . . and when she saw me, she said, 'Oh God, what do you want?' [and] . . . 'Go away,' and I pushed the door open." While in custody, defendant gave his address as that of his sister's home in Mecklenburg County.

From his conviction for submitting information under false pretenses to the sex offender registry and resulting sentence, defendant now appeals.

Defendant contends the trial court erred by (1) denying defendant's motion to dismiss; (2) failing to properly instruct the jury; and (3) allowing an expert witness to testify as to identification of fingerprints. Defendant also argues that North Carolina's Sex Offender and Public Protection Registration Program is unconstitutional. For the reasons stated herein, we find no merit to defendant's arguments and no error by the trial court.

[1] Defendant argues the trial court erred in denying his motion to dismiss. Defendant contends there was no evidence of any intent to deceive on his part when he registered his address as 2311 Heidelberg Drive. We disagree.

Upon a defendant's motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). A motion to dismiss is proper when the State fails to present substantial evidence of each element of the crime charged. *State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). Substantial evidence is evidence that is "existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Defendant in the instant case was charged with submitting information under false pretenses to the Registration Program. Under section 14-208.11(a) of the North Carolina General Statutes, a person is guilty of submitting information under false pretenses if the person (1) stands convicted of a sexual offense requiring him to register as a sexual offender and (2) submits information under false pretenses to the sexual offender registry. *See* N.C. Gen. Stat. § 14-208.11(a)(4) (1999). False pretense occurs when one makes an untrue representation to another that is calculated and intended to deceive. *See, e.g., State v. Murphy*, 280 N.C. 1, 5-7, 184 S.E.2d 845, 847-48 (1971). "Intent is a mental attitude which seldom can be proved by direct evidence, but must ordinarily be proved by circumstances from which it can be inferred." *State v. Kendrick*, 9 N.C. App. 688, 691, 177 S.E.2d 345, 347 (1970).

In the light most favorable to the State, there was adequate evidence in the record from which a reasonable jury could conclude that defendant knowingly and intentionally gave an address he knew to be false when he registered his address as 2311 Heidelberg Drive with the sexual offender registry at the Cabarrus County Sheriff's Department. Parks testified that she informed defendant that she was pursuing a divorce, and that he would have to find another place at which to live. After his release from prison on 30 October 1999, defendant resided in Mecklenburg County with his sister, at whose home defendant's personal belongings were located. When Parks specifically challenged defendant's actions in registering an address at which he did not reside, defendant replied, "Well, they don't know that." Defendant forcibly entered Park's residence, as he did not have a key to her home. Upon his arrest for breaking and entering, defendant gave his address as that of his sister's and acknowledged that the house at 2311 Heidelberg Drive was his wife's residence. Based on the above-stated facts, the trial court did not err in denying defendant's motion to dismiss. We therefore overrule defendant's first assignment of error.

[2] By his second assignment of error, defendant argues the trial court erred by inadequately instructing the jury on the offense of submitting false information to the sexual offender registry. When defendant's case was at trial, the pattern jury instructions for a violation of section 14-208.11 of the North Carolina General Statutes did not exist. The trial court therefore asked the State and defendant for suggestions on appropriate jury instructions. Defendant submitted no proposals, nor did he object to the instructions as given to the jury.

Failure to properly object subjects an alleged error to review only on the grounds of plain error. *See* N.C.R. App. P. 10(c)(4) (2001); *State v. Fennell*, 307 N.C. 258, 263, 297 S.E.2d 393, 396-97 (1982). Moreover, if a defendant fails to assert plain error in an assignment of error or fails to specifically and distinctly argue in his brief that the trial court's instructions amounted to plain error, this Court will not conduct plain error review. *State v. Nobles*, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999); *State v. Truesdale*, 340 N.C. 229, 232-33, 456 S.E.2d 299, 301 (1995). Defendant did not assign plain error to the trial court's instructions, nor did he argue such in his brief to this Court. Thus, defendant has waived his right to appellate review regarding the instructions given by the trial court. We therefore do not address defendant's second assignment of error.

[3] By his third assignment of error, defendant argues the trial court erred in permitting expert testimony by Detective Ron Beaver concerning a fingerprint analysis Detective Beaver conducted in connection with defendant's case. Defendant asserts that, because there was no proper foundation for the admission of Detective Beaver's testimony, such evidence was inadmissible. During the course of trial, defendant raised the issue as to whether he was the same person as the "Tommie Everette Parks" shown on the Judgment and Commitment in the 15 January 1991 conviction and the same as the "Tommie Edward Parks" whose name appeared on the 9 November 1999 arrest report. As a result, Detective Beaver was called to the stand and permitted to testify as an expert on fingerprint identification. Detective Beaver testified that defendant's fingerprints taken in 1999 were identical to the fingerprints of the "Tommie Parks" convicted in 1991 for sexual offense charges. Defendant now argues that the State presented no evidence concerning the reliability of the method Detective Beaver used to compare the fingerprints, and that the trial court took no judicial notice of the reliability of such testing. As such, defendant argues the State did not establish a proper foundation for the testimony given by Detective Beavers. We disagree.

Our Supreme Court in *State v. Rogers*, 233 N.C. 390, 398, 64 S.E.2d 572, 578 (1951), recognized that fingerprinting is an established and scientifically reliable method of identification. The trial court recognized Detective Beavers as an expert in such identification, and we discern no abuse of discretion by the court in qualifying him as such. *See State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984) (noting that the trial judge is afforded wide latitude of discretion in admitting expert testimony). Moreover, Detective Beaver's testimony

concerning the fingerprint identification only served to buttress his confirmation that defendant was the same person in both the 1991 and 1999 arrests. Specifically, Detective Beavers testified that he compared the names and aliases used by defendant, his date of birth, tatoos, and his social security number to determine that defendant was the same individual convicted in 1991 of the registered offenses. We therefore overrule defendant's third assignment of error.

[4] Finally, defendant argues that North Carolina's Sex Offender and Public Protection Registration Program violates the *ex post facto* provisions of the United States and North Carolina Constitutions. Defendant did not raise this argument before the trial court, however, and therefore this issue is not properly before this Court. *See* N.C.R. App. P. 10(b)(1) (2001); *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988). Accordingly, we do not address defendant's final assignment of error.

In summary, we hold defendant received a fair trial, free from prejudicial error.

No error.

Judges McGEE and JOHN concur.

CHARLES BOYD, PLAINTIFF-APPELLANT v. KENNETH J. HOWARD, JOYCE M. HOWARD AND THE FOUR HUNTERS, INC., DEFENDANTS-APPELLEES

No. COA01-78

(Filed 4 December 2001)

Corporations— shareholder derivative claim—breach of fiduciary duty—foreclosure sale

The trial court did not err by granting partial summary judgment in favor of defendant corporate officers and directors on plaintiff's shareholder derivative claim based on defendants' alleged breach of fiduciary duty by purchasing the corporation's property at a foreclosure sale and by not previously informing plaintiff that they intended to bid on the property at the foreclosure sale, because: (1) the corporation was in no position to financially take advantage of the opportunity to purchase the property at the foreclosure sale, nor did it have the means to stop

the foreclosure sale; (2) defendant president of the corporation attempted to find a way for the corporation to take advantage of the opportunity by soliciting banks for loans, but failed; (3) plaintiff and the corporation were notified of the foreclosure sale; and (4) defendants as guarantors on the note were acting in their individual capacity in bidding at the foreclosure sale based on their personal liability.

Appeal by plaintiff from judgment entered 1 November 2000 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 18 October 2001.

John Haworth for plaintiff-appellant.

Pete Bradley for defendants-appellees.

WALKER, Judge.

Defendant corporation, The Four Hunters, Inc. (Four Hunters), was in the furniture business. Its shares of stock were split two-thirds to defendant Kenneth J. Howard (Mr. Howard) and one-third to plaintiff. Mr. Howard was the president, chief executive officer and a member of the board of directors of Four Hunters. Defendant Joyce M. Howard (Ms. Howard), the wife of Mr. Howard, was the secretary/treasurer and also a member of the board of directors. The plaintiff was the remaining member of the board of directors.

Four Hunters owned two and one-half acres of property which contained a 35,000 square foot office, manufacturing and warehouse facility. This property was pledged as security for two separate mortgages—the first mortgage with NationsBank (currently Bank of America) and the second with High Point Bank & Trust. Mr. Howard personally guaranteed the note with High Point Bank & Trust and plaintiff personally guaranteed the note with NationsBank. On 17 August 1997, High Point Bank & Trust began foreclosure proceedings to protect its interest because NationsBank was already foreclosing on the same property.

On 27 August 1997, the board of directors and the corporate counsel met to discuss options in the face of the foreclosures. They ultimately determined that the board recommend to the shareholders that Four Hunters voluntarily dissolve. There was a shareholders meeting on 8 September 1997 of which plaintiff had notice although he declined to attend. Mr. Howard, as majority shareholder, voted to

follow the recommendations of the board to voluntarily dissolve Four Hunters.

High Point Bank & Trust held the foreclosure sale of the property on 10 October 1997. As a personal guarantor on the note, Mr. Howard bid on the property at the sale to protect his interest. Mr. and Ms. Howard purchased the property, subject to the NationsBank mortgage, using a personal loan from High Point Bank & Trust to pay off the purchase price and both outstanding mortgages. Mr. and Ms. Howard then leased the property back to Four Hunters for a few months and subsequently leased it to another party. The Articles of Dissolution of Four Hunters were filed on 4 December 1997 with the Secretary of State.

On 24 March 1998, plaintiff filed suit against Mr. and Ms. Howard for breach of fiduciary duties which was dismissed without prejudice for failure to properly serve Four Hunters, a necessary party. On 11 February 2000, plaintiff filed the present action alleging both a shareholder derivative claim and an individual claim for breach of fiduciary duties, for usurping a corporate opportunity and for unfair and deceptive trade practices. Mr. and Ms. Howard counterclaimed alleging breach of fiduciary duty by the plaintiff.

Plaintiff moved for partial summary judgment as to the shareholder derivative claim. Simultaneously, he moved for dismissal of defendants' counterclaim. The trial court ruled there were no issues of fact as to the shareholder derivative claim and granted partial summary judgment for Mr. and Ms. Howard. Plaintiff's motion to dismiss the counterclaim was denied. Plaintiff appeals the partial summary judgment in favor of the defendants and the denial of his motion to dismiss the counterclaim.

Plaintiff contends that Mr. and Ms. Howard breached their fiduciary duty by purchasing the property at the foreclosure sale and by not previously informing the plaintiff that they intended to bid on the property at the foreclosure sale. Mr. and Ms. Howard admit they stand in a fiduciary relationship with Four Hunters and the plaintiff. However, they contend that their purchase of the property as individuals is valid because the transaction was fair to Four Hunters.

Both NationsBank and High Point Bank & Trust had begun foreclosure proceedings. On 27 August 1997, the board of directors, including plaintiff and defendants, met to discuss both pending fore-

closures. Mr. Howard informed the plaintiff that NationsBank, High Point Bank & Trust, and Bank of North Carolina had all denied Four Hunters' applications for loans which would have stopped the foreclosure proceedings. At this point, the plaintiff refused to personally guarantee a loan to the corporation. Therefore, the board of directors voted at this meeting to recommend to the shareholders that Four Hunters voluntarily dissolve. The shareholders, in a separate meeting, voted to follow that recommendation.

Because the defendants are officers and directors, they have a fiduciary duty to Four Hunters. "A transaction with the corporation in which a director of the corporation has a direct or indirect interest" is a "conflict of interest transaction" and usually voidable by the corporation. N.C. Gen. Stat. § 55-8-31(a) (1999). However, "[a] conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true: . . . (3) The transaction was fair to the corporation." *Id.* The official commentary to the statute states: "The fairness of a transaction for purposes of section 8.31 should be evaluated on the basis of the facts and circumstances as they were known or should have been known at the time the transaction was entered into."

N.C. Gen. Stat. § 55-8-31 replaced the former N.C. Gen. Stat. § 55-30(b). In *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983), our Supreme Court noted that N.C. Gen. Stat. § 55-30(b) was a statutory standard which codified the law regarding fiduciaries taking advantage of corporate opportunities. *Meiselman* set out six "recurring circumstances" to which our courts should look to determine whether a corporate opportunity has been usurped. *Meiselman*, 309 N.C. at 310, 307 S.E.2d at 569. They are:

1) the ability, financial or otherwise, of the corporation to take advantage of the opportunity;

2) whether the corporation engaged in prior negotiations for the opportunity;

3) whether the corporate director or officer was made aware of the opportunity by virtue of his or her fiduciary position;

4) whether the existence of the opportunity was disclosed to the corporation;

5) whether the corporation rejected the opportunity; and

6) whether the corporate facilities were used to acquire the opportunity.

Id.

The "opportunity" here was to purchase the property of Four Hunters at the foreclosure sale. Four Hunters was in no position financially to take advantage of this opportunity. It did not have the means to stop the foreclosure sale. Mr. Howard, as a director, officer, and shareholder, attempted to find a way for Four Hunters to take advantage of the opportunity by soliciting banks for loans but failed. Plaintiff and Four Hunters were notified of the foreclosure sale.

Although they had knowledge of the foreclosure sale because of their fiduciary positions, the defendants also had a personal interest in the foreclosure sale. Mr. Howard was a personal guarantor on the High Point Bank & Trust note and would be personally liable if the foreclosure sale did not bring sufficient funds to pay off the outstanding loan. Plaintiff also had knowledge of the foreclosure sale prior to the sale taking place. Because Mr. and Ms. Howard were acting in their individual capacity in bidding at the foreclosure sale, we find there was no breach of fiduciary duty by the Howards in their failure to notify the plaintiff that they intended to bid on the property.

All of the facts in the record establish that the foreclosure sales by NationsBank and High Point Bank & Trust were going forward. Four Hunters did not have the financial ability to stop the High Point Bank & Trust foreclosure sale. As a guarantor on the note, Mr. Howard had a personal interest in purchasing the property. Applying the *Meiselman* factors to all of the facts attendant to the purchase of the property by the defendants at foreclosure, we agree with the trial court that the defendants did not breach their fiduciary duty to Four Hunters.

The trial court did not err in granting partial summary judgment in favor of the defendants on plaintiff's shareholder derivative claim. In view of the fact that the individual claims of the plaintiff still exist, we decline to address the denial of the plaintiff's motion to dismiss the counterclaim of the defendants against the plaintiff in his individual capacity.

Affirmed.

Judges MARTIN and TYSON concur.

ROBERT SHARON McCARVER, EXECUTOR OF THE ESTATE OF ROBERT ALEXANDER McCARVER, PLAINTIFF v. WILLIAM HENRY BLYTHE, JR., DONNA BLYTHE HARRINGTON, PERRY BLYTHE, PATTI BLYTHE LEMMONDS, MARILYN BLYTHE WOOTEN, TERRY F. BLYTHE AND ROBIN S. BLYTHE, DEFENDANTS

No. COA00-1116

(Filed 4 December 2001)

Statutes of Limitations and Repose— waste—accrual of action—first discovery of damage

A 2000 counterclaim for permissive waste by a remainderman against the estate of the life tenant was barred by the statute of limitations where the remainderman admitted visiting the home in 1992 and noticing that the porches and roof were rotting, that boards needed replacing, and that the roof needed "sheathing." A remainderman's action for waste accrues from the date of the first act or omission of the life tenant and N.C.G.S. § 1-52 (16) does not change the fact that the injury springs into existence and completes the cause of action once some physical damage has been discovered. Further damage discovered in 1999, after the life tenant's death, does not permit the remainderman to circumvent the statute of limitations.

Appeal by defendant, William Henry Blythe, Jr., from judgment entered 6 April 2000 by Judge Michael E. Beale in Union County Superior Court. Heard in the Court of Appeals 20 August 2001.

Perry, Bundy, Pyler & Long, L.L.P., by H. Ligon Bundy, for plaintiff-appellee.

Griffin, Smith, Caldwell, Helder & Lee, P.A., by W. David Lee and Annika M. Goff, for defendant-appellant.

TIMMONS-GOODSON, Judge.

William Henry Blythe, Jr. ("defendant") appeals from an order of the trial court granting summary judgment in favor of Robert Sharon McCarver ("plaintiff"), executor of the estate of Robert Alexander McCarver.

The relevant factual and procedural background is as follows: In 1960, Lena Blythe ("Lena") inherited a life estate in land located at 2002 Billy Howie Road in Waxhaw, North Carolina. Lena's nephews,

defendant and Larry F. Blythe ("Larry"), acquired the remainder interest with each owning a one-half interest in the property. The property consisted of 29.5 acres of land, a two-story house and three outbuildings. On 13 April 1964, defendant and Larry executed a deed conveying a life estate in the property to Lena's husband, Robert Alexander McCarver ("decedent"), retaining the remainder in fee simple. The conveyance was subject to the life estate held by Lena. Lena died in 1992, and Robert continued to occupy the property until his death in 1999.

In his deposition, defendant testified that he visited the property several times over the two months following Lena's death in 1992. During his visits, defendant stated that he observed deterioration in the home and indicated that the porches were "getting in bad shape." Defendant did not visit the property again until 1999 and at that time, defendant testified, the property was in "total disrepair."

Plaintiff commenced an action to recover personal property belonging to decedent's estate on 12 April 1999. Subsequently, defendant filed a counterclaim on 15 March 2000 requesting damages for permissive waste alleging that decedent failed to exercise reasonable precautions to preserve the property. Additionally, defendant alleged that decedent failed to act with due regard toward the rights of the remaindermen. The failure to act, defendant asserted, extensively and permanently destroyed the estate.

Plaintiff filed a motion for summary judgment regarding defendant's counterclaim. In support of the motion, plaintiff offered the affidavit of Warren Carter Plyler ("Plyler") who visited the home on a regular basis for over thirty years. Plyler indicated that he noticed a slow deterioration in the property for many years prior to Lena's death. He indicated that the property was in "poor condition" at Lena's death and that the value of the property did not "appreciably change" between 1992 and 1999. On 22 June 2000 the trial court entered an order granting summary judgment in favor of plaintiff.

Defendant's sole contention on appeal is that summary judgment was improper because the trial court erred in finding that his claim for waste against a life tenant, was barred by the statute of limitations.

It is well established that "[s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Thompson v. Three Guys Furniture Co.*, 122 N.C. App. 340, 344, 469 S.E.2d 583, 585 (1996) (quoting N.C. Gen. Stat. § 1A-1, Rule 56 (c)). The moving party has the burden of "positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law." *James v. Clark*, 118 N.C. App. 178, 180, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). All the evidence presented is "viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1988).

"Whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Hatem v. Bryan*, 117 N.C. App. 722, 724, 453 S.E.2d 199, 201 (1995). However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes a question of law, and summary judgment is appropriate. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 508, 317 S.E.2d 41, 43 (1984), *aff'd*, 313 N.C. 488, 329 S.E.2d 350 (1985).

Defendant's claim against decedent for waste is based upon a theory that the decedent failed to properly maintain the property in a state of good repair, known as permissive waste. *Norris v. Laws*, 150 N.C. 599, 64 S.E. 499 (1909). The applicable statute of limitations for permissive waste is three years. *Sherrill v. Connor*, 107 N.C. 630, 12 S.E. 588 (1890). A remainderman's action for waste accrues from the date of the first act or omission of the life tenant. *Id.* Although defendant does not contest the application of a three-year statute of limitations, he contends that it begins to run when the physical damage to the property is discovered. Under N.C. Gen. Stat. § 1-52(16) (1999), which allows accrual of actions for physical damage of property when the damage is discovered, defendant contends his cause of action did not accrue until Robert's death in 1999. Defendant asserts that only at Robert's death did his interest become possessory which is when he had a reasonable opportunity to discover the waste. For the reasons discussed below, we disagree.

" '[W]here bodily injury to the person or a defect in property is an essential element of the cause of action', the three-year statute of limitations found in [N.C. Gen. Stat. § 1-52] should be utilized." *Hanover Insurance Co. v. Amana Refrigeration, Inc.*, 106 N.C. App. 79, 82, 415 S.E.2d 99, 101 (quoting *Bernick v. Jurden*, 306 N.C. 435, 444-45, 293 S.E.2d 405, 411-12 (1982)) *disc. review denied*, 332 N.C. 344, 421

S.E.2d 147 (1992). Section 1-52 (16) provides that a cause of action for personal injury or physical property damage "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C. Gen. Stat. § 1-52(16) (1999). The primary purpose of the discovery rule set forth in N.C. Gen. Stat. § 1-52 (16) "is that it is intended to apply to plaintiffs with latent injuries." *Robertson v. City of High Point*, 129 N.C. App. 88, 91, 497 S.E.2d 300, 302, *disc. review denied*, 351 N.C. 370, 510 S.E.2d 654 (1998).

In applying the discovery rule, it must be determined when defendant knew or should have known the cause of action accrued. Under common law, "[w]hen the right of the party is once violated, even in ever so small a degree, the injury, in the technical acception of that term, at once springs into existence and the cause of action is complete." *Mast v. Sapp*, 140 N.C. 533, 540, 53 S.E. 350, 352 (1906). "G.S. § 1-52 (16) modifies [the common law] rule in the case of latent damage only to the extent that it requires discovery of physical damage before a cause of action can accrue." *Pembee*, 69 N.C. App. at 508, 317 S.E.2d at 43. However, "[i]t does not change the fact that once some physical damage has been discovered, the [damage or] the injury springs into existence and completes the cause of action." *Pembee* at 509, 317 S.E.2d at 43.

In *Pembee*, plaintiffs had contracted with defendants to construct an industrial plant. Plaintiff filed an action in 1981 alleging that faulty construction had caused the roof to leak. Plaintiff found leaks in the roof in 1973, 1976 and 1977. Plaintiff argued that these leaks were not of the same nature as those discovered in 1980. Therefore, under G.S. § 1-52 (16), a cause of action did not accrue until the defect could have reasonably been apparent. This Court ruled that the leaks in 1973, 1976, and 1977 should have made it apparent that the roof was defective. *Id.* Thus by 1976, plaintiff's cause of action for the property damage accrued. The Court further stated that "this statute serves to delay the accrual of a cause of action in the case of latent damages until the plaintiff is aware he has suffered damage, not until he is aware of the full extent of the damages suffered." *Id.*

Similarly, in the case *sub judice*, defendant was aware of the deterioration occurring to the property before and after Lena's death in 1992. In his deposition, defendant testified that he knew as early as 1992 that the property was deteriorating and causing permanent damage to his remainder interest. He admitted visiting the home in 1992

and noticing that the porches and the roof were rotting, noting that the boards needed replacing and roof needed "sheathing." Defendant conceded that "little things could have been done early that would have kept the big things from happening." The evidence clearly establishes that defendant knew of damage to the property in 1992 and any further damage discovered in 1999, "does not permit [defendant] to circumvent the bar of the statute of limitations." *Pembee* at 509, 317 S.E.2d at 43. By failing to institute this action within three years of discovering the alleged waste in 1992, defendant is barred by the three-year statute of limitations for permissive waste. Defendant is therefore not entitled to the protection of the discovery rule outlined in N.C. Gen. Stat. § 1-52 (16).

Therefore, summary judgment in favor of plaintiff was appropriate. Based on the foregoing analysis, the trial court's decision is affirmed.

Affirmed.

Chief Judge EAGLES and Judge THOMAS concur.

RAMON KENT HENDERSON, AND WIFE, KYMBERLEY ANNE HENDERSON v. PARK HOMES INCORPORATED; SOUTHERN SYNTHETIC & PLASTIC, INC.; AND DRYVIT SYSTEMS, INC.

No. COA00-1114

(Filed 4 December 2001)

1. **Appeal and Error— appealability—summary judgment as to only remaining defendant—appeal not interlocutory**

   A summary judgment was final and not interlocutory as to one of three defendants where one of the other defendants had made no appearance and the other settled.

2. **Statutes of Limitations and Repose— synthetic stucco—statute of repose—products liability rather than real property statute controls**

   The products liability rather than real property statute of repose applied to a synthetic stucco action where defendant was a remote manufacturer and the product made its way to plaintiffs through the commerce stream. Defendant was not a

materialman who furnished materials to the job sites under N.C.G.S. § 1-50(a)(5)(b)(9).

3. Statutes of Limitations and Repose— synthetic stucco— statute of repose—began to run at contractor's purchase of product

The statute of repose barred a synthetic stucco action where the statute began to run when the synthetic stucco was first purchased by the subcontractor for installation on plaintiffs' residence rather than when plaintiffs purchased their house. Plaintiffs had 6 years to file suit after the "initial purchase or consumption,"which occurred at the subcontractor's purchase because the ultimate and intended use of providing a weatherproof barrier began at the moment of application.

4. Statutes of Limitations and Repose— not tolled by class action

The statute of repose in a synthetic stucco claim was not tolled by the filing of a class action suit. A statute of repose creates substantive rights that may not be tolled by equitable considerations.

Appeal by plaintiffs from judgment entered 18 April 2000 by Judge Orlando Hudson in Wake County Superior Court. Heard in the Court of Appeals 20 August 2001.

Lewis & Roberts, P.L.L.C., by Daniel K. Bryson and F. Murphy Averitt,III, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Hada Haulsee, Scott Mebane and Charles L. Becker, for defendant-appellee.

THOMAS, Judge.

This case concerns alleged defects in synthetic stucco applied to the home of plaintiffs, Ramon Kent Henderson and wife, Kymberley Anne Henderson. The trial court granted summary judgment for defendant, Dryvit Systems, Inc., based on the products liability statute of repose and the statute of limitations.

Plaintiffs appeal, arguing four assignments of error. For the reasoning herein, we affirm the decision of the trial court.

Plaintiffs entered into a purchase agreement with defendant, Park Homes Incorporated (Park Homes), on or about 23 June 1992 for construction of a house. Park Homes, in turn, subcontracted with defendant, Southern Synthetic & Plastic, Inc. (Southern), for the task

of cladding the exterior of the house with a manufactured exterior insulation finish system (EIFS), commonly known as synthetic stucco. Southern purchased the EIFS from defendant, Dryvit Systems, Inc., (Dryvit), a manufacturer and distributor of the EIFS.

In the fall of 1992, workers for Southern applied the EIFS manufactured by Dryvit to the house plaintiffs agreed to purchase. The certificate of occupancy was issued on 5 April 1993. Shortly thereafter, plaintiffs closed on the purchase and moved into their home. Through media reports, plaintiffs learned in the spring of 1996 that there may be defects associated with the EIFS. A moisture intrusion inspection report, dated 31 May 1996, confirmed that plaintiffs' home did indeed have moisture intrusion problems due to defective EIFS cladding. Plaintiffs filed suit against defendants on 5 March 1999. On 16 July 1999, plaintiffs opted out of *Ruff v. Parex*, 96-CVS-0059, a class action lawsuit against Dryvit and other EIFS manufacturers asserting claims essentially identical to those alleged by plaintiffs.

The trial court granted Dryvit's motion for summary judgment on two grounds. First, the trial court found that the appropriate statute of repose was N.C. Gen. Stat. § 1-50(a)(6), the products liability statute of repose, and that it barred plaintiffs' claims against defendant. Second, the trial court found that the applicable statute of limitations had run because more than three years had passed since plaintiffs first noticed bulging and wrinkling on the surface of the EIFS. Plaintiffs advance four arguments in maintaining that the trial court erred.

[1] Initially, we note that the summary judgment order from which defendant appeals is not interlocutory. Rather, it is a final judgment that is immediately appealable because Park Homes settled with plaintiffs and Southern made no appearance. *See Jenkins v. Wheeler*, 69 N.C. App. 140, 142, 316 S.E.2d 354, 356, *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 the suit). 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).

Plaintiffs first argue that their action is governed by the real property statute of repose, and that their claims were filed within six years of "the later of the specific last act or omission of the defend-

ant . . . or substantial completion of the improvement." N.C. Gen. Stat. § 1-50(a)(5) (1999). Second, plaintiffs maintain that if the products liability statute of repose applies, their claims against Dryvit were filed within six years of the "initial purchase for use or consumption" of the residence, and thus complied with the statute. N.C. Gen. Stat. § 1-50(a)(6) (1999). Third, plaintiffs contend that the statute of repose was tolled with respect to their claims against Dryvit by the filing of *Ruff v. Parex* in 1996. Finally, plaintiffs argue that this action is not barred by the applicable three-year statute of limitations, N.C. Gen. Stat. § 1-50(a)(5)(f), which provides that the cause of action "shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant." N.C. Gen. Stat. § 1-50(a)(5)(f) (1999). We consider plaintiffs' arguments in the above order.

[2] Dryvit, which uses a wholesale distribution network, is a remote manufacturer. The EIFS made its way to plaintiffs' home through the commerce stream, thus implicating the products liability statute of repose, N.C. Gen. Stat. § 1-50(a)(6). *See Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 445, 444 S.E.2d 423, 427 (1994) (products liability statute of repose, as opposed to real property statute of repose, N.C. Gen. Stat. § 1-50(a)(5)(b)(9), applies to remote manufacturer whose materials find their way to a job site indirectly through the commerce stream; such manufacturer would not be a materialman who furnished materials to the job site under N.C. Gen. Stat. § 1-50(a)(5)(b)(9)).

We therefore apply the products liability statute of repose, section 1-50(a)(6), which provides:

> No action for recovery of damages . . . based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

N.C. Gen. Stat. § 1-50(a)(6).

[3] Plaintiffs claim the running of the time period did not begin until the date of the purchase of their home in April of 1993. This Court, however, recently held that the statute of repose was triggered upon the purchase by the subcontractor of the EIFS for installation on the plaintiffs' house. *See Cacha v. Montaco*, 147 N.C. App. 21, 554 S.E.2d 388 (2001). The holding in *Cacha* turned on the interpretation of

"initial purchase for use or consumption." After the "initial purchase for use or consumption," the plaintiffs had six years to file suit against the EIFS manufacturer before their claims would be barred; the statute, however, does not define the phrase, nor does it have a clear, independent meaning of its own. *See* N.C. Gen. Stat. § 1-50(a)(6). This Court, therefore, examined the definitions of "use" and "consume." *Cacha* at 23-4, 554 S.E.2d at 390. In addition, the Court relied on the holding in *Chicopee, Inc. v. Sims Metal Works*, that the date of initial purchase for use under section 1-50(a)(6) is the date of purchase for the "ultimate and intended use of the product." *Chicopee*, 98 N.C. App. 423, 428, 391 S.E.2d 211, 214, *disc. review denied* 327 N.C. 426, 395 S.E.2d 674 (1990) (purchase for assembly is not purchase for use). *See also Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985) (purchase for resale is not purchase for use). The ultimate and intended use of the EIFS is to provide a weather-resistant barrier to protect the house interior from exposure to the weather. *See Cacha* at 30, 554 S.E.2d at 393-4. The EIFS begins to perform this function at the moment of application. *Id.* The EIFS, therefore, was first "purchased for use or consumption," by the subcontractor who applied the EIFS to the plaintiffs' residence. *Id.* Once the applicator applied the EIFS,

> it was "consumed," that is, "utilized in the construction process," which use resulted in its transformation . . . and the destruction of its original form . . . .

Id.

Accordingly, the EIFS was first purchased for use or consumption by Southern for installation on plaintiffs' residence. Southern installed the EIFS on plaintiffs' home in late fall of 1992. The statute of repose, therefore, began to run before 5 March 1993, and plaintiffs' suit, filed more than six years after Southern's purchase of the EIFS, is barred. *See* N.C. Gen. Stat. § 1-50(a)(6).

[4] By their third assignment of error, plaintiffs argue that even if the products liability statute of repose is the appropriate one to apply, and even if it began running prior to 5 March 1999, the statute of repose regarding their claims against defendant was equitably tolled by the filing of *Ruff v. Parex* in 1996. This same contention was rejected in *Cacha*, which held that a statute of repose creates substantive rights that may not be tolled by equitable considerations. *See Cacha* at 27-9, 554 S.E.2d at 392-3.

Based on the foregoing, we need not address plaintiffs' final assignment of error regarding the statute of limitations, N.C. Gen. Stat. § 1-50(a)(5)(f).

Accordingly, we affirm the order of the trial court granting the summary judgment motion of defendant.

AFFIRMED.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

JOHN S. RICE v. LORETTA F. RICE

No. COA00-73

(Filed 4 December 2001)

Paternity— determined by separation agreement and divorce judgment

A divorce order and judgment determined all issues of paternity where plaintiff admitted in his verified divorce complaint and in a separation agreement that there were three children born of the marriage; plaintiff requested and received visitation rights and obligated himself to pay child support; defendant admitted in her answer and counterclaim that the marriage produced three children; the final consent order and judgment for divorce concluded that three children had been born of the marriage; plaintiff subsequently filed a verified motion to enforce his visitation rights; and plaintiff attempted to raise the issue of paternity two and one half years after the consent order and divorce judgment.

Appeal by plaintiff from judgment entered 20 October 2000 by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals 18 October 2001.

Gum & Hillier, PA, by Patrick S. McCroskey and Howard L. Gum, for plaintiff-appellant.

Robert E. Riddle, P.A., by Robert E. Riddle, for defendant-appellee.

TYSON, Judge.

John S. Rice ("plaintiff") appeals from an order granting Loretta F. Rice's ("defendant") motion for summary judgment, and denying plaintiff's motions for paternity testing, joinder of an additional party, and denial of relief pursuant to Rule 60. We affirm the trial court's order.

I. Facts

Plaintiff and defendant were married on 5 June 1981. Three children were born during their marriage. The parties separated on 13 April 1995 and executed a separation agreement on 2 June 1995. On 18 September 1996, plaintiff filed suit seeking absolute divorce and requested incorporation of a separation agreement into the divorce judgment. Judgment of absolute divorce was entered on 13 February 1997, which incorporated the separation agreement with certain modifications by consent into the judgment.

On 23 July 1998, plaintiff filed a motion seeking to enforce his visitation rights under the consent judgment and charged defendant with contempt for refusing him visitation with the children. On 19 July 1999, plaintiff filed a motion for paternity testing.

II. Issues

Plaintiff assigns as error the trial court's: (1) granting defendant's motion for summary judgment, (2) denying plaintiff's motion seeking DNA paternity testing, (3) refusing plaintiff's request for joinder of a third-party, (4) deciding the best interests of the children prior to adjudicating issues of paternity, and (5) granting defendant's ex-parte motion denying plaintiff's discovery requests.

III. Summary Judgment

Plaintiff argues that the paternity of the minor children has never been judicially determined, and that the judgment of absolute divorce between plaintiff and defendant was not a final determination of the paternity of the children, which raises a disputed issue of material fact. We disagree.

"North Carolina courts have long recognized that children born during a marriage, as here, are presumed to be the product of the marriage." *Jones v. Patience*, 121 N.C. App. 434, 439, 466 S.E.2d 720, 723 (citations omitted). "The presumption of paternity is rebuttable because a man will not be required to support a child not his own;

conversely, '[t]he father of an illegitimate child has a legal duty to support his child.' " *Ambrose v. Ambrose*, 140 N.C. App. 545, 547, 536 S.E.2d 855, 857 (2000) (quoting *Wright v. Gann*, 27 N.C. App. 45, 47, 217 S.E.2d 761, 763, *cert. denied*, 288 N.C. 513, 219 S.E.2d 348 (1975) (citation omitted)).

Once the issue of paternity is judicially determined however, the parentage of children born of a marriage is no longer an open question. *Dorton v. Dorton*, 69 N.C. App. 764, 765, 318 S.E.2d 344, 346 (1984); *Withrow v. Webb*, 53 N.C. App. 67, 70, 280 S.E.2d 22, 24 (1981) (where former husband could have raised issue of paternity during divorce proceedings which included alimony, custody, and support issues, but instead admitted that a child was born of the marriage, was barred by *res judicata* from attempting to raise issues of paternity five years later); *Williams v. Holland*, 39 N.C. App. 141, 147, 249 S.E.2d 821, 825 (1978) (Defendant barred from raising paternity issues by the principle of *res judicata*. "That a judgment rendered by a court having jurisdiction to do so finding paternity to exist bars the relitigation of that issue by the parties to the original judgment is a well established rule of law in other jurisdictions. . . .")

In *Ambrose*, *supra*, this Court noted that a father is entitled to have blood tests administered pursuant to N.C. Gen. Stat. § 8-50.1(b1) (1994). However, when the father has acknowledged paternity in a sworn statement, he is estopped from relitigating the issue. Here, plaintiff admitted in his verified complaint for absolute divorce and the separation agreement that there were three children born of the marriage. In the separation agreement, defendant received sole care, custody and control of the children. Plaintiff requested and received visitation rights and obligated himself to pay $1,600.00 per month child support.

In defendant's answer and counterclaim, she admitted that the marriage produced three children. She also noted that the parties had agreed to two amendments to their separation agreement: (1) plaintiff's child support would be increased to $2,000.00 per month, and (2) that the separation agreement would be incorporated into the judgment for divorce "*and be made a part of the Order of this Court.*" (Emphasis supplied).

The final consent judgment and order for divorce entered 13 February 1997 concluded that three children were born of the marriage, plaintiff would pay $2,000.00 per month until the youngest child attained the age of twenty-one, and that the separation agreement be

incorporated into the judgment for divorce and be made part of the order. Plaintiff did not appeal from that judgment.

In July of 1998, plaintiff filed a verified motion to enforce his visitation rights. He stated that "[b]y the terms of the Judgment, a Separation Agreement entered into by and between the plaintiff and defendant on June 2, 1995, was . . . incorporated by reference into the Judgment." Plaintiff then requested that "the court enter an order directing the defendant to appear and show cause as to why she should not be held in contempt of this court, both civil and criminal, for her willful disobedience of the Judgment of this court."

Two and one half years after the consent order and judgment for absolute divorce, plaintiff has attempted to raise the issue of paternity. His three children are now eighteen, twelve and eleven years old. Despite plaintiff's arguments, it is illogical for the consent order and judgment to operate as *res judicata* for child support and visitation rights, and not for issues of paternity.

"In this case the father has held himself out as the father of the [children] . . . insisted on visitation rights and is certainly regarded by the [children] and the outside world as the father." *Webb*, 53 N.C. App. at 71-72, 280 S.E.2d at 26. By his own verified complaint, defendant admitted that the three children were born of the marriage. In addition, "that the plaintiff is the father of these . . . children was judicially determined by the order entered on [13 February 1997] and this part of the order having been neither attacked nor modified, it is *res judicata* as to the contention raised by plaintiff's motion." *Dorton*, 69 N.C. App. at 766, 318 S.E.2d at 346, (citing *Holland*, 39 N.C. App. 141, 249 S.E.2d 821). "Even if the principle of res judicata were not applicable . . . to grant the motion for a blood-grouping test on this record, would open the door to unwarranted challenges of paternity, violate public policy, and clearly result in irreparable harm to the child whose parents appear to be bent on harassing one another." *Webb*, 53 N.C. App. at 72, 280 S.E.2d at 26.

We hold that the divorce order and judgment, which incorporated a separation agreement, in which plaintiff and defendant admitted that three children were born of their marriage, judicially established the rights and obligations of the parties, and determined all issues of paternity. In view of our holding, it is unnecessary to consider plaintiff's other assignments of error. Additionally, although plaintiff appealed from the trial court's order denying his Rule 60 motion, he has failed to assign any error or argue any of those issues. Plaintiff's

appeal from those issues is deemed abandoned. N.C.R. App. P. 28(b)(5) (1990). The trial court's order and judgment awarding summary judgment for defendant, denial of plaintiff's motion for paternity testing, and denial of plaintiff's motion to join an additional party are affirmed.

Affirmed.

Judges MARTIN and WALKER concur.

BOBBY L. RAYBON, AND RICHARD H. RAYBON, PLAINTIFFS AND COUNTERCLAIM DEFENDANTS v. TEDDY DEAN KIDD AND WIFE CONNIE BARHAM KIDD, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR AMANDA GAIL KOENCK, DEFENDANTS AND COUNTERCLAIMANTS v. GERALD WAYNE ADAMS, JERRY WAYNE MITCHELL, SR., AND VARIETY PIC-UP, INC., ADDITIONAL DEFENDANTS ON THE COUNTERCLAIMS

No. COA00-1193

(Filed 4 December 2001)

1. **Appeal and Error— appealability—partial summary judgment—certified as final—no just reason for delay**

Partial summary judgment granting plaintiffs specific performance of an option to purchase was interlocutory but appealable where the court did not hear defendants' counterclaims, but certified that the judgment was final and that there was no just cause for delaying the appeal. N.C.G.S. § 1A-1, Rule 54(b).

2. **Vendor and Purchaser— option to purchase—violation of underlying lease**

The trial court erred by granting partial summary judgment for plaintiffs in an action for specific performance of an option to purchase real estate arising from a lease where there were material issues of fact as to whether plaintiffs breached the lease by creating a nuisance on the property (environmental contamination) and by failing to maintain proper insurance, and whether defendant had terminated the lease properly prior to its expiration, thus preventing the exercise of the option.

Appeal by Connie Barham Kidd and Amanda Gail Koenck from partial summary judgment entered 19 June 2000 by Judge Henry V.

Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 28 September 2001.

Smith Debnam Narron Wyche Story & Myers, L.L.P., by Bettie Kelley Sousa, for plaintiff appellees.

Barefoot & Patrick, L.L.P., by Thomas N. Barefoot, for defendant appellants Connie Barham Kidd and Amanda Gail Koenck.

TIMMONS-GOODSON, Judge.

Connie Barham Kidd ("Kidd") and her daughter, Amanda Gail Koenck (collectively "defendants"), appeal from partial summary judgment granting specific performance of a purchase option clause contained in a lease agreement of certain real property owned by defendants and leased by Bobby and Richard Raybon ("plaintiffs"). The facts pertinent to this appeal are as follows:

On 11 April 1974, plaintiffs entered into a lease agreement with Marvin E. Barham and his wife, Idell Barham, for certain real property on which a small house and grocery store were located. The lease included a purchase option clause, which gave plaintiffs "the option to buy property at the end of [the] lease including lot and house on south side of store for $35,000.00." The lease required plaintiffs, among other conditions, to maintain public liability insurance on the property and to "use said premises in a lawful manner and . . . not permit any nuisance to exist or continue." The lease further provided that if plaintiffs "should violate the terms of this Lease then the Lessors at their option has [sic] the right and privilege to enter and take possession of said leased premises in such event." The parties later modified the lease to extend its terms and options from 1 July 1989 until 1 June 1999.

Under the will of Idell Barham, Amanda Koenck, a minor, inherited a remainder interest in the property, while her mother, Connie Kidd, inherited a life estate interest in the property. Plaintiffs continued to lease the property from Kidd, and on 21 October 1997, notified her of their intent to exercise their option to purchase the property. At this time, plaintiffs and defendants were involved in litigation concerning plaintiffs' alleged environmental contamination of the property. By letter dated 5 November 1997, Kidd informed plaintiffs that they had violated the terms of the lease, and that unless such violations were cured within thirty days, Kidd intended to exercise her right to terminate the lease agreement. In September or October of

1998, defendants ceased accepting rent payments from plaintiffs. On 21 June 1999, plaintiffs filed a complaint in Wake County Superior Court alleging that defendants had refused to sell them the property and requested an order for specific performance. Defendants thereafter filed a counterclaim alleging, *inter alia*, that plaintiffs were in breach of the lease for creating a nuisance on the property and for failing to maintain adequate public liability insurance. The counterclaim further averred that, pursuant to the termination of the lease, defendants had asked plaintiffs to vacate the property, which request plaintiffs had ignored. The counterclaim also named additional defendants who are not pertinent to the present appeal.

Plaintiffs' motion for summary judgment came before the trial court on 31 May 2000. Without hearing defendants' counterclaims, the trial court determined that plaintiffs were entitled to exercise the purchase option on the lease and therefore ordered defendants to render specific performance by selling the property to plaintiffs. Defendants now appeal the trial court's order.

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[1] We note initially that the trial court's order is interlocutory, as it adjudicates fewer than all of the claims, rights, and liabilities between fewer than all of the parties. *See Cunningham v. Brown*, 51 N.C. App. 264, 266, 276 S.E.2d 718, 721 (1981). This Court does not review interlocutory appeals as a matter of course. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (1999); *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Under section 1A-1, Rule 54(b), of the General Statutes of North Carolina, however, where there are multiple claims or multiple parties to an action, the trial court "may enter a final judgment as to one or more but fewer than all of the claims or parties . . . if there is no just reason for delay and it is so determined in the judgment." N.C. Gen. Stat. § 1A-1, Rule 54(b). The trial court in the instant case entered a final judgment on fewer than all of the claims and certified that the judgment was final in nature and that no just cause existed to delay appeal. We may therefore properly review the instant case on its merits. *See DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998).

[2] Defendants argue that the trial court erred in granting partial summary judgment to plaintiffs, in that genuine issues of material fact exist concerning whether or not plaintiffs breached their lease with defendants by creating a nuisance on the property and by failing to maintain proper insurance. Defendants assert that plaintiffs' acts violated the lease, and that plaintiffs were therefore not entitled to

enforce the purchase option of the lease. Defendants also contend that they properly terminated the lease prior to its expiration on 1 June 1999, thus preventing plaintiffs from exercising the purchase option. We agree with defendants that genuine issues of material fact preclude entry of summary judgment, and we therefore reverse the order of the trial court.

A motion for summary judgment is only appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999); *Johnson v. Insurance Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). Summary judgment is a drastic remedy and should be used cautiously. *See Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E.2d 375, 379 (1976).

The lease agreement before the trial court in the instant case requires plaintiffs to "maintain suitable public liability insurance" and to prevent any nuisance from arising on the property. The lease further provides that, unless plaintiffs correct violations of the lease within a "reasonable length of time[,]" defendants have the right to enter and take possession of the property. In their counterclaims, defendants asserted that plaintiffs breached material provisions of the lease agreement by creating a nuisance and by failing to maintain public liability insurance. "[I]t is fundamental in our jurisprudence that one who breaches a material provision of a contract may not ask a court of equity to enforce the rest of the agreement." *Bowman v. Drum*, 97 N.C. App. 505, 506, 389 S.E.2d 125, 125 (1990). A provision in a lease agreement requiring lessees to obtain liability insurance on the leased property constitutes a material provision of the lease agreement. *See id.* at 505-06, 389 S.E.2d at 125.

Furthermore, the lease agreement allows plaintiffs to purchase the property "at the end of [the] lease[.]" The lease expired on 1 June 1999. Defendants allege that they terminated the lease agreement on 10 September 1998, approximately one year after informing plaintiffs that they were in breach of the lease. Defendants also accepted no further rental payments by plaintiffs after September or October of 1998. Whether or not defendants properly terminated the contract prior to plaintiffs' ability to exercise their option to purchase the property is an issue of material fact precluding summary judgment. *See Dettor v. BHI Property Co.*, 324 N.C. 518, 519, 379 S.E.2d 851, 851 (1989) (holding that summary judgment regarding a contract for sale

of real property was inappropriate where genuine issues of material fact existed concerning the agreement). Because we hold that genuine issues of material fact exist concerning plaintiffs' ability to exercise the purchase option in the lease agreement, the trial court erred in granting partial summary judgment to plaintiffs.

Reversed and remanded.

Judges McGEE and BIGGS concur.

IN THE MATTER OF WILBUR JAMES ROBERT FRASHER, CARRIE ANN FRASHER

No. COA01-472

(Filed 4 December 2001)

1. Termination of Parental Rights— lack of stability—clear, cogent, and convincing evidence

Although respondent mother contends the trial court erred by terminating respondent mother's parental rights based on evidence that she still suffered from a mental condition which rendered her incapable of providing for the care and supervision of her children on the date of the termination hearing, the trial court's primary basis for its decision to terminate her parental status was based on her lack of stability, and there was clear, cogent, and convincing evidence that the mother's life was no more stable now than it was when the minor children were removed from her custody and that she had willfully left the children in foster care for more than twelve months without making reasonable progress toward correcting those conditions which led to their removal since: (1) the mother was still not employed and had not obtained stable housing; and (2) the mother did not appear at the termination hearing despite the best efforts of her attorney to contact her by letter at her last known address, and her whereabouts were unknown.

2. Termination of Parental Rights— diligent efforts requirement

The trial court did not abuse its discretion by terminating respondent mother's parental rights even though the mother asserts the Department of Social Services (DSS) failed to provide

services to the mother to assist her in correcting the conditions that led to her children's removal, because N.C.G.S. 7B-1111(a)(2) deleted the diligent efforts requirement, and therefore, a determination that DSS made diligent efforts to provide services to a parent is no longer a condition precedent to terminating parental rights.

Appeal by respondent from order entered 30 November 2000, *nunc pro tunc* 2 November 2000, by Judge Jonathan L. Jones in Burke County District Court. Heard in the Court of Appeals 5 November 2001.

Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services.

No brief filed by guardian ad litem Mary McKay.

Russell R. Becker for respondent-appellant.

SMITH, Judge.

The Burke County Department of Social Services ("DSS") first provided services to the Frasher children in 1989, and have provided treatment for reports of improper care, improper discipline, and physical and sexual abuse. On 17 March 1999, a petition was filed by DSS alleging that Wilbur James Robert Frasher and Carrie Ann Frasher were neglected and abused juveniles. DSS stated in the petition that the children's maternal grandfather, James Metcalf, was sleeping in the same bed as Wilbur and had touched Wilbur's genitals several times. The petition further alleged that Metcalf had inappropriately disciplined the juveniles, having beaten them with fan blades and switches. Additionally, Metcalf had allowed Wilbur to drink beer and smoke cigarettes, their home was filthy and roach infested, and Carrie was sleeping on the floor. Finally, DSS noted that Wilbur had been diagnosed with attention deficit hyperactivity disorder and medication had been prescribed, but Metcalf had failed to monitor the administration of Wilbur's medication. The children had been placed in Metcalf's custody by respondent-mother after she was imprisoned for violating her probation for larceny and stabbing a man. At the time the petition was filed, respondent-mother was living with her boyfriend.

On 5 May 1999, at a pre-hearing conference, respondent-mother and the children's father stipulated that they "did not resist a finding

that the allegations contained in the petition are true" and that the children were therefore abused and neglected juveniles. Accordingly, on 1 June 1999, Wilbur was adjudicated an abused and neglected juvenile and Carrie was adjudicated a neglected juvenile. The children were placed in the custody of DSS, and respondent-mother was ordered to: (1) undergo a complete psychological and substance abuse evaluation and cooperate with any recommendations; (2) notify DSS of any change in address; (3) maintain a stable and appropriate residence; and, (4) obtain employment.

On 15 June 2000, DSS filed a petition to terminate the parental rights of respondent-mother and the children's father. A hearing was held on 2 November 2000, but respondent-mother did not attend the hearing. On 30 November 2000, *nunc pro tunc* 2 November 2000, the trial court terminated respondent-mother's parental rights. Respondent-mother appeals.

[1] Respondent-mother first argues that there was insufficient evidence that she still suffered from a mental condition which rendered her incapable of providing for the care and supervision of her children on the date of the termination hearing. Respondent-mother contends that the trial court should have ordered a psychological evaluation because there had been changed circumstances between the time of the initial evaluation and the hearing date.

After careful review of the record, briefs and contentions of the parties, we affirm. G.S. 7B-1111 sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support a termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "[T]he party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997) (citing G.S. 7A-289.30(e)). Here, the trial court concluded that the children were abused and neglected juveniles, and that respondent-mother had willfully left the children in foster care for twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances had been made within those twelve months in correcting those conditions which led to the children's removal. G.S. 7b-1111(1) and (2). The trial court based its conclusion on its finding that:

> Ms. Harbison [the respondent mother] initially and repeatedly has been ordered to obtain and maintain employment, maintain a

> stable and appropriate residence and notify the Department of any address changes. She has failed to do so, and her whereabouts today are unknown. She has resided in multiple residences, some without electricity. Her psychological evaluation revealed a diagnosis of narcissistic personality disorder with histrionic and depressive personality features. She was deemed not to be a good candidate for psychotherapy or changing behavior, and she had not participated in any treatment. Her life is no more stable now tha[n] it was when the minor children were removed from her custody. She has not corrected those conditions which led to the removal of the minor children from her custody. She has difficulty meeting her own needs and supporting herself and she is not capable of supporting and appropriately meeting the needs of the minor children.

Although the trial court considered respondent-mother's mental status, the trial court did not conclude that her intelligence or mental status rendered her incapable of caring for her children. See G.S. 7B-1111(a)(6). Instead, the primary basis for the trial court's decision to terminate respondent-mother's parental rights was her lack of stability. Dalena Jackson, a DSS social worker, testified that respondent-mother was still not employed and had not obtained stable housing. Additionally, respondent-mother did not appear at the termination hearing "despite the best efforts of her attorney to contact her by letter at her last known address." The trial court stated that her whereabouts were "unknown." Thus, the trial court found that respondent-mother's life was "no more stable now than it was when the minor children were removed from her custody." Accordingly, we conclude there was clear, cogent and convincing evidence to support the trial court's finding that respondent had willfully left Wilbur and Carrie in foster care for twelve months without making reasonable progress towards correcting those conditions which led to their removal.

[2] Respondent-mother next argues that the trial court abused its discretion by terminating her parental rights. Respondent-mother asserts that DSS was obligated to provide services to her to assist her in correcting the conditions that led to her children's removal, but DSS failed to do so. *See In re Harris*, 87 N.C. App. 179, 185-86, 360 S.E.2d 485, 488-89 (1987). We do not agree.

G.S. 7A-289.32(3), the applicable termination statute when *Harris* was decided, included a requirement that DSS undertake "diligent efforts" to "encourage the parent to strengthen the parental relation-

ship to the child or to make and follow through with constructive planning for the future of the child." However, G.S. 7A-289.32(3) was repealed and replaced by 7B-1111(a)(2) effective 1 July 1999. 7B-1111(a)(2) deleted the "diligent efforts" requirement, indicating an intent by the legislature to eliminate the requirement that DSS provide services to a parent before a termination of parental rights can occur. Thus, we hold that a determination that DSS made diligent efforts to provide services to a parent is no longer a condition precedent to terminating parental rights.

Accordingly, the order terminating respondent's parental rights is affirmed.

Affirmed.

Judges McGEE and HUNTER concur.

RUTH MARIE LEE, PLAINTIFF v. B. HUNT BAXTER, JR., AS ADMINISTRATOR, C.T.A. OF THE ESTATE OF CHARLES W. LEE, DEFENDANT v. FORD MOTOR COMPANY, A DELAWARE CORPORATION, THIRD-PARTY DEFENDANT

No. COA00-1309

(Filed 4 December 2001)

1. Appeal and Error— appealability—denial of summary judgment—trial court certification—not a final judgment—Rule 54 not applicable

A purported appeal from the denial of a third-party defendant's summary judgment motion did not fall within the scope of N.C.G.S. § 1A-1, Rule 54(b) even though it was certified by the trial court where the judgment was not final as to either a claim or a party. Rule 54(b) provides that a judgment is immediately appealable when the trial court certifies that there is no just reason for delay in an action with multiple parties or multiple claims.

2. Appeal and Error— appealability—denial of summary judgment—statute of repose defense—substantial right not affected

A third-party's appeal from the trial court's denial of its motion for summary judgment based upon the statute of repose

was interlocutory and did not affect a substantial right, and the appeal was dismissed. Defendant can raise the statute of repose on appeal from a final judgment and, unlike the defense of immunity, the only loss suffered would be the time and expense of trial. Moreover, it has been held that the statute of limitations does not affect a substantial right and is therefore not appealable.

Appeal by third-party defendant from an order entered 14 June 2000 by Judge James E. Ragan, III in Craven County Superior Court. Heard in the Court of Appeals 17 September 2001.

No brief filed for plaintiff-appellee.

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III and Robert J. McAfee, for defendant-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Kirk G. Warner and Jane Langdell, for third-party defendant-appellant.

HUNTER, Judge.

Third-party defendant, Ford Motor Company ("Ford"), appeals from an order denying its motion for summary judgment. We dismiss Ford's appeal as interlocutory.

Ruth Marie Lee ("plaintiff") and her husband, Charles W. Lee, bought a new Ford Ranger on 12 April 1991. Five and a half years later, on 28 October 1996, plaintiff was injured when her husband drove the Ford Ranger off the road, hitting a tree while plaintiff was a passenger in the truck. In December of 1996, plaintiff's husband died of a heart attack, unrelated to the October accident. On 26 October 1999, plaintiff commenced this suit against her husband's estate seeking damages for the injuries sustained in the accident in October of 1996. On 8 March 2000, the estate filed a third-party complaint against Ford alleging entitlement to contribution and/or indemnification based on negligence and breach of warranty. Ford subsequently filed a motion for summary judgment relying on the statute of repose. Ford claimed that because the original action and the third-party complaint were filed more than six years after the initial purchase of the truck, the suit was barred by the statute of repose. *See* N.C. Gen. Stat. § 1-50(6) (1999). The trial court denied the motion for summary judgment, and certified the action for appeal under Rule 54(b). Ford appeals.

[1] An appeal is interlocutory "if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). North Carolina law allows an immediate appeal from an interlocutory order only in limited circumstances. *See* N.C. Gen. Stat. §§ 1-277, 7A-27(d) (1999); N.C.R. Civ. P. 54(b). We first note that Rule 54(b) does not provide a basis for review here. "Rule 54(b) provides that in an action with multiple parties or multiple claims, if the trial court enters a final judgment as to a party or a claim and certifies there is no just reason for delay, the judgment is immediately appealable." *DKH Corp. v. Rankin-Patterson Oil Company*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998). Here, although the judgment was certified for appeal by the trial court, it was not final as to either a claim or a party. Thus, this purported appeal does not fall within the scope of Rule 54(b).

[2] Ford argues, however, that the denial of its motion for summary judgment based upon the statute of repose affects a substantial right and is, therefore, immediately appealable. It is settled law in North Carolina that the denial of a motion for summary judgment is interlocutory, and not immediately appealable. *Anderson v. Town of Andrews*, 133 N.C. App. 185, 186, 515 S.E.2d 55, 56 (1999). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985). However, a party may appeal an interlocutory order where the order affects a substantial right. N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1) (1999). A right is considered substantial if it "will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983).

Ford argues that the statute of repose gives a defendant a "vested right" not to be sued and is therefore similar to the defense of immunity, which is considered a substantial right. *Anderson v. Atlantic Casualty Ins. Co.*, 134 N.C. App. 724, 727, 518 S.E.2d 786, 789 (1999). Since North Carolina law allows for an interlocutory appeal where the denial of a motion for summary judgment is based on immunity, *see id.*, Ford argues that an interlocutory appeal should be allowed where the denial of a motion for summary judgment is based upon the statute of repose. We disagree.

" ' "[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." ' " *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991) (citations omitted). We do not believe the statute of repose creates a similar entitlement. Unlike a claim for immunity, Ford's right to raise the statute of repose defense will not be lost if we do not review the case prior to a final judgment since Ford may raise the issue on appeal from a final judgment. The only loss Ford will suffer will be the time and expense of trial. We note, however, that avoiding the time and expense of trial is not a substantial right justifying immediate appeal. *Anderson*, 134 N.C. App. at 727, 518 S.E.2d at 789.

In addition, we note that our Supreme Court has previously determined that a motion to dismiss "based on a statute of limitation[s] does not [a]ffect a substantial right and is therefore not appealable." *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (citing *Johnson v. Insurance Co.*, 215 N.C. 120, 1 S.E.2d 381 (1939)). For this purpose, we see no reason to treat a motion for summary judgment based on the statute of repose differently than a motion to dismiss based on the statute of limitations.

For these reasons, we hold that the third-party defendant's appeal from the trial court's denial of its motion for summary judgment based on the statute of repose defense is interlocutory and does not affect a substantial right, and therefore must be dismissed.

Appeal dismissed.

Chief Judge EAGLES and Judge HUDSON concur.

RAINBOW PROPERTIES, A LIMITED PARTNERSHIP, PLAINTIFF-APPELLEE v. WALTER M. WILKINSON, AND WIFE, ADA FOWLER WILKINSON, DEFENDANTS-APPELLANTS

No. COA01-48

(Filed 4 December 2001)

Vendor and Purchaser— option to purchase—specific performance

The trial court properly granted summary judgment for plaintiff in an action for specific performance of an option to purchase land where the option contained a clause stating that the price of

the option would be refunded if the sellers were not able to deliver a good and sufficient deed. Although this clause allowed plaintiff to decline to exercise the option and to recover its payments if defendants were unable to perform, it did not permit defendants to avoid their obligation to convey the land on the ground that they are dependent upon the land to provide food for their cattle which provide for their livelihood.

Appeal by defendants from judgment entered 14 August 2000 by Judge Michael E. Beale in Cabarrus County Superior Court. Heard in the Court of Appeals 18 October 2001.

Williams, Boger, Grady, Davis & Tuttle, P.A., by Samuel F. Davis, Jr., for plaintiff-appellee.

Hartsell, Hartsell & White, P.A., by Fletcher L. Hartsell, Jr. and Kimberly A. Lyda, for defendants-appellants.

WALKER, Judge.

On 10 July 1985, the plaintiff entered into an Option to Purchase Real Estate (Option Agreement) with the defendants. For an initial consideration of $5,000.00, the Option Agreement gave the plaintiff the option, for a period of 12 months, to purchase thirty acres of land owned by the defendants in Cabarrus County for $200,000.00. Thereafter, plaintiff and defendants annually entered into thirteen separate agreements to extend the time for the plaintiff to exercise its option by one year for a consideration of $2,000.00 each. The last such extension agreement occurred on 1 July 1998 and extended the time to exercise the option until 10 July 1999. Plaintiff paid the defendants a total of $31,000.00 for the option under the Option Agreement and the extension agreements.

The Option Agreement states in part:

8. At any time within the closing period, upon tender by the party of the second part [the plaintiff] of said purchase price in the sum above set out, parties of the first part [the defendants] will make, execute and deliver to said party of the second part a good and sufficient deed for said land in fee simple with general warranties and free from encumbrances.

9. If said land be sold by said parties of the first part to said parties of the second part under the terms of this option, the sums for which a receipt has been given as set forth above shall be a

> credit on the cash payment of the purchase price, but if said lands be not sold within the periods above limited and if the party of the second part does not exercise the option to acquire a right-of-way as hereinafter provided, then said sums shall be retained by parties of the first part as the purchase price of this option and thereafter said party of the second part shall have no further rights under this option. In the event that *the parties of the first part, for any reason, are not able to deliver to the party of the second part a good and sufficient deed as required in Paragraph 8 of this option, then the purchase price of this option shall be refundable to the party of the second part.* (emphasis added).

On 2 July 1999, defendants received written notice of plaintiff's election to exercise its option to purchase the land. The Option Agreement specified that, after the exercise of the option, the plaintiff had ninety days to complete closing on the land. Plaintiff prepared to close on 24 September 1999 even though the defendants had refused to allow the plaintiff to have the land surveyed pursuant to the Option Agreement. The record shows that the plaintiff was ready and able to purchase the land at closing. However, defendants did not attend the closing and they have since refused to convey the land to the plaintiff. Plaintiff filed this action to enforce the Option Agreement by compelling the defendants to allow the survey of the land and by ordering the defendants to convey the land pursuant to the Option Agreement. Plaintiff moved for summary judgment which was granted.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Langley v. Moore*, 64 N.C. App. 520, 522, 307 S.E.2d 817, 819 (1983). Defendants appeal contending the trial court erred in granting summary judgment for the plaintiff in that the language of the Option Agreement is ambiguous and as such there is an issue of fact. Defendants specifically contend that their dependence on the land to produce food for their cattle creates a factual issue as to whether they are excused from the Option Agreement by reason of the language in paragraph 9 "for any reason, are not able to deliver to the [plaintiff] a . . . deed."

" 'An agreement should be interpreted as a whole and the meaning gathered from the entire contract, and not from particular words, phrases, or clauses.' " *Starling v. Still*, 126 N.C. App. 278, 281, 485 S.E.2d 74, 76 (1997) (*quoting Divine v. Watauga Hospital*, 137 F.

Supp. 628, 631 (M.D.N.C. 1956)). Thus, the language in the Option Agreement must not be construed in isolation nor by leaving out words or phrases. It must be construed in light of the other language in the Option Agreement.

Defendants do not contend that they are unable to convey the land by warranty deed free from encumbrances. Instead, they would have us construe paragraph 9 as giving them a means of avoiding performance under the Option Agreement if they have "identified a legitimate reason for their inability to complete the transaction." Therefore, defendants assert they are dependent on this land to provide feed for their cattle which in turn provides for their livelihood. Our construction of the Option Agreement does not support the defendants' contention. The Option Agreement only allows for the plaintiff to decline to exercise its option and recover its option payments if the defendants are unable to perform according to paragraphs 8 and 9 of the Option Agreement. The Option Agreement does not permit the defendants to avoid their obligation to convey the land.

"A contract, whereby one party, for a valuable consideration, grants to another an option on terms, conditions, and for a time, specified, to call for the doing of a certain act, constitutes an irrevocable offer which, on acceptance in accordance with its terms, gives rise to a contract that may be specifically enforced." *Byrd v. Freeman*, 252 N.C. 724, 727, 114 S.E.2d 715, 718 (1960) (citations omitted). "An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value." *Texaco, Inc. v. Creel*, 310 N.C. 695, 706, 314 S.E.2d 506, 512 (1984) (*quoting Watts v. Keller*, 56 F. 1, 4 (8th Cir. 1893)). Thus, specific performance is a proper remedy for enforcement of an option to purchase real estate.

In summary, the Option Agreement gave the plaintiff the option to purchase land owned by the defendants. It did not provide a means of avoidance as the defendants have asserted. Therefore, no issues of fact exist and the trial court properly granted summary judgment for the plaintiff entitling it to specific performance of the Option Agreement.

Affirmed.

Judges MARTIN and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 DECEMBER 2001

BEESON v. DURHAM BULLS BASEBALL CLUB, INC. No. 00-1166	Durham (99CVS05577)	Affirmed
BENGE v. KIMBERLY-CLARK CORP. No. 00-1534	Rowan (99CVS1903)	Affirmed
DAMIANO v. PENN-AMERICA INS. CO. No. 00-1198	Onslow (99CVS3391)	Affirmed
DAVIS v. THE BOWLING CTR., INC. No. 01-38	Ind. Comm. (849274)	Affirmed
FREEMAN v. YOUNG No. 00-1524	Columbus (92CVD1093)	Reversed
GUILFORD CTY. ex rel. WARD v. WOODY No. 01-447	Guilford (96CVD7380)	Vacated
IN RE ARRINGTON No. 00-1488	Buncombe (99J351) (99J352)	Affirmed
IN RE ARRINGTON No. 01-126	Buncombe (99J316) (99J317) (99J318)	Affirmed
IN RE BYRD No. 01-311	Cumberland (99J790) (99J791)	Affirmed
IN RE DANIELS No. 00-1126	Forsyth (98J400)	Affirmed
IN RE GILLESPIE No. 01-528	McDowell (00J22)	Affirmed
JOHNSTON CTY. CHILD SUPPORT ENFORCEMENT ex rel. DOBBIN v. DOBBIN No. 00-1255	Johnston (87CVD1609)	Affirmed
KILLIAN v. WINEBARGER No. 00-1530	Catawba (99CVS127)	No error
McKOY v. CITY OF DUNN No. 00-1452	Ind. Comm. (815591)	Affirmed in part, reversed in part
MOORE v. BARNETTE No. 00-1082	Alamance (00CVS149)	Affirmed

SHACKLEFORD-MOTEN v. LENOIR CTY. DSS No. 00-1513	Lenoir (98CVS1111)	Dismissed
STATE v. BARBOUR No. 01-255	Mecklenburg (99CRS118675) (99CRS118676) (99CRS118677)	No error
STATE v. BENFIELD No. 00-1236	Iredell (99CRS2503) (99CRS2505) (99CRS2506)	No error
STATE v. BOWDEN No. 01-507	Wake (99CRS20598) (99CRS20599)	No error
STATE v. BUNN No. 00-1481	Wayne (99CRS10406) (99CRS11354)	No error
STATE v. CARD No. 00-1459	Wake (98CRS21016) (98CRS21017) (98CRS24897)	No error
STATE v. CHAMBERS No. 00-1338	Iredell (93CRS5280)	No error
STATE v. ELMORE No. 00-1141	Mecklenburg (98CRS7868)	No error
STATE v. EVANS No. 00-1314	Rockingham (97CRS771)	No error as to the trial. Vacated and remanded as to the sentence
STATE v. FLACK No. 01-283	Rutherford (99CRS9527)	Appeal dismissed
STATE v. GREEN No. 00-1403	Richmond (99CRS5079)	No error
STATE v. LAFORTE No. 01-26	Gaston (99CRS37393) (99CRS37394)	No error
STATE v. LEWIS No. 00-1317	Guilford (97CRS81258) (97CRS81259) (97CRS81260)	In 97CRS81259, Counts I and II, no error. In 97CRS81258, Count III, reversed. In 97CRS81259, no error. In 97CRS1260, no error

STATE v. McCRICKARD No. 01-324	Stokes (99CRS684) (99CRS685) (99CRS686) (99CRS687)	No error
STATE v. MELVIN No. 01-106	Bladen (99CRS4523)	No error
STATE v. MILLER No. 01-281	Mecklenburg (99CRS24724)	No error
STATE v. SADOFF No. 00-1445	Mecklenburg (97CRS37260) (97CRS37261) (97CRS37262) (97CRS37263)	No error
STATE v. SEAMON No. 01-291	Davidson (98CRS20659)	Affirmed
STATE v. SHAW No. 01-123	Chatham (98CRS6781) (98CRS6865) (98CRS6866) (98CRS6867) (98CRS6868)	No error
STATE v. SMITH No. 01-113	Brunswick (98CRS8388)	No error
STATE v. WASHINGTON No. 01-369	Lenoir (00CRS3852) (00CRS3853)	No error
VECELLIO & GROGAN, INC. v. N.C. DEP'T OF TRANSP. No. 00-1122	Wake (98CVS11610)	Affirmed

STATE OF NORTH CAROLINA v. JOSEPH OSMAR JONES

No. COA00-1182

(Filed 18 December 2001)

1. Confessions and Incriminating Statements— juvenile— right to be questioned with a guardian present

The trial court did not err in a first-degree murder, first-degree sexual offense, and first-degree kidnapping case by denying a thirteen-year-old defendant's motion to suppress a statement he made to police during questioning even though defendant contends that his aunt was not his guardian under the law and therefore his juvenile right to be questioned with a guardian present under N.C.G.S. § 7A-595 was allegedly violated, because: (1) the aunt acted as a guardian since she was responsible for the defendant and he was dependent upon his aunt for room, board, education, and clothing; and (2) although the aunt may have had a conflict of interest since her brother was a coparticipant, an officer testified that the aunt did not intimidate defendant, twice encouraged defendant to tell the truth, and acted like a natural concerned parent.

2. Confessions and Incriminating Statements— juvenile—voluntariness—waiver

The trial court did not err in a first-degree murder, first-degree sexual offense, and first-degree kidnapping case by denying a thirteen-year-old defendant's motion to suppress a statement he made to police during questioning even though defendant contends he was not afforded all statutory procedural protections during his interrogation by the police, because the evidence reveals that defendant knowingly and intelligently waived his rights based on the facts that: (1) defendant made good grades in school and had the level of intelligence necessary to effect a knowing and intelligent waiver of his rights; and (2) the warnings defendant received complied with the requirements of Miranda.

3. Evidence— expert opinion testimony—belief that victim would not have consensual sex with defendant before the murder

The trial court did not err in a first-degree murder, first-degree sexual offense, and first-degree kidnapping case by admit-

ting the expert opinion testimony of a doctor stating that she did not believe the ten-year-old victim would have had consensual sex with the thirteen-year-old defendant the day before her murder, because: (1) defendant has not clearly identified the evidence which he finds improper and has not assigned plain error to this assignment of error on appeal; (2) defendant's two trial objections failed to attack the foundation or substance of the doctor's testimony; and (3) the doctor properly testified under N.C.G.S. § 8C-1, Rule 705 since she examined the victim's medical records, autopsy photographs, autopsy report, and reviewed a family history taken from the victim's grandmother.

4. **Homicide; Kidnapping; Sexual Offenses— first-degree—sufficiency of evidence**

The trial court did not err in a first-degree murder, first-degree sexual offense, and first-degree kidnapping case by denying defendant's motion to dismiss the charges, because the State presented sufficient evidence to be submitted to the jury on each of the charges.

5. **Juveniles— transfer—juvenile court to superior court—probable cause**

The trial court did not err in a first-degree murder, first-degree sexual offense, and first-degree kidnapping case by transferring the case from juvenile court to superior court even though defendant contends his transfer was allegedly based on improperly admitted evidence including his statement to police, because: (1) defendant's motion to suppress his statement was properly denied; (2) the trial court properly concluded under N.C.G.S. § 7A-608 that probable cause existed to show that defendant committed a Class A felony (first-degree murder), and the trial court automatically acquired jurisdiction over the first-degree kidnapping and first-degree sexual offense charges since they arose out of the same act or transaction as the murder; and (3) there can be no appellate review of a mandatory transfer done under N.C.G.S. § 7A-608.

Judge BIGGS concurring in result with separate opinion.

Appeal by defendant from judgment entered 23 February 2000 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 13 September 2001.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Miles and Montgomery, by Mark D. Montgomery, for defendant appellant.

McCULLOUGH, Judge.

Defendant Joseph Osmar Jones was tried before a jury at the 14 February 2000 Criminal Session of Cumberland County Superior Court after being charged with one count of first degree murder, two counts of first degree sexual offense, and one count of first degree kidnapping. Evidence for the State showed that defendant Jones lived with his sixteen-year-old uncle, Harold Jones, and his aunt, Al-Neisa Jones, in a house in Burlington, North Carolina. Harold and Al-Neisa Jones are brother and sister. Harold Jones' girlfriend, Dorthia Bynum, aged seventeen, also stayed at the house from time to time. Defendant, Harold Jones and Dorthia Bynum knew ten-year-old Tiffany Long, who lived nearby with her grandmother. At all times relevant to this appeal, defendant was thirteen years old.

On 16 October 1998, Tiffany telephoned her grandmother around 3:30 p.m. and got permission to visit a neighborhood friend. When Mrs. Long returned from work around 6:00 p.m., Tiffany was not at home. Mrs. Long contacted several people in the neighborhood in an effort to locate her granddaughter. Many of the children later testified they saw Tiffany with defendant during the afternoon, and that the two were walking toward 614 Lakeside Avenue, where defendant, Harold Jones, and Dorthia Bynum used to live. Mrs. Long's efforts to locate Tiffany failed, so she called the police around 8:00 p.m.

After a police search of the area, Tiffany Long's body was discovered under a heavy cloth in the backyard of 614 Lakeside Avenue. A TV cable was looped around her neck, and her shirt was stained with fecal matter. S.B.I. Crime Scene Specialist William Lemons found a pool of blood in the right front bedroom and drag marks in the house and on a path outside the house. He found a backpack purse by the back porch, later identified as Tiffany's, which contained, among other things, church "bus bucks," candy, an earring, and a note which read "Dorthia loves Harold." Agent Lemons found a blue and white coat and a pair of panties outside the fence of the backyard, as well as a bloody bed rail. Agent Lemons also noted the presence of footprints and bicycle tire tracks in the blood trail.

Examination of Tiffany's corpse showed that she had lacerations on her head, wounds from the back of her head down to her skull, and ligature marks around her neck, which indicated strangulation. Dr. John Butts, the Chief Medical Examiner of North Carolina and an expert in forensic pathology, determined that the cause of Tiffany's death was "blows to the head that broke, cracked the skull, caused bruising and bleeding over the brain and within the brain." He also opined that the lacerations on Tiffany's head were caused by a heavy object with a narrow edge. Additionally, Tiffany's vagina and rectum showed signs of trauma.

A pubic hair with an attached root was recovered from Tiffany's body, and examination determined that the DNA matched that of defendant. A pair of light blue Tommy Hilfiger jeans seized from defendant's bedroom had blood stains; testing revealed that the blood was Tiffany's.

After discovering Tiffany Long's body, the police interviewed many witnesses, who stated that they saw defendant wearing the light blue jeans at a local park on 16 October 1998. Witnesses also saw Dorthia Bynum and Harold Jones at the park that day. On 17 October 1998, Al-Neisa Jones consented to a police search of her apartment. Police seized a black t-shirt believed to have been worn by defendant, as well as defendant's bicycle, the light blue Tommy Hilfiger jeans, and a pair of boxer shorts. The clothing appeared to have fecal matter on them, and that suspicion was later confirmed by Dr. Butts' investigation.

Defendant was interviewed but not taken into custody at the police station on 17 October 1998. After the interview he went home with his aunt, Al-Neisa Jones. During the interview, defendant stated that he had not seen Tiffany Long on 16 October 1998, nor had he been at 614 Lakeside Avenue, his previous home. When asked where he was during the evening hours of 16 October 1998, defendant said he attended a football game.

On 19 October 1998, a teacher alerted police that Dorthia Bynum made comments about Tiffany Long being killed by a TV cable cord. As this information had not been made public, the police suspected her of perpetrating the crime. She was taken into custody and gave a statement; she was then charged with first degree murder, first degree kidnapping, and first degree sexual offense.

On 21 October 1998, defendant was taken into police custody and interviewed in the presence of his aunt. He was advised of his rights

both orally and in writing; he waived his rights and stated that he fully understood them. Defendant gave a statement, which was re-read to him sentence by sentence. Upon reviewing it, he signed it. In the statement, defendant said he brought Tiffany to 614 Lakeside Avenue after being requested to do so by Dorthia Bynum. Once there, he admitted to placing his penis in Tiffany's rectum and being present when Tiffany was hit on the head with the bed rail. He also stated that he helped drag Tiffany's body outside and threw the bed rail over the fence in the backyard. He stated that Dorthia Bynum and "Fat Boy" were participants in the murder. He also indicated that "Fat Boy" sodomized Tiffany, causing her to defecate. According to defendant, "Fat Boy" then strangled her with the TV cable, and hit her repeatedly on the head with the bed rail.

After the police interview, defendant was charged with one count of first degree murder, two counts of first degree sexual offense, and one count of first degree kidnapping. On 23 November 1998, the trial court held a hearing to determine whether defendant should be transferred to the superior court for trial as an adult. At the conclusion of the hearing, the trial court found probable cause to believe defendant committed a Class A felony (first degree murder), and signed an order transferring defendant to superior court for trial as an adult, pursuant to N.C. Gen. Stat. § 7A-608 (1995).

On 25 November 1998, defendant appealed the trial court's decision to transfer him to superior court. On 30 November 1998, defendant filed a petition for writ of supersedeas under Rule 23 and a motion for a temporary stay to delay execution of the trial court's transfer order. On 30 November 1998, this Court denied defendant's motion for a temporary stay and stated that a ruling on the petition for writ of supersedeas would be made "upon the filing of a response to the petition or the expiration of the time for the filing of a response, if none is filed."

The State filed a motion to dismiss defendant's appeal on 16 December 1998; this Court denied the motion on 18 December 1998. Defendant's petition for writ of supersedeas was denied on the same date. Subsequently, on 7 September 1999, defendant was indicted on one count of first degree murder, two counts of first degree sexual offense, and one count of first degree kidnapping.

The trial court conducted a suppression hearing on 29 November 1999 to evaluate defendant's waiver of his *Miranda* rights and his rights under N.C. Gen. Stat. § 7A-595 (1995). On 30 November 1999,

the trial court determined that none of defendant's rights under N.C. Gen. Stat. § 7A-595, N.C. Gen. Stat. Chapter 15, or the federal or state constitutions were violated. The trial court also found that defendant's aunt was his "guardian" under N.C. Gen. Stat. § 7A-595, and that she was present during his interrogation. Defendant's motion to change venue from Alamance County to Cumberland County was granted, and defendant's jury trial took place at the 14 February 2000 Criminal Session of Cumberland County Superior Court.

During its presentation of evidence, the State called twenty-seven witnesses, including Tiffany's grandmother. Mrs. Long testified that Tiffany was not interested in boys and that she bathed every day, thereby rebutting defendant's claim that his pubic hair got on Tiffany's body the day before she died. The State extracted voluminous testimony from neighborhood witnesses who saw defendant with Tiffany Long the day of her death, and then presented several law enforcement officers who investigated the murder. The jury also heard testimony from Dr. John Butts, the State's Chief Medical Examiner, who performed the autopsy on Tiffany Long's body.

Defendant was the sole defense witness called to testify. He testified on his own behalf and stated that Dorthia Bynum told him to bring Tiffany to the Lakeside Avenue house because she had to talk to her. Defendant denied that he sexually assaulted Tiffany, but did state that Harold Jones sodomized her. Defendant said he was present when Tiffany was murdered, but maintained that Dorthia, not Harold, performed the murder. Defendant said he covered up for Harold because he wanted to keep him out of trouble. He repudiated parts of his earlier statement to police and admitted lying to the police during previous conversations. Defendant also testified he had consensual sex with Tiffany on 15 October 1998, which accounted for his pubic hair being on her body.

During the rebuttal stage of the trial, the State called Dr. Sharon Cooper, an expert in developmental and forensic pediatrics, to testify about her knowledge of Tiffany Long's medical records and her behaviors. Dr. Cooper testified that Tiffany appeared to have been sexually abused in the past, as she did not have a hymen and had not had one for some time. Dr. Cooper then discussed sexual abuse and its effect on children in general, as well as the impact such abuse had on Tiffany Long before her death.

On 23 February 2000, defendant was found guilty of one count of first degree murder, two counts of first degree sexual offense, and

first degree kidnapping. Defendant was sentenced to life in prison without parole for the first degree murder verdict, and to 300-369 months' imprisonment for the other crimes. Defendant appealed.

On appeal, defendant argues that the trial court erred by (I) denying his motion to suppress his statement, as a violation of his right to avoid self-incrimination under the federal and state constitutions; (II) admitting the testimony of Dr. Sharon Cooper; (III) denying his motion to dismiss; and (IV) transferring the case from juvenile court to superior court. For the reasons set forth, we disagree with defendant's arguments and find no error in his conviction.

Initially, we note that this case arose when our State's Juvenile Code was codified as Chapter 7A of the North Carolina General Statutes. The entire Juvenile Code underwent extensive revision and was renumbered as Chapter 7B of our General Statutes, effective 1 July 1999. 1998 N.C. Sess. Laws ch. 202. The offense was committed in October 1998, prior to the effective date of the revisions. Hence, all references herein will be to statutory provisions in effect in 1998.

I. Motion to Suppress

[1] Defendant first argues that the trial court erred in denying his motion to suppress the statement he made to police during questioning. Defendant's main argument is that his aunt, Al-Neisa Jones, was not his "guardian" under the law and that his juvenile right to be questioned with a guardian present was violated, making his waiver of his juvenile rights ineffective and his statement inadmissible as a matter of law. Defendant argues that Ms. Jones was only a person with whom he lived, and that she had a serious conflict of interest because her brother, Harold Jones, was also charged with the victim's murder.

In considering this assignment of error, we note that the stated purpose of the juvenile code is

> [t]o develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety[.]

N.C. Gen. Stat. § 7A-516(3) (1995).

(1) The Definition of "Guardian"

Under N.C. Gen. Stat. § 7A-595, a juvenile must be informed of his rights before being interrogated; these rights include having a "par-

ent, guardian, or custodian" present and the right to an attorney. If the child is under fourteen, as defendant was, the rights afforded are even greater. A juvenile defendant under fourteen must be interrogated only in the presence of his "parent, guardian, custodian, or attorney." *See* N.C. Gen. Stat. § 7A-595(b).

Defendant argues that his aunt did not fall under any of the four categories enumerated by N.C. Gen. Stat. § 7A-595(b). He argues that she was, at most, his caretaker or one who stood *in loco parentis* to him. Based on the facts of the case, it is clear that Al-Neisa Jones was neither defendant's natural parent nor his attorney. Ms. Jones was also not defendant's custodian. N.C. Gen. Stat. § 7A-517(11) (Cum. Supp. 1998) defines a custodian as "[t]he person or agency that has been awarded legal custody of a juvenile by a court." *Id.* Because Al-Neisa Jones was never technically awarded legal custody of defendant by a court, she does not qualify as his "custodian." Thus, we must now consider whether Ms. Jones qualifies as defendant's "guardian."

Our examination of the term "guardian" begins in the Juvenile Code. N.C. Gen. Stat. § 7A-517, entitled "Definitions," does not define the term "guardian." Nonetheless, there are helpful points of reference to which we turn. For example, Black's Law Dictionary defines a "guardian" as

> [a] person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affairs. One who legally has responsibility for the care and management of the person, or the estate, or both, of a child during its minority.

Black's Law Dictionary 706 (6th ed. 1990).

Despite its failure to define the term "guardian," the Juvenile Code does explore the situation in which the trial court must appoint a guardian for a juvenile. N.C. Gen. Stat. § 7A-585 (Cum. Supp. 1998) states:

> In any case when no parent appears in a hearing with the juvenile or when the judge finds it would be in the best interest of the juvenile, the judge may appoint a guardian of the person for the juvenile. The guardian shall operate under the supervision of

> the court with or without bond and shall file only such reports as the court shall require. The guardian shall have the care, custody, and control of the juvenile or may arrange a suitable placement for him and may represent the juvenile in legal actions before any court. The guardian shall also have authority to consent to certain actions on the part of the juvenile in place of the parent including marriage, enlisting in the armed forces, and undergoing major surgery. The authority of the guardian shall continue until the guardianship is terminated by order, until the juvenile is emancipated pursuant to Article 56, or until the juvenile reaches the age of majority.

With these points in mind, we are now faced with the particular question in this case; namely, whether Al-Neisa Jones was defendant's guardian. To resolve this question, we turn to the facts of the case.

The evidence at the 23 November 1998 hearing consisted of testimony from several law enforcement officers and Al-Neisa Jones, defendant's aunt. Sergeant Lowe of the Burlington Police Department testified that defendant was interrogated in the presence of his aunt. Prior to taking defendant's statement, Sergeant Lowe told defendant

> [y]ou have a right to have a mother, father, sister, brother, aunt, uncle, et cetera, with you while you're being questioned. You have your aunt Al-Neisa here with you, and she is actually your guardian. Do you understand this?

After hearing from Sergeant Lowe, the trial court conducted a *voir dire* examination of Al-Neisa Jones. Ms. Jones explained that her sister, Attillah Jones, had come from New Jersey to North Carolina with her six children in March 1998. They stayed with Al-Neisa Jones for three to four months. Attillah Jones then told her sister that she was returning to New Jersey "to go take care of some business." However, she left two of her sons, defendant and Eric, with Al-Neisa Jones. Al-Neisa Jones testified that she tried to get in touch with her sister so she could come get her sons, but was unable to do so. Ms. Jones then explained that, in addition to welfare payments she was already receiving for her own children, she began receiving welfare payments to support her two nephews. Ms. Jones stated that the Department of Social Services did not require her to sign any papers to receive the additional money because it was already familiar with both her and her sister's situations.

Ms. Jones testified that she had to meet with school officials and go to the Board of Education to sign papers to enroll defendant in school. Ms. Jones read from portions of the educational residency affidavit that she signed, as follows:

Q. And you see where it says educational residency affidavit?

A. Yes.

Q. I want you to look at the words I'm getting ready to highlight in blue right here. Read what it says, what I—

A. —"Custodial adult."

Q. Custodial adult. Now, you swore to the truth of this affidavit, didn't you?

A. Yes, I did.

. . . .

Q. Now, read paragraph one that I just highlighted in blue?

A. "I am the custodial adult with whom the following children reside."

Q. And read what I just highlighted there beneath that?

A. "Joseph Osmar Jones."

Q. Age?

A. "13 . . ."

Ms. Jones was also asked specific questions regarding her living situation prior to the murder of Tiffany Long:

Q. Did you ever hear from [your sister] again?

A. No.

. . . .

Q. Did you try to get up with her before Tiffany was killed?

A. That's correct.

Q. More than once?

A. That's correct.

Q. But no success whatsoever?

A. Yeah.

Q. Who was feeding Joseph?

A. I was.

Q. Who was providing shelter?

A. I was.

Q. Who was attending to his educational needs?

A. I was.

Q. Who was clothing him?

A. I was.

. . . .

Q. So isn't it fair to say, Ms. Jones, that Joseph was dependent upon you for his room, board, and education, and clothing?

A. That's correct.

At the end of the hearing, the trial court made the following findings of fact:

6. That on October 21, 1998, the defendant was interviewed by Sergt. Lowe and Staff Sergt. Tim Flack at the Burlington Police Department, Criminal Investigation Division interview room; that the defendant was accompanied by his aunt, Alneesa Jones, who was present during the course of the interview process.

7. That in the presence of his aunt, Alneesa Jones, Sergt. Lowe advised the defendant Joseph Osmar Jones of those rights . . . that the defendant acknowledged his understanding of each of those rights by placing in his own handwriting . . . the word "yes" and his initials "JJ"; that the defendant indicated his willingness to speak to the law enforcement officers by placing a "yes" and his initials after the waiver; that the defendant further acknowledged that "no promises or threats have been made to me and no pressure or coercion of any kind used against me by anyone" by placing yes and his initials thereafter.

8. That . . . Alneesa Jones signed in the area designated for parent, guardian, custodian.

. . . .

13. That Alneesa Jones was responsible for and Joseph Jones was dependent upon her for room, board, education, and clothing.

. . . .

15. That in respect to Alneesa Jones, although she may have had conflicting emotions as they relate to her brother, Harold Jones, and to her nephew, Joseph Jones, there is no evidence before this Court that any such conflict was so overbearing that the will of the defendant was overridden to the extent that it interfered with the defendant's free exercise of those rights . . . .

16. That by declaration and conduct, Alneesa Jones did those things that can be construed as a guardian in its broadest legal sense.

. . . .

18. That the advisement of those rights enumerated in N.C.G.S. § 7A-595(a) were done in the presence of Alneesa Jones whom the Court has now declared to be the defendant's guardian.

The trial court then concluded, as a matter of law:

1. That none of the defendant's rights under North Carolina General Statute 7A-595 were violated.

2. That none of the defendant's rights under Chapter 15A were violated.

3. That none of the defendant's rights under the U.S. Constitution or the North Carolina Constitution were violated.

4. That the defendant was fully advised of his rights under Miranda Vs. Arizona and North Carolina General Statute 7A-595, and thereafter knowingly, intelligently, understandingly and willfully waived those rights.

5. That Alneesa Jones was the defendant's guardian within the spirit and intent of N.C.G.S. § 7A-595 and was present during the advisement of those rights and during a confession by the defendant.

At defendant's trial, much of the same testimony regarding defendant's interrogation was elicited from witnesses, and defendant's statement was admitted over a renewed objection based on the trial court's previous determination at the suppression hearing that

Ms. Jones was defendant's guardian. Additionally, the State called Lieutenant Tim Flack, a twenty-one-year veteran of the Burlington Police Department, who was also involved in the case and interviewed defendant on 21 October 1998. He testified that defendant seemed to want to whisper "Harold" as the name of the perpetrator, but would look at his aunt and then fall silent. Specifically, Lieutenant Flack stated:

> We asked Joseph several times who the black male was. . . . He started breathing heavily, and he was trying to whisper a name and he would get out and would almost sound like "Harold." It would come out like HA. And he would say it, but not quite say—he never would say the full name Harold, but that sounded like that's what he was trying to say. He'd look at his aunt Al-neisa who was sitting to his left. And, uh, before he would say it, and then he'd look back down and he never would, uh—wouldn't give me the full name. The last time he whispered what I thought sounded like Harold, Al-neisa jumped up and said, "I'm sorry, I have to go pee."

Another officer, Sergeant Doug Murphy, testified that Al-Neisa Jones told him defendant had harmed her children in the past and she believed defendant, not her brother, had murdered Tiffany Long. Ms. Jones told officers that she was afraid of defendant and wanted him taken to court, and she accused him of murder. However, Sergeant Lowe said Ms. Jones did not intimidate defendant, twice encouraged him to tell the truth, and acted "like a natural, concerned parent."

Defendant maintains the trial court erroneously concluded that his aunt was his guardian because there is a definition of "guardian," based on legislative intent, that she does not meet. Defendant also utilizes the canon of statutory construction, *ejusdem generis*, to argue that the term "guardian" should be construed to apply only to terms of the same class as those previously enumerated in N.C. Gen. Stat. § 7A-595. Thus, defendant argues, a guardian must be interpreted to mean someone court-appointed, with legally established rights and responsibilities regarding the juvenile. To that end, defendant asserts the Director of the Alamance County Department of Social Services is technically his guardian. *See* N.C. Gen. Stat. § 35A-1220 (1999). Finally, defendant points out that Ms. Jones never stated that she considered herself defendant's guardian; moreover, she was never appointed by a court or clerk of court to be his guardian, nor was she supervised by a court in that capacity.

Defendant also states that he was in no position to deny that Ms. Jones was his guardian, after Sergeant Lowe told him she was his guardian. Defendant did not know his aunt had accused him of murder and was ignorant of her "agenda" to protect her brother. He maintains that the officers did not try to find out if Ms. Jones was his guardian; instead, they just assumed she was, and their assumption amounted to bad faith. Defendant further asserts that the trial court failed to make any findings of fact that the officers reasonably believed Ms. Jones to be defendant's guardian, and, in any event, the statute does not provide for such an exception.

After careful consideration of all the evidence, we conclude that Al-Neisa Jones was defendant's guardian within the spirit and meaning of the Juvenile Code. The definition of "guardian" set forth in Black's Law Dictionary denotes one who "legally has responsibility for the care and management . . . of a child during its minority." Legal authority is not exclusively court-appointed authority, but is rather any authority conferred by the government upon an individual. Applying the facts previously set forth to this definition, it is clear that defendant's aunt was his guardian. Both DSS and the local school system, each a part of the State, gave Ms. Jones lawful authority over defendant. We believe she thus acted as a "guardian" for the purposes set forth in N.C. Gen. Stat. § 7A-595.

(2) Constitutional Considerations

[2] Defendant also argues his statement was improperly admitted in violation of his Fifth, Sixth and Fourteenth Amendment rights. Statements elicited by governmental misconduct offend constitutional rights. *Miller v. Fenton*, 474 U.S. 104, 88 L. Ed. 2d 405 (1985). In support of his contention, defendant makes the same evidentiary observations as before, and argues that the admission of his statement requires a new trial because the bike, the pubic hair, and the soiled t-shirt are weak circumstantial evidence connecting him to Dorthia Bynum and Harold Jones on the day of the murder, and to the victim in the past, since only his statement puts him at the murder scene. Thus, defendant maintains that inclusion of his statement amounts to prejudicial error that is harmful beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (1999); and *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705 (1967).

"The findings of a trial court following a *voir dire* hearing on the voluntariness of a confession are conclusive and will not be disturbed on appeal if they are supported by competent evidence in the record."

State v. Gibson, 342 N.C. 142, 146-47, 463 S.E.2d 193, 196 (1995). If a defendant fails to except specifically to any findings of fact, they are not reviewable on appeal. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

"Whether a waiver is knowingly and intelligently made depends on the specific facts of each case, including the defendant's background, experience, and conduct." *State v. Brown*, 112 N.C. App. 390, 396, 436 S.E.2d 163, 167 (1993), *aff'd*, 339 N.C. 606, 453 S.E.2d 165 (1995). In this case, the trial court found defendant knowingly and intelligently waived his rights. The trial court noted that defendant made good grades in school and had the level of intelligence necessary to effect a knowing and intelligent waiver of his rights. Additionally, the trial court found that the warnings defendant received complied with the requirements delineated by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Also, as defendant did not argue to the trial court that his Sixth Amendment rights were violated, we cannot consider this argument on appeal. *State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995).

Because we conclude that Al-Neisa Jones was defendant's guardian within the spirit and meaning of the North Carolina Juvenile Code, we also conclude that defendant was afforded all statutory procedural protections during his interrogation by the police. Defendant's waiver of his rights was made knowingly and intelligently, and his statement was properly included at trial. Defendant's first assignment of error is hereby overruled.

II. Expert Testimony

[3] Defendant next argues that the trial court erred in admitting the testimony of Dr. Sharon Cooper, who testified as to Tiffany Long's sexual behavior. The main point of Dr. Cooper's testimony is that she did not believe Tiffany would have had consensual sex with defendant the day before her murder, thereby rebutting defendant's explanation of events.

During defendant's trial, the State called Dr. Sharon Cooper to testify. Dr. Cooper was a developmental and forensic pediatrician with extensive experience in pediatrics. She was tendered, without objection, as an expert witness in the field of developmental and forensic pediatrics. When the State's questions regarding defendant's case began, Dr. Cooper testified that she had reviewed the victim's medical records, the police investigation reports, the autopsy report from the State Chief Medical Examiner, Dr. John Butts, and autopsy

photographs. Dr. Cooper also testified that she had taken a personal history from the victim's grandmother "for the purpose of obtaining more medical information." While the prosecutor was looking for the photographs, defendant's attorney addressed the trial court, outside the presence of the jury:

> MR. MORSE [Defendant's attorney]: If your Honor please, we would object. It appears that Dr. Cooper never examined Tiffany Long.
>
> THE COURT: It's not required.
>
> MR. MORSE [Defendant's attorney]: If your Honor please, under 403, we would object to whatever she's gonna say. It is, uh—it's gonna be highly inflammatory. It's not relevant to anything in rebuttal.
>
> THE COURT: How do you know it's inflammatory if you haven't heard her testify?
>
> MR. MORSE [Defendant's attorney]: Because, with her credentials, your Honor, you know whatever she says is going to be believable, I promise you. And I'd like to know where they're going with this.
>
> THE COURT: Well, I'll let [the prosecutor] make a proffer in just general parameters. I assume it's in rebuttal to the defendant's testimony, though.

A short time later, Dr. Cooper was asked the following questions:

> Q. Did you sit in here today and listen to Joseph Jones's testimony?
>
> A. Yes, I did.
>
> Q. Did you hear his testimony wherein he essentially described Tiffany Long as having seduced him there in the living room of her house while he was getting a glass of water?
>
> MR. MORSE [Defendant's attorney]: We would object, Your Honor, to Mr. Johnson's characterization of the evidence.
>
> THE COURT: Overruled.
>
> A. Yes, I did hear that testimony.
>
> Q. Have you an opinion, satisfactory to yourself, as to whether or not on the 15th of October, 1998, this behavior

would be characteristic of a child fitting Tiffany Long's description from all of the information that you've had made available to you?

A. I do have an opinion.

Q. What is that opinion?

A. My opinion is that the description of Tiffany having seduced, uh, a youth offender is extremely out of character. You do not have a child who has given any indication that she is sexually promiscuous or that she is precocious in any way as far as her sexual being is concerned. . . . This is very out of char- — would be—have been very out of character for a child who has all of the other behaviors and symptoms that we see in this child who carries dolls in her little backpack and who plays with dolls in the evenings and who has sleepovers with children three and four years younger than she is. That would be extremely out of character.

Defendant's first objection essentially claims that Dr. Cooper's expert opinion testimony was unduly prejudicial to him. Defendant's second objection takes issue with the way the prosecutor characterized part of defendant's testimony. On appeal, however, defendant couches his assignment of error in terms of the adequacy of the foundation for Dr. Cooper's testimony. As evidenced by the previous excerpts from the trial transcript, defendant did not raise this specific objection at trial. Moreover, defendant has not clearly identified the evidence which he finds improper and has not assigned plain error to this assignment of error on appeal. As defendant has failed to assign plain error, he has not preserved this issue for our review. *See* N.C. R. App. P. 10(b)(1) (1999); N.C. R. App. P. 10(c)(4) (1999); and *State v. Frye*, 341 N.C. 470, 495-96, 461 S.E.2d 664, 676-77 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). Since defendant's two trial objections did not attack the foundation or substance of Dr. Cooper's testimony, they are not adequate grounds upon which defendant may now challenge that foundation.

We further note that the trial court did not abuse its discretion in accepting Dr. Cooper as an expert in developmental and forensic pediatrics. N.C. Gen. Stat. § 8C-1, Rule 702(a) (1999) states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge,

skill, experience, training, or education, may testify thereto in the form of an opinion.

North Carolina case law has interpreted Rule 702 as follows:

> [F]or [an expert's] testimony to be admissible as expert testimony, the witness must be qualified by "knowledge, skill, experience, training, or education." North Carolina case law requires only that the expert be better qualified than the jury as to the subject at hand, with the testimony being "helpful" to the jury. *State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 282, *disc. review denied*, 327 N.C. 639, 399 S.E.2d 127 (1990). Whether the witness qualifies as an expert is exclusively within the trial judge's discretion, *id.*, (citation omitted), "and is not to be reversed on appeal absent a complete lack of evidence to support his ruling." *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 603 (1985), *disc. rev. denied*, 316 N.C. 198, 341 S.E.2d 581 (1986).

State v. Davis, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993).

Additionally, N.C. Gen. Stat. § 8C-1, Rule 705 (1999) states:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question.

Dr. Cooper testified after examining Tiffany's medical records, autopsy photographs, and the autopsy report from Dr. Butts, and after reviewing a family history taken from Tiffany's grandmother. Her testimony rebutted defendant's assertion that he had consensual sex with the victim the day before her murder. After careful review of the record and consideration of the arguments, we overrule defendant's second assignment of error.

III. Motion to Dismiss

[4] Defendant next argues that the trial court erred in denying his motion to dismiss. In support of this assignment of error, defendant relies on his previous arguments regarding the admission of his state-

ment and the testimony of Dr. Cooper, and maintains that his motion to dismiss should have been granted based on the State's failure to prove the essential elements of the crimes against him.

The standard of review on a motion to dismiss is as follows:

> [A]ll of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. 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) (citations omitted). Moreover,

> [o]nce the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then " 'it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' "

State v. Barnes, 334 N.C. 67, 75-76, 430 S.E.2d 914, 919 (1993) (citations omitted). In making this determination,

> the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. . . . When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455-56, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (citations omitted).

Based on the evidence previously discussed in connection with defendant's other assignments of error, we conclude that the State presented sufficient evidence to survive defendant's motion to dismiss. Defendant's third assignment of error is hereby overruled.

IV. Transfer to Superior Court

[5] By his final assignment of error, defendant contends the trial court erred in transferring his case from juvenile court to superior court. Defendant maintains the transfer occurred because the trial

court improperly based its determination of probable cause on his statement. Because he believes his statement should have been suppressed, defendant contends his transfer to superior court was based on improperly admitted evidence. As previously discussed, defendant's motion to suppress his statement was properly denied. Thus, we disagree with defendant's arguments regarding the transfer of his case.

In all felony cases where the accused is thirteen years of age or older, the State's burden is simply to "show that there is probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the juvenile committed it[.]" N.C. Gen. Stat. § 7A-609(c) (1995). N.C. Gen. Stat. § 7A-609(a) states: "(a) The court shall conduct a hearing to determine probable cause in all felony cases in which a juvenile was 13 years of age or older when the offense was allegedly committed."

In cases where the offense is a Class A felony, transfer of the case to superior court is *mandated* by N.C. Gen. Stat. § 7A-608. N.C. Gen. Stat. § 7A-608 states:

> The court after notice, hearing, and a finding of probable cause may transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults.

There was extensive evidence provided by the officers regarding the location and condition of the victim's body, the bloody bike track through the yard, defendant's whereabouts and activities the day of the murder, the bike at defendant's residence, and the condition of the clothing found in defendant's bedroom. All this evidence was admissible pursuant to N.C. Gen. Stat. § 7A-609, and it was properly considered by the trial court. The trial court did not err in concluding that probable cause existed to show that defendant committed a Class A felony (first degree murder). The superior court automatically acquired jurisdiction over the first degree kidnapping and first degree sexual offense charges because they arose out of the same act or transaction as the murder.

We also note that this Court has previously held there can be no appellate review of a mandatory transfer done pursuant to N.C. Gen.

Stat. § 7A-608. "There [is] thus no discretion as to that transfer for the juvenile court to exercise and for this Court to review." *In re Ford*, 49 N.C. App. 680, 682, 272 S.E.2d 157, 159 (1980). Defendant's final assignment of error is therefore overruled.

After careful consideration of the record, we conclude defendant received a fair trial, free from prejudicial error.

No error.

Judge MARTIN concurs.

Judge BIGGS concurs in result with separate opinion.

BIGGS, Judge concurring in the result with separate opinion.

While I believe the defendant received a fair trial free of prejudicial error; the admission of his confession was in violation of N.C.G.S. § 7A-595(b) (now N.C.G.S. § 7B-2101(b)), and therefore error, albeit harmless.

N.C.G.S. § 7A-595(b) provides in pertinent part:

> When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian or attorney.

The trial court concluded "that Al-Neisa Jones was the defendant's guardian within the spirit and intent of N.C.G.S. § 7A-595 and was present . . . during a confession by the defendant." The majority adopted similar language in its conclusion that "Al-Neisa Jones was defendant's guardian within the spirit and meaning of the Juvenile Code." The rules of statutory construction however are clear that there is no room for judicial construction where the language of a statute is clear and unambiguous. *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 823-24 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). *See also In re Declaratory Ruling by N.C. Comm'r of Ins.*, 134 N.C. App. 22, 517 S.E.2d 134, *disc. review denied*, 351 N.C. 105, 540 S.E.2d 356 (1999) (court held that is the function of the judiciary to construe a statute only when the meaning

is in doubt). Where the language of a statute is clear and unambiguous, the court is without power to interpolate, or superimpose, provisions and limitations not contained herein. *State v. Green*, 348 N.C. at 596, 502 S.E.2d at 824.

In the case *sub judice*, while the term guardian does not appear in the section marked "Definitions", another provision in the Juvenile Code sets forth the appointment, authority and responsibilities of a guardian. *See* N.C.G.S. § 7A-585 (now N.C.G.S. Chapter 7B (1999)). In this provision, the term guardian requires court appointment and supervision. Moreover, a second rule of judicial construction is that all statutes dealing with the same subject matter are to be construed in *pari-materia* i.e., in such a way to give effect, if possible, to all provisions. Further, where one statute deals with certain subject matter in particular terms and another deals with the same subject matter, in more general terms, the particular statute will be viewed as controlling in the particular circumstances absent clear legislative intent to the contrary. *State ex rel. Utilities Comm. v. Thornburg*, 84 N.C. App. 482, 485, 353 S.E.2d 413, 415, *disc. review denied*, 320 N.C. 517, 358 S.E.2d 533 (1987). Had the legislature intended for (guardian) to have one meaning in N.C.G.S. § 7A-595(b) and another in other provisions in the Juvenile Code, it could have said so. It was not permissible for the trial court and the majority of this Court to go outside of the Juvenile Code to define a term where such term is clearly defined within the Code.

Accordingly, I conclude it was error for the trial court to conclude that Al-Neisa Jones was a guardian under N.C.G.S. § 7A-595(b). Thus the confession should have been suppressed. However, error alone will not justify a reversal. Only where there is a reasonable possibility that, without the error complained of, a different result might have been reached, the error is prejudicial and the defendant is entitled to a new trial. *State v. Moctezuma*, 141 N.C. App. 90, 539 S.E.2d 52 (2000) (Court awards new trial, stating that error is prejudicial if it is reasonable possible that erroneously admitted evidence determined outcome); *State v. Robinson*, 136 N.C. App. 520, 524 S.E.2d 805 (2000) (holding that error warrants new trial only if defendant can show he was prejudiced thereby; prejudice occurs when there is a reasonable possibility that without the error, the result of the trial would have been different).

In the present case, there is substantial evidence of guilt without the confession. The evidence against defendant included witnesses who saw him on a bicycle leading Tiffany Long to the house where

she was killed. An eye witness saw the defendant on a blue, Huffy Mountain bike on the afternoon of the murder and identified the "Stone Cold Steve Austin T-shirt" and the light blue Tommy Hilfiger jeans, both of which, Dr. Butts concluded had fecal matter on them, as the clothing defendant was wearing on the afternoon of the murder. The jeans also had blood on them and that blood matched the DNA profile of Tiffany Long. Defendant conceded that the blue, Huffy, mountain bike outside Ms. Jones's apartment belonged to him. The bicycle had a chemical indication of blood on one pedal and the tread of its tires was consistent with the tread marks crossing the bloody trail in the back yard of 614 Lakeside. A pubic hair containing defendant's DNA was found in the perineal fold of the victim—a ten-year-old girl who had not reached puberty, who had no pubic hair, and who took a bath every night almost as ritual.

Defendant cannot demonstrate prejudice where the evidence of guilt is so compelling. Accordingly, I concur with the majority that defendant is not entitled to a new trial.

STATE OF NORTH CAROLINA v. RONNIE WESLEY STROUD AND BONNIE EDWARDS STROUD

No. COA00-1153

(Filed 18 December 2001)

1. **Constitutional Law— effective assistance of counsel— direct appeal—premature**

A claim for ineffective assistance of counsel was prematurely asserted on direct appeal where defendant's arguments concerned potential questions of trial strategy and counsel's impressions and ineffective assistance of counsel could not be found on the face of the record. The procedure to determine those issues would be an evidentiary hearing through a motion for appropriate relief; defendant's direct appeal of this issue was dismissed without prejudice to his right to file that motion.

2. **Homicide— first-degree murder—short-form indictment— sufficient**

A short-form indictment was sufficient to charge defendant with first-degree murder.

3. Conspiracy— criminal—husband and wife—common law merger of identity—not applicable

The trial court did not err in the prosecution of a mother and stepfather for the murder of her child by denying the mother's motion to dismiss an indictment for conspiracy to commit murder on the grounds that a husband and wife are one entity under the common law and therefore cannot enter into a conspiracy with one another. Antiquated notions of a woman's identity found in the common law do not extend into an interpretation of the present-day crime of criminal conspiracy between husband and wife.

4. Appeal and Error— preservation of issues—composition of jury panel—no objection at trial

A first-degree murder defendant did not preserve for appellate review a challenge to the jury panel where she did not object at trial. A defendant must satisfy the requirements of N.C.G.S. § 15A—1211(c) to challenge the composition of a jury panel.

5. Jury— selection—divided pool—no plain error

There was no plain error in a first-degree murder prosecution where the pool of eighty-nine potential jurors was divided into multiple sequestered panels, with defendant Edwards present for the division of the last two groups and for the entire voir dire questioning. Defendant knew the procedure in advance, observed at least part of the procedure, expressly consented to the procedure afterwards, and did not use all of her peremptory challenges. She merely speculates that the State may have unfairly completed background checks on potential jurors when she was not present, but offers no evidence.

Judge JOHN concurring in part and dissenting in part.

Appeal by defendants from judgments entered 10 February 2000 by Judge Michael E. Helms in Superior Court, Wilkes County. Heard in the Court of Appeals 22 August 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell; and Special Deputy Attorney General James C. Gulick, for the State.

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

Don Willey for defendant-appellant Bonnie Edwards Stroud.

McGEE, Judge.

Defendant Ronnie Wesley Stroud (Stroud) was indicted for conspiracy to commit murder and for the 6 July 1998 first degree murder of Darren Edwards. Defendant Bonnie Edwards Stroud, now known as Bonnie Edwards (Edwards), was also indicted for conspiracy to commit murder and for the first degree murder of Darren Edwards. The cases were joined for trial. A jury found both defendants guilty of first degree murder and conspiracy to commit murder on 10 February 2000. Both defendants were sentenced to life imprisonment without parole for the first degree murder convictions, and both defendants were sentenced to 189 to 236 months in prison for the conspiracy to commit murder convictions. Defendants appeal.

Evidence presented by the State at trial tended to show that eighteen-year-old Darren Edwards (Darren) was stabbed at his home in Wilkes County during the early morning hours of 6 July 1998. Darren lived with Edwards, his mother, and with Stroud, his stepfather. Dr. Patrick Lantz, who performed an autopsy of Darren's body on 7 July 1998, testified Darren died of a stab wound about two and a quarter inches long between his spine and his right shoulder blade. A knife went into Darren's right lung and severed his breathing tube.

A neighbor of Stroud and Edwards, Raye Miller, testified that on 6 July 1998, Edwards came to her house asking her for help and to call "911." Ms. Miller saw Darren lying in her front yard with puddles of blood around him. She testified Stroud stated, "I'll be sent off forever." Another neighbor, Colbert Eller (Eller), testified Stroud had awakened him by ringing his doorbell. He looked out his door and saw a body in Ms. Miller's yard and heard someone say, "I think he's dead."

Deputy Eric Anderson of the Wilkes County Sheriff's Department testified that when he arrived at the scene, he asked Stroud what had happened and Stroud replied, "Oh, my God, I did it. I did it. He hit Bonnie." Sergeant Alan Flora of the Wilkes County Sheriff's Department approached Stroud and asked if he needed help. Stroud

stated, "I threw it and I hit him with it, and now he's hurt bad." When Sergeant Flora asked what he threw, Stroud stated, "A knife."

Upon hearing Sergeant Flora confirm Darren was dead, Edwards became hysterical. As Sergeant Flora walked Edwards to her home, he observed blood across the driveway and a trail of blood towards the home of Edwards and Stroud. There was a significant amount of blood inside the home, especially in the kitchen. Edwards told Sergeant Flora, "I begged him not to bring that knife into this house." After unsuccessfully looking for the knife, officers asked Stroud for assistance, and he led them to where he had hidden the knife. Stroud kept saying, "I did it. I killed Darren."

Eller testified that about a week prior to Darren's death, he observed a fight between Darren and Stroud, in which Stroud was holding a baseball bat, and Darren was holding a piece of wood. Darren threw a rock at Stroud, and Stroud lost his footing. Darren took the bat from Stroud, and Stroud ran away with Darren chasing after him.

Darren's older brother, Bobby Edwards (Bobby), testified that the earlier death of his and Darren's father bothered Darren a great deal, and both Darren and Bobby were concerned about their mother dating Stroud soon after their father's death. Bobby testified that when he was at his mother's home, he saw problems between Darren, Edwards, and Stroud. Darren told Bobby about fights between Darren and Stroud, including one incident when Stroud allegedly hit Darren with a baseball bat.

Darren's fiancé, Angela Edgle, testified she observed a fight between Darren and Edwards about three weeks before Darren's death. Edwards chased Darren with a large piece of glass and told Darren to pack his things and leave the house.

Two social workers from the Wilkes County Department of Social Services testified there had been reports of violence at Darren's home involving Darren, Edwards, and Stroud. Their records indicated Darren was placed in the Ebenezer Garden Christian Children's Home in Wilkes County for a period of time because his mother's home was unsafe due to Stroud's presence. Edwards had agreed Darren needed to be out of her home because it was unsafe, but later she denied their problems after she learned she would not receive Darren's social security checks if he was not living in her home.

Several of Edwards' former co-workers at Tyson's Foods testified regarding statements Edwards had made in the past that she hated Darren, wished he were dead, and wished she had never had children. One co-worker testified Edwards told her if someone did not kill Darren, she would. Another co-worker testified that a couple of months before Darren's death, Edwards had asked her where Edwards might obtain a gun to kill Darren and Stroud. A benefits counselor at Tyson's Foods testified Edwards had several life insurance policies through her employment, including policies which covered her husband and any children under the age of nineteen, including Darren. In the event Darren died before age nineteen, Edwards would receive $50,000. Darren's nineteenth birthday would have been 24 July 1998.

Sandra Osborne (Osborne) testified that on the morning of 5 July 1998, Edwards went to the mobile home park where Stroud was staying with a friend. Osborne saw Edwards leave the trailer with a hunting knife about twelve to fourteen inches long. Osborne testified Edwards told her, "I smell death tonight." Edwards told Stroud to "get the knife and come on," and "this is going to end once and for all."

Neither defendant presented evidence at the guilt/innocence phase of the trial.

I. Defendant Ronnie Wesley Stroud

A.

[1] Stroud first argues he must be granted a new trial because he was not afforded effective assistance of counsel. He specifically argues his counsel failed to move to sever his case from Edwards' case for trial, failed to object to irrelevant evidence and inadmissible hearsay, and failed to request limiting instructions for evidence admissible against Edwards but not against Stroud.

In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments defendant must move for appropriate relief

pursuant to G.S. 15A-1415."). A motion for appropriate relief is preferable to direct appeal because in order to

> defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. "[O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance." Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of representation.

State v. Buckner, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citations omitted).

However, Stroud states that in light of *McCarver v. Lee*, 221 F.3d 583 (4th Cir. 2000), *cert. denied*, 531 U.S. 1089, 148 L. Ed. 2d 694 (2001), he has raised the issue of ineffective assistance of counsel on direct appeal. In *McCarver*, the Fourth Circuit Court of Appeals dismissed the defendant's petition for writ of habeas corpus, filed after the defendant's motion for appropriate relief had been denied, because the court stated the defendant's claim was barred by N.C. Gen. Stat. § 15A-1419(a)(3). This statute provides for denial of a motion for appropriate relief if "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419(a)(3) (1999). In *State v. Fair*, 354 N.C. 131, 557 S.E.2d 500 (2001), our Supreme Court, agreeing with the analysis set out in *McCarver*, stated that " 'N.C.G.S. § 15A-1419 is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review. Instead, the rule requires North Carolina *courts* to determine whether the particular claim at issue could have been brought on direct review.' " *Fair* at 166, 557 S.E.2d at 525 (quoting *McCarver*, 221 F.3d 583 (4th Cir. 2000)). Our Supreme Court has instructed that "should the reviewing court determine the IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent MAR proceeding." *Fair* at 167, 557 S.E.2d at 525. In order to determine whether a defendant is in a position to adequately raise an ineffective assistance of counsel claim, we stress this Court is limited to reviewing this assignment of error only on the record before us, without the benefit of "information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor[,]" *Buckner* at 412, 527 S.E.2d at 314, that could be pro-

vided in a full evidentiary hearing on a motion for appropriate relief. Nonetheless, Stroud argues this case is one of those rare cases where ineffective assistance of counsel is shown on the face of the record on appeal.

In order to prevail on an ineffective assistance of counsel claim, a defendant must satisfy a two-prong test. "First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, . . . he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error." *State v. Blakeney*, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984) and *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985)). Furthermore, in determining an objective standard of reasonableness in the first prong of the test, the U.S. Supreme Court has stated that because

> of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland at 689, 80 L. Ed. 2d at 694-95 (citations omitted). In the case before us, Stroud is unable, on the face of the record, to meet either of the prongs set out in *Strickland* and adopted by our Supreme Court in *Braswell*.

Stroud first argues his trial counsel did not object to substantial amounts of evidence he claims was admissible against Edwards but not against him, nor did his trial counsel request limiting instructions as to that evidence. However, it is not clear from the record whether the trial court would have granted Stroud's defense counsel's repeated requests to exclude evidence. Consequently, Stroud's counsel, as a tactical measure, may have refrained from continuous objections to evidence in order to avoid alienating the jury. Furthermore, if Stroud's counsel had requested a limiting instruction for the evidence Stroud contends was admissible against Edwards but not against him, Stroud's counsel possibly would have called more attention to the evidence than it warranted.

Stroud next argues his counsel provided ineffective assistance of counsel by not moving to sever his case from Edwards' for trial. However, from the record, this Court is unable to determine if this omission was ineffective, or again a tactical decision. There are drawbacks to any defendants' cases being joined for trial—any evidence admissible against one but not the other will still be heard by the jury, albeit with a limiting instruction. Nonetheless, in the case before us, anticipating much of the evidence might be admissible on other grounds, counsel for Stroud could have reasonably determined that Stroud's position juxtaposed against Edwards' position was advantageous. In any event, we cannot conclusively resolve this issue from the record. Stroud, at this point, has "prematurely asserted" his ineffective assistance of counsel claim and is "not in a position to adequately develop [his IAC claim] on direct appeal." *Fair* at 167, 557 S.E.2d at 525. As both of Stroud's arguments concern potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues.

As this Court is unable to find ineffective assistance of counsel on the face of the record, we dismiss this assignment of error without prejudice to defendant's right to file a motion for appropriate relief.

B.

[2] Stroud next argues the trial court erred by entering judgment on the first degree murder conviction and sentencing Stroud to life imprisonment without parole where the indictment was insufficient to charge first degree murder. A valid indictment must allege all of the elements of the crime sought to be charged. *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). Stroud argues the "short form" murder indictment alleges only the elements of second degree murder; the indictment does not contain the elements of premeditation and deliberation. Therefore, Stroud argues that the indictment was insufficient to charge him with first degree murder.

However, these short form indictments are authorized under N.C. Gen. Stat. § 15-144 (1999) and have been upheld by our Supreme Court after its consideration of *Jones* and *Apprendi* in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), and *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Our

Supreme Court "has consistently held that indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions[,]" and "the short-form indictment is sufficient to charge first-degree murder on the basis of any of the theories, including premeditation and deliberation, set forth in N.C.G.S. § 14-17, which is referenced on the short-form indictment." *Braxton*, at 174, 531 S.E.2d at 437. Therefore, we overrule this assignment of error.

II. Defendant Bonnie Edwards Stroud

A.

[3] Edwards first argues the trial court erred in denying her motion to dismiss the indictment for conspiracy to commit murder on the grounds that under North Carolina common law a husband and wife are deemed to be one entity, and therefore, they cannot enter into a conspiracy with one another.

Edwards first relies on the principle that a "conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way or by unlawful means." *State v. Goldberg*, 261 N.C. 181, 202, 134 S.E.2d 334, 348, *cert. denied*, 377 U.S. 978, 12 L. Ed. 2d 747 (1964), *rev'd on other grounds by News and Observer v. State; Co. Of Wake v. State; Murphy v. State*, 312 N.C. 276, 322 S.E.2d 133 (1984). Furthermore, "if one person merely feigns acquiescence in the proposed criminal activity, no conspiracy exists between the two since *there is no mutual understanding or concert of wills.*" *State v. Hammette*, 58 N.C. App. 587, 589, 293 S.E.2d 824, 826 (1982) (emphasis added). The alleged conspiracy in *Hammette* involved an undercover police officer and the defendant. However, our Court held this conspiracy was not possible since the two "conspirators" did not have a mutual understanding or concert of wills.

In the case before us, Edwards combines this theory with the common law principle that a husband and wife are one entity. As a result, she argues a husband and wife could not have a "concert of wills" to establish a conspiracy. Edwards argues this common law principle has not been abolished either by our General Assembly or our Supreme Court.

Although the issue of a criminal conspiracy between a husband and wife was raised in *State v. Phillips*, 240 N.C. 516, 82 S.E.2d 762 (1954), our Supreme Court remanded the case on other grounds

before reaching "the question whether the statutes liberating the wife from her merged identity with the husband have abrogated the common law rule that one spouse cannot be guilty of conspiracy with the other spouse alone." *Id.* at 521, 82 S.E.2d at 765. *But see Combs v. Com.*, 520 S.E.2d 388 (Va. 1999) (upholding conspiracy conviction between husband and wife for conspiracy to sell their child); *People v. Watkins*, 393 N.Y.S.2d 283 (1977), *aff'd*, 406 N.Y.S.2d 343, *cert. denied*, 439 U.S. 984, 58 L. Ed. 2d 656 (1978) (allowing indictment of criminal conspiracy between husband and wife and holding spousal communication privilege does not apply where both spouses engaged together in criminal activity); *State v. Pittman*, 306 A.2d 500, 502 (N.J. 1973) ("It is completely unrealistic to uphold an anachronism which suggests that in this day and age a married couple is legally incapable of engaging or agreeing to engage in illegal enterprises and therefore do not engage in them."); *People v. Lockett*, 102 Cal. Rptr. 41 (1972); *People v. Martin*, 122 N.E.2d 245, (Il. 1954). In *Com. v. Lawson*, 309 A.2d 391 (Pa. 1973), a Pennsylvania court held a husband and wife can commit criminal conspiracy and concluded there

> is no reason to perpetuate the fiction that husband and wife are one person with one will in the eyes of the law. They are not. They are separate individuals. Each has a distinct personality and a will which is not destroyed by any process of spousal fusion. Each acts separately and should be separately responsible for their conduct. We have so recognized in other areas of the law. Women should not lose their identity—or their responsibility—when they become wives. The status of wife or husband should not relieve any person of one's obligation to obey the law.

Id. at 396. While North Carolina courts have not reached this specific issue of criminal conspiracy among a husband and wife, other jurisdictions have, and those jurisdictions have consistently concluded such a conspiracy can exist.

In *Burton v. Dixon*, 259 N.C. 473, 131 S.E.2d 27 (1963), our Supreme Court upheld an action against a husband and wife for civil conspiracy. The Court cited G.S. 52-10 and G.S. 52-15 as examples of laws where "a married woman may 'sue and be sued in the same manner and with the same consequences as if she were unmarried.' " *Burton* at 477, 131 S.E.2d at 31 (citations omitted). These statutes were later codified as N.C. Gen. Stat. § 52-4 (1999) and N.C. Gen. Stat. § 52-12 (1999), and both these statutes abrogate common law rules. N.C.G.S. § 52-4 provides that

> [t]he earnings of a married person by virtue of any contract for his or her personal service, and any damages for personal injuries, or other tort sustained by either, can be recovered by such person suing alone, and such earnings or recovery shall be his or her sole and separate property.

The common law rule provided that a recovery of the wife in court was the property solely of the husband and, as a result, required the husband to be joined in any action where a wife sought recovery. *See Patterson v. Franklin*, 168 N.C. 75, 84 S.E. 18 (1915) (Clark, C.J. concurring). After the enactment of N.C.G.S. § 52-4, a married person can sue and obtain a recovery completely separate from his or her spouse.

N.C.G.S. § 52-12 states that "[n]o married person shall be liable for damages accruing from any tort committed by his or her spouse, or for any costs or fines incurred in any criminal proceeding against such spouse." The common law rule that a husband was responsible for the torts of his wife because "her legal existence was incorporated in that of her husband" was abrogated by the General Assembly. *Roberts v. Lisenbee*, 86 N.C. 136, 137 (1882).

N.C. Gen. Stat. § 52-5 (1999) provides that "[a] husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried." The "common law disability of the spouses to sue each other in tort actions has been completely removed in North Carolina[.]" *Foster v. Foster*, 264 N.C. 694, 696, 142 S.E.2d 638, 640 (1965). This disability was based on the common law theory where "the husband and wife were considered one,—the legal existence of the wife during coverture being merged in that of the husband, and they were not liable for torts committed by one against the other." *Scholtens v. Scholtens*, 230 N.C. 149, 150, 52 S.E.2d 350, 351 (1949) (citations omitted).

N.C. Gen. Stat. § 52-10 (1999) allows contracts between a husband and wife without restriction, other than being consistent with public policy. This statute also abrogated the common law rule that husband and wife were considered the same entity. While contracts between a husband and wife have always been recognized in equity, at "the common law the husband and wife were regarded as so entirely one as to be incapable of either contracting with, or suing one another." *George v. High*, 85 N.C. 99, 101 (1881). N.C.G.S. § 52-4, N.C.G.S. § 52-5, N.C.G.S. § 52-12, and N.C.G.S. § 52-10 are all "statutes

liberating the wife from her merged identity with the husband[.]" *Phillips* at 521, 82 S.E.2d at 765.

Moreover, the abrogation of the merged identity of husband and wife has clearly been followed in federal courts and is supported by strong public policy. The well-settled modern rule in federal courts is that criminal conspiracy can occur between a husband and wife. *See United States v. Dege*, 364 U.S. 51, 4 L. Ed. 2d 1563 (1960). In *Dege*, the Supreme Court stated that the

> claim that husband and wife are outside the scope of an enactment of Congress in 1948, making it an offense for two persons to conspire, must be given short shrift once we heed the admonition of this Court that "we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule," and therefore do not allow ourselves to be obfuscated by medieval views regarding the legal status of woman and the common law's reflection of them. Considering that legitimate business enterprises between husband and wife have long been commonplaces in our time, it would enthrone an unreality into a rule of law to suggest that man and wife are legally incapable of engaging in illicit enterprises and therefore, forsooth, do not engage in them.

Id. at 52, 4 L. Ed. 2d at 1564 (citations omitted). To hold that criminal conspiracy cannot exist between a husband and wife would require us "to disregard the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country." *Id.* at 54, 4 L. Ed. 2d at 1565.

Edwards argues in her brief that our State's "common law doctrine that a husband and wife are one entity and therefore cannot enter into a conspiracy remains the law today; it has at no point been abolished by statute or by ruling of the North Carolina Supreme Court." However, we note there is no past or present statute in this State that mandates the non-existence of criminal conspiracy between a husband and wife and no case law that establishes that criminal conspiracy cannot exist between a husband and wife. In consideration of the General Assembly's history of abrogating the common law rule of a wife's merged identity with her husband in the enactment of various statutes; along with the holding and reasoning of other jurisdictions, including our United States Supreme Court, on

this issue; and with no North Carolina statute or case law prohibiting the existence of criminal conspiracy among spouses; and in consideration of modern sensibilities and views of the status of women, we hold that such antiquated notions of a woman's identity found in the common law do not extend into an interpretation of the present day crime of criminal conspiracy between a husband and wife. Therefore, a husband and wife can enter into a criminal conspiracy between themselves.

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Dege at 53-54, 4 L. Ed. 2d at 1565 (quoting Holmes, Collected Legal Papers, 187 (1920), reprinting The Path of the Law, 10 Harv L Rev 457, 469 (1897)). Furthermore, as former Chief Justice Walter Clark of our Supreme Court stated in 1912:

> It is true that under the decisions of the courts made in a ruder age, not based upon any statute, but evolved by the judges out of their own consciousness, and termed by euphemism "the common law," a married woman could not recover her earnings, nor for damages to her person, nor for her sufferings, physical or mental, and that compensation for all these things belonged to her husband, upon Petruchio's theory that the wife is the chattel or property of her husband.
>
> . . .
>
> Even statutes have been held obsolete and unenforcible [sic] because of changed conditions and the long lapse of time. Certainly this ought to be true of decisions which rest upon no statute and which are now contrary to every sense of right and opposed to the spirit of our Constitution and of the age in which we live.
>
> . . .
>
> There are of course principles of the common law which are eternally just and which will survive throughout the ages. But this is not because they are found in a mass of error or were enunciated by judges in an ignorant age, but because they are right in them-

> selves and are approved, not disapproved as much of the common law must be, by the intelligence of today.
>
> As, however, common-law views as to the status of women still survive among a few and are still urged as law, it would not be amiss should the General Assembly make such enactment in this regard as that body may deem just and proper. Every age should have laws based upon its own intelligence and expressing its own ideas of right and wrong. Progress and betterment should not be denied us by the dead hand of the Past. The decisions of the courts should always be in accord with the spirit of the legislation of to-day [sic][.]

Price v. Electric Co., 160 N.C. 450, 455-57, 76 S.E. 502, 504-05 (1912) (Clark, C.J., concurring in the result). Because we hold that a husband and wife are capable of a criminal conspiracy, a fundamental principle on which Edwards relies fails. Having found a criminal conspiracy can exist between a husband and wife, this Court need not address Edwards' further argument that the trial court erred in admitting certain evidence under the co-conspirator exceptions. We dismiss this assignment of error.

B.

[4] Edwards next argues the trial court erred both in failing to impanel jurors by a system of random selection which precluded advance knowledge of the identity of the next juror, and in performing part of the jury selection process of separating jurors outside the presence of Edwards and her counsel. Edwards contends this process violated the provisions of N.C. Gen. Stat. § 15A-1214 and entitles her to a new trial. We disagree.

Stroud's counsel filed a motion for individual juror *voir dire* and sequestration of jurors on 22 December 1999 and mailed copies of the motion to all parties involved. The motion was also served on Edwards' counsel. Stroud requested in his motion that the jury pool be divided up during *voir dire* because it "is extremely important in a case such as this for a juror to feel free to candidly and honestly express their perceptions, feelings, biases, and prejudices. It would be impossible for jurors to do this if questioned collectively in panels." Furthermore, Stroud's counsel argued the jurors would be able to "become educated" by answers given and would likely then answer the *voir dire* questions in a manner "so as to be excused from jury service." An order was entered on 11 January 2000 granting the jury

selection procedures requested by Stroud. The record does not show that Edwards objected to the jury selection procedures prior to trial.

N.C.G.S. § 15A-1214(a) provides:

> The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called.

In the case before us, the record shows the total number of people in the potential jury pool was eighty-nine. The trial court divided these jurors into four panels of twenty jurors and one remaining panel of nine jurors. The one panel of nine and three panels of twenty were removed from the courtroom and sequestered in other areas of the courthouse. Edwards was present for the division of the last two groups, and she was present for the entire *voir dire* questioning. At the end of the division into groups, counsel for Edwards stated, upon being questioned by the trial court, "Yes, sir. The Defendant Bonnie Stroud consents to the procedure *that we've agreed upon.*" (emphasis added). Edwards knew the type of jury selection that had been requested and ordered. She observed a portion of the actual division of the jury panel into groups, and not only did she fail to object, but she expressly consented to a procedure her counsel stated she had previously agreed upon.

In general, when "a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). However, in order to challenge the composition of a jury panel, a defendant must satisfy the requirements of N.C. Gen. Stat. § 15A-1211(c) (1999), which provides that a challenge

(1) May be made only on the ground that the jurors were not selected or drawn according to law.

(2) Must be in writing.

(3) Must specify the facts constituting the ground of challenge.

(4) Must be made and decided before any juror is examined.

Edwards failed to follow the procedures set out in N.C.G.S. § 15A-1211(c). Therefore, in "light of defendant's failure to follow the procedures clearly set out for jury panel challenges and [her] failure

to alert the trial court to the challenged improprieties," Edwards has failed to preserve this issue for appeal. *Braxton*, 352 N.C. at 177, 531 S.E.2d at 439.

[5] Edwards further contends this process was performed outside her presence. Again, Edwards failed to object at trial, and we must therefore review this issue under a plain error standard. Edwards has failed to show any prejudice as a result of her not being present. Edwards merely speculates the State may have unfairly completed background checks on potential jurors; however, she offers no evidence of this behavior. Furthermore, Edwards failed to use all of her peremptory challenges and indicated she was satisfied with the jury chosen. A defendant "cannot demonstrate prejudice in the jury selection process if he does not exhaust his peremptory challenges." *State v. Hyde*, 352 N.C. 37, 53, 530 S.E.2d 281, 292 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). *See also* N.C. Gen. Stat. § 15A-1214(h) (1999). Edwards knew in advance what the procedure would be, she observed at least part of the proceedings at trial, and she expressly consented to the procedure afterwards. Edwards' argument that her consent is flawed since it was an after-the-fact consent to a proceeding she did not observe is without merit, in that Edwards admitted she had previously agreed to the system chosen. We overrule this assignment of error.

C.

Edwards argues the "short form" murder and conspiracy indictments violate her right to notice and right to due process under the United States and North Carolina Constitutions. This assignment of error is essentially the same as Stroud's second assignment of error. Accordingly, this Court adopts the same reasoning set out above in (I.)(B.). Therefore, we overrule this assignment of error.

D.

Edwards next argues the trial court erred in granting the State's motion to amend the indictment for conspiracy to add the language of "Now known as Bonnie Edwards" following defendant's name. However, Edwards conceded at oral argument the case law did not support her argument, and she abandoned this argument. Therefore, we dismiss this assignment of error.

No error in the trial of Ronnie Wesley Stroud.

No error in the trial of Bonnie Edwards Stroud.

Judge HUDSON concurs.

Judge JOHN concurs in part and dissents in part with a separate opinion.

JOHN, J., concurring in part, dissenting in part.

I concur in the majority opinion in all respects save that portion of section I.A. dismissing without prejudice defendant Ronnie Wesley Stroud's ineffective assistance of counsel claim. As to that issue, I do not read either *McCarver v. Lee*, 221 F.3d 583 (4th Cir. 2000), *cert denied*, 551 U.S. 1089, 148 L. Ed. 2d 694 (2001), or *State v. Fair*, 552 S.E.2d 568 (2001), as mandating that an ineffective assistance of counsel claim, raised on direct appeal in consequence of a defendant's calculated "decision," *id.* at 593, to do so, be reviewed by *both* the appellate and trial courts. Stroud elected to pursue such claim in this Court without an evidentiary hearing in the trial court, potentially available to him had he filed a motion for appropriate relief in that court, and thus has made the "decision" referred to in *Fair. Id.* at 593. Indeed, he asserts in his appellate brief that "this is a rare case in which specific instances of ineffective assistance of counsel may be found on the face of the record on appeal."

The majority properly considers Stroud's assertion on direct appeal of ineffective assistance of counsel in light of the instant record and concludes he is unable "to meet either of the prongs set out in *Strickland* and adopted by our Supreme Court in *Braswell.*" I join the majority's determination that Stroud's ineffective assistance of counsel claim is without merit. *See Fair* at 594, ("defendant has failed to show that his attorney's conduct rose to the level of unreasonableness or that his attorney's conduct prejudiced defendant's trial," citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984), and, "defendant's ineffective assistance of counsel claims are thus without merit"). For the reasons stated herein, therefore, I respectfully dissent from the majority's dismissal without prejudice of defendant Ronnie Wesley Stroud's ineffective of assistance of counsel claim and vote no error thereon.

REYNOLDS v. REYNOLDS

[147 N.C. App. 566 (2001)]

DAVID P. REYNOLDS, PLAINTIFF v. CYNTHIA W. REYNOLDS, (NOW FLYNN), DEFENDANT

CYNTHIA FLYNN (FORMERLY REYNOLDS), PLAINTIFF v. DAVID P. REYNOLDS, DEFENDANT

No. COA00-383

(Filed 18 December 2001)

1. Contempt— slow payment of child support—suspended jail sentence—civil rather than criminal

A contempt order arising from a child custody and support action was civil rather than criminal where the trial court imposed a thirty-day active jail sentence "suspended" upon the posting of a cash bond, the payment of interest, the payment of attorney's fees, and the timely payment of future child support due under prior orders. The contempt is civil if the relief is imprisonment conditioned on the performance of certain acts such that the contemnor may avoid or terminate imprisonment by performing these acts, and criminal if the relief is imprisonment limited to a definite time without the possibility of avoidance by performance of a required act or if the relief is imprisonment suspended for a term of probation, with one of the conditions being the performance of certain acts.

2. Contempt— civil—compliance with prior orders before hearing—authority of court

A trial court was without authority to adjudicate a child support defendant in civil contempt where defendant fully complied with the court's previous orders between the time he was served with a show cause notice and the hearing. A trial court does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the show cause notice. However, this does not preclude an adjudication of criminal contempt.

3. Child Support, Custody, and Visitation— attorney fees—findings

The trial court did not err by ordering a contempt defendant to pay plaintiff's attorney fees in the underlying child custody and support action where the initial action encompassed custody and support, rather than support only, so that the court was not required to find that defendant had refused to provide adequate child support; the court determined that the fee was reasonable

and appropriate; and the court found that plaintiff was an interested party acting in good faith who did not have sufficient funds to employ counsel.

4. Contempt— civil—failed action—attorney fees

An award of attorney fees was proper in a failed contempt action arising from the slow payment of child support where the contempt failed due to defendant's compliance with previous court orders after the show cause notice was issued and before the contempt hearing.

Judge JOHN dissenting in part and concurring in part.

Appeal by plaintiff/defendant David P. Reynolds from order filed 30 August 1999 by Judge William G. Jones in Mecklenburg County District Court. Heard in the Court of Appeals 30 January 2001.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., for plaintiff-appellee Cynthia Flynn.

Helms, Cannon, Henderson & Porter, P.A., by Thomas R. Cannon and Christian R. Troy, for defendant-appellant David P. Reynolds.

GREENE, Judge.

David P. Reynolds (Defendant) appeals an order filed 30 August 1999 (the 30 August 1999 Order) in favor of Cynthia Flynn (Plaintiff) adjudicating Defendant in criminal contempt and ordering him to pay Plaintiff's attorney's fees in the sum of $65,000.00.

Plaintiff and Defendant were married on 2 July 1983. One child, Audrey Louise Reynolds (Audrey), was born of Plaintiff's and Defendant's marriage on 20 January 1984. The parties subsequently separated on 6 May 1991 and divorced on 2 November 1992. On 1 October 1992, the parties entered into a binding Separation Agreement and Property Settlement (the Agreement). The Agreement provided that Defendant was to pay Plaintiff $2,000.00 per month "for the partial maintenance of [Audrey] to be paid on the first day of each month." In addition, pursuant to the Agreement, the parties were to "have joint custody of [Audrey]." Audrey, however, would "reside primarily with [Plaintiff], subject to reasonable visitation by [Defendant]" as provided in the Agreement.

Plaintiff filed an action on 25 October 1993 against Defendant seeking specific performance of the Agreement and damages for

Defendant's breach of the Agreement due to his failure to: abide by a visitation schedule; give Plaintiff reasonable notice of his visitation; and pay the $2,000.00 per month in child support. An order was entered on 28 April 1994 ordering Defendant to immediately deliver to Plaintiff the sum of $6,000.00 to bring current his child support arrears and "in the future, to make his child support payments on time, directly to [Plaintiff]." The trial court filed a second order on 3 May 1994, with the consent of the parties, directing Defendant to pay Plaintiff the cash sum of $2,000.00 per month for the support of Audrey. On 5 May 1999, the trial court filed a consent order from a 17 February 1998 hearing resolving pending claims for specific performance, custody, visitation, child support, and Plaintiff's contempt motion of 7 October 1997. This order awarded legal custody of Audrey to Plaintiff, as well as provided a visitation schedule for Defendant, and directed Defendant to: bring current all obligations for child support through the month of April 1999; maintain medical insurance for the benefit of Audrey and pay uninsured medical, dental, and drug bills incurred on behalf of Audrey; and "if a contempt citation [was] successfully brought by either party against the other, the losing party [would] be required to pay the reasonable counsel fees of the prevailing party."

After the entry of the trial court's orders, Defendant remained consistently delinquent in his payments of child support to Plaintiff. On 5 April 1999, Plaintiff filed a motion for contempt alleging Defendant: was four months delinquent in his child support payments; had failed to provide medical insurance coverage for Audrey; had failed to pay uninsured medical, dental, and drug expenses incurred by Audrey; had the ability to comply with all orders entered; had full knowledge and understanding of the requirements of the orders; and had refused and continued to refuse to comply with the terms of the order. After Plaintiff filed the motion for contempt for non-payment of child support, Defendant paid the cash child support arrearages due through April 1999.

On 30 August 1999, the trial court found, in pertinent part, that:

> 16. [Defendant] offered no legitimate excuse for his non-payment of cash child support on repeated occasions from 1993 through 1999.
>
> 17. [Defendant] has stipulated that he has the financial capability of making an attorney['s] fee and court cost payment as may

be ordered by this [c]ourt without the necessity of the [c]ourt examining economic data related to [Defendant].

18. [Defendant] has liquid assets approaching $1 million as of the date of this hearing, in addition to his real estate holdings, automobiles, and tangible property.

19. [Defendant's] failure to comply with the terms of the [o]rders is willful and deliberate.

20. At all times since entry of the [o]rders, [Defendant] has had the ability to comply with the [o]rders.

21. [Defendant] has at all times been fully aware of the [o]rders entered by this [c]ourt and has had full knowledge and understanding of the requirements of the [o]rders.

22. Beginning in October of 1993 and continuing into April of 1999, [Defendant] has refused, repeatedly, to comply with the terms of the [c]ourt [o]rders related to cash child support. . . .

. . . .

25. There has never been a question about [Defendant's] ability to pay; he has simply not paid from time to time as a means of punishing and/or harassing [Plaintiff].

. . . .

32. William K. Diehl, Jr. [(Diehl)] . . . has represented [Plaintiff] throughout these proceedings.

. . . .

34. Beginning in 1993, when [Defendant] stopped complying with [the Agreement] to pay child support through June 17, 1999, [Diehl's] firm has submitted billings to [Plaintiff] in the total amount of $71,782.50 representing time expenditures by [Diehl] of 126.4 hours; 132 hours by his associate Katherine Line Kelly; and 96 hours by paralegals. Furthermore, the firm advanced costs totaling $2,601.25.

. . . .

36. [Diehl] is an experienced lawyer, having practiced for thirty years. He is an expensive lawyer, charging $500.00 per hour for his time. His associate . . . billed between $90.00 and $150.00 per hour. Paralegal time was billed at $75.00 to $85.00 per hour.

The [c]ourt finds the hourly rates charged by [Diehl], his associate and the paralegals are reasonable, and consistent with charges made by lawyers of comparable skill and ability in this community.

37. [Defendant's attorney], like [Diehl], is an experienced practitioner and has appeared before this [c]ourt on many occasions. [Plaintiff] is entitled to have counsel of the caliber of [Diehl], to meet [Defendant] and his attorney on an equal footing.

38. The value of [Diehl's] service [is] no less than $65,000.00.

. . .

39. The [c]ourt obtained from counsel for [Plaintiff and Defendant] a stipulation that of the $65,000.00 award, $10,000.00 represents time related to the contempt portion of this case and the remaining $55,000.00 to other issues (custody and visitation).

The trial court then concluded:

2. Past willful disobedience of a court [o]rder for child support is punishable as criminal contempt.

3. Beginning in 1993, and continuing through the first four months of 1999, [Defendant] has repeatedly violated court [o]rders entered in this case requiring him to timely pay cash child support.

4. At the times [Defendant] has not paid cash child support, he has had the ability to make the payments, but has chosen, intentionally, not to do so as a form of harassment and punishment directed to [Plaintiff].

5. [Defendant] did not make child support payments due on the 1st of January, February and March of 1999 and the 1st of July 1998.

6. [Defendant] offered no legal excuse for his non-payment and there is none.

7. After [Plaintiff] filed her most recent Motion for Contempt, [Defendant] made the cash child support arrearage payments. These payments eliminate the option of finding [Defendant] in civil contempt of court, but do not excuse his criminal contempt.

8. [Defendant] is guilty beyond a reasonable doubt of criminal contempt of the [o]rders of this [c]ourt requiring him to timely make cash child support payments.

9. Interest is due . . . from the due date of each $2,000.00 per month child support payment and interest arrearages with regard to payments due July 1, 1998, January 1, 1999, February 1, 1999, March 1, 1999, until the date of payment total $212.50 and [Plaintiff] is entitled to a judgment against [Defendant] in that amount.

10. [Plaintiff] does not have sufficient funds with which to employ and pay counsel with regard to the handling of this case commencing in 1993 and continuing through the contempt hearing in July of 1999.

. . . .

13. [Plaintiff] is an interested party who has acted in good faith in bringing this action and in prosecuting the Motion for Contempt.

14. Counsel for [Plaintiff] has acted skillfully and considering the work performed, the nature of the task imposed, the result obtained, a total charge of $65,000.00 to be paid by [Defendant] to [Diehl] and his firm is, in all respects, reasonable and appropriate.

15. [Defendant] has the ability to immediately make the attorney['s] fee award as required by this [o]rder.

16. By stipulation, the parties agree that $55,000.00 of the award relates to the handling of the custody, child support aspects of the case and $10,000.00 to the Motion to hold [Defendant] in contempt of [c]ourt.

17. [Defendant's] conduct requires the [c]ourt to impose security to ensure that in the future cash child support payments are paid in a timely fashion.

The trial court then adjudged Defendant guilty of criminal contempt and ordered an active sentence of thirty days in the Mecklenburg County Jail suspended on the following conditions: Defendant's posting of a cash bond or security of at least $75,000.00 to secure and assure the timely payment of future cash child support; Defendant immediately paying Plaintiff's attorney the sum of $212.52, "representing interest on the four delinquent child support payments";

Defendant timely paying each cash child support amount due; and Defendant immediately paying $10,000.00 in attorney's fees. The 30 August 1999 Order also ordered Defendant to pay to Diehl and his firm "the sum of $55,000.00[,] representing legal services rendered to [Plaintiff] for the custody/child support aspects of this proceeding and not including time related to [Defendant's] contempt."

The issues are whether: (I) the 30 August 1999 Order of contempt is civil or criminal; (II) Defendant can be found in civil contempt although he had paid the child support arrearages due under previous orders of the court prior to the court hearing on contempt; and (III) (A) the trial court's award of attorney's fees for the underlying child custody and support action was supported by the findings of fact; and (B) the trial court's award of attorney's fees in the contempt action was proper.

I

Civil or Criminal Contempt

[1] Whether an order constitutes criminal or civil contempt depends on the "character of the [actual] relief" ordered by the trial court, not on the classification selected by the trial court. *Bishop v. Bishop*, 90 N.C. App. 499, 505, 369 S.E.2d 106, 109 (1988). If the relief is imprisonment and the imprisonment is conditioned on the contemnor's performance of certain acts required by the court such that the contemnor "may avoid or terminate his imprisonment by performing" these acts, the contempt is civil in nature. *Id.* If the relief is imprisonment and the imprisonment is "limited to a definite period of time without possibility of avoidance by the contemnor's performance of an act required by the court," the contempt is criminal in nature. *Id.* A contempt is also criminal in nature if the relief is imprisonment and the imprisonment is suspended for a term of probation, supervised or unsupervised,[1] and *one* of the conditions of the suspended sentence (probation) requires the performance of certain acts by the contemnor to comply with the prior orders of the court. *Id.* at 506, 369 S.E.2d at 110. This is so because a determinate term of probation places the contemnor "under numerous disabilities that he cannot escape by [simply] complying with the dictates of the prior [court] orders." *Hicks v. Feiock*, 485 U.S. 624, 639 n.11, 99 L. Ed. 2d 721, 736 n.11 (1988). Those disabilities could include, for example, the require-

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1. "The court may place a person on supervised or unsupervised probation." N.C.G.S. § 15A-1341(b) (1999).

ment that the contemnor "[c]ommit no criminal offense," N.C.G.S. § 15A-1343(b)(1) (1999), and/or "[r]emain gainfully and suitably employed," N.C.G.S. § 15A-1343(b)(7) (1999).

In this case, the trial court ordered the imposition of a thirty-day sentence "suspended" on the following conditions: the posting of a $75,000.00 cash bond or security; the payment of interest of $212.52; the payment of $10,000.00 in attorney's fees; and the timely payment of each future child support amount due under the trial court's prior orders. The trial court did not order Defendant be placed on probation or placed under any "disabilities." This order, therefore, constitutes civil contempt because Defendant was permitted to avoid the thirty-day imprisonment upon the performance of four delineated acts.

II

Civil Contempt

[2] A trial court may impose criminal contempt, N.C.G.S. § 5A-11(a)(3) (1999), or civil contempt, N.C.G.S. § 5A-21(b) (1999), if an individual willfully disobeys a court order. A trial court, however, does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court. *Hudson v. Hudson*, 31 N.C. App. 547, 551, 230 S.E.2d 188, 190 (1976). Compliance after a party is served with a motion to show cause why he should not be held in contempt of court does not, however, preclude an adjudication of criminal contempt. *See* W. Gregory Rhodes, Note, *The Distinction Between Civil and Criminal Contempt in North Carolina*, 67 N.C. L. Rev. 1281, 1290 n.87 (1988); *see, e.g.*, *Hudson*, 31 N.C. App. at 551, 230 S.E.2d at 189-90.

In this case, Defendant was in noncompliance with the previous orders of the trial court at the time he was served with a notice to appear at a contempt hearing. At some point prior to the hearing he fully complied with the previous orders, so that at the time of the contempt hearing, he was not in violation of any court order. Accordingly, the trial court was without authority to adjudicate Defendant in civil contempt of court and the order of contempt must be vacated.[2] *See*

2. As the trial court was without authority to adjudicate Defendant in civil contempt of court, it does not follow the contempt is criminal in nature. The contempt is criminal only if it qualifies as such under the teachings of *Bishop*, and in this case, as discussed in part I of this opinion, it does not.

Hudson, 31 N.C. App. at 551, 230 S.E.2d at 190. Therefore, all of the conditions for Defendant purging himself of civil contempt must fail, except the order to post a cash bond or security in the amount of $75,000.00, *see Parker v. Parker*, 13 N.C. App. 616, 617-18, 186 S.E.2d 607, 608 (1972); *see also* N.C.G.S. § 50-13.4(f)(1) (1999), and the $10,000.00 award of attorney's fees in the contempt action as discussed in part III(B) of this opinion.

III

Attorney's Fees

A

Custody and Support

[3] Defendant next assigns error to the trial court requiring him to pay Plaintiff's attorney's fees in the underlying custody and support action on the grounds (1) there is no finding by the trial court he "failed to provide adequate support" and (2) there is no finding by the trial court that the fees are reasonable.[3] We disagree.

Prior to an award of attorney's fees in an action for custody or in an action for custody and support, the trial court must find the interested party was acting in good faith and had "insufficient means to defray the expense of the suit." *Lawrence v. Tise*, 107 N.C. App. 140, 153, 419 S.E.2d 176, 184 (1992); N.C.G.S. § 50-13.6 (1999). Additionally, the trial court must make a finding of "reasonableness" regarding "the nature and scope of the legal services rendered and the skill and time required." *Warner v. Latimer*, 68 N.C. App. 170, 176, 314 S.E.2d 789, 793 (1984). The trial court is not required to make the additional finding that " 'the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action' " unless the action is one for support only. *Lawrence*, 107 N.C. App. at 153, 419 S.E.2d at 184 (citation omitted); N.C.G.S. § 50-13.6.

In this case, the initial action was one encompassing custody and support. Therefore, the trial court was not required to make a finding

3. Defendant also argues in his brief to this Court that the trial court had no authority to "make payment [of the $55,000.00 attorney's fees] a condition of [Defendant] purging himself of contempt." Our review of the trial court's order, however, does not reveal the trial court imposed the payment of the $55,000.00 in attorney's fees as a condition on Defendant's release, rather that the payment of attorney's fees for the underlying child custody and support action was separate and distinct from the contempt issue.

that Defendant had refused to provide adequate child support for Audrey. The trial court determined the fee award was "reasonable and appropriate" and there are numerous findings supporting that determination relating to the skill and expertise of Plaintiff's counsel and Plaintiff's entitlement "to have counsel of the caliber of [Diehl] to meet [Defendant] and his attorney on an equal footing." Moreover, the trial court found Plaintiff, an interested party, acted in good faith in bringing the action and did not have "sufficient funds with which to employ and pay counsel with regard to the handling of this case commencing in 1993 and continuing through the contempt hearing in July of 1999." Accordingly, the trial court did not err in ordering Defendant to pay Plaintiff's attorney's fees of $55,000.00 in the underlying child custody and support action.

B

Contempt

[4] As a general rule, attorney's fees in a civil contempt action are not available unless the moving party prevails. *Smith v. Smith*, 121 N.C. App. 334, 339, 465 S.E.2d 52, 55 (1996). Nonetheless, in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing, an award of attorney's fees is proper. *Hudson*, 31 N.C. App. at 552, 230 S.E.2d at 190. In either event, an award for attorney's fees is only proper upon a finding by the trial court that: (1) the interested party was acting in good faith, *Lawrence*, 107 N.C. App. at 153, 419 S.E.2d at 184; (2) the interested party had insufficient means to defray the expense of that suit, *id.*; and (3) the attorney's fees were reasonable, *Warner*, 68 N.C. App. at 176, 314 S.E.2d at 793.

In this case, the reason the contempt failed is because Defendant complied with the previous court orders after the notice to show cause was issued and prior to the contempt hearing. The trial court did, however, make findings that: (1) Plaintiff was acting in good faith; (2) Plaintiff had insufficient means to defray the expense of the suit; and (3) the attorney's fees were reasonable. Accordingly, the trial court's award for attorney's fees in the contempt action was proper.

In summary, the order of contempt entered by the trial court is one for civil contempt and is vacated. The order of attorney's fees in the underlying child custody and support action and in the contempt

action is affirmed, as well as the order for Defendant to post a cash bond or security.

Vacated in part, and affirmed in part.

Judge TYSON concurs.

Judge JOHN concurs in part and dissents in part with a separate opinion.

JOHN, J., dissenting in part; concurring in part.

Plaintiff Cynthia Reynolds Flynn (plaintiff) contends, *inter alia*, that defendant David P. Reynolds's (defendant) "appeal is not within the jurisdiction of this Court and should be dismissed." As to defendant's appeal of that part of the trial court's order adjudicating him in contempt, I agree and vote to dismiss said appeal. Therefore, I respectfully dissent from those portions of the majority opinion treating the court's adjudication as civil, as opposed to criminal, contempt. However, defendant's appeal of the trial court's discrete award of $55.000.00 as counsel fees "in the underlying custody and support action" appears to be properly before this Court, and I concur in the portion of the majority opinion affirming that award.

District court orders adjudicating criminal contempt are appealable to the superior court, not the Court of Appeals, *see* N.C.G.S. § 5A-17 (1999) ("appeal from a finding of [criminal] contempt by a judicial official inferior to a superior court judge is by hearing *de novo* before a superior court judge"), which lacks jurisdiction to entertain the appeal, *see Michael v. Michael*, 77 N.C. App. 841, 843, 336 S.E.2d 414, 415 (1985), *cert. denied*, 316 N.C. 195, 341 S.E.2d 577 (1986) (G.S. § 5A-17 "vests exclusive jurisdiction in the superior court to hear appeals from [district court] orders holding a person in criminal contempt"). However, appeals in district court civil contempt matters are directly to this Court. *See* N.C.G.S. § 5A-24 (1999)("[a] person found in civil contempt may appeal in the manner provided for appeals in civil actions").

The distinction between criminal and civil contempt has been characterized by our Supreme Court as "hazy at best." *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1986). Another court observed that contempt proceedings "occup[y] what may be termed the twilight zone between civil and criminal cases." *Andreano v.*

Utterback, 202 Iowa 570, 571, 210 N.W. 780, 780 (1926). The disagreement of the panel regarding the present case indicates it is no exception.

Our Supreme Court has observed that

> [a] major factor in determining whether contempt is criminal or civil is the purpose for which the power is exercised.

O'Briant, 313 N.C. at 434, 329 S.E.2d at 372. Therefore,

> criminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way. . . . Civil contempt, on the other hand, is employed to coerce disobedient defendant into complying with orders of [the] court. . . .

Brower v. Brower, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984).

Accordingly, civil contempt is not a form of punishment, *Jolly v. Jolly*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); rather its purpose is remedial, *i.e.*, "to coerce a defendant into compliance" with the court's order, *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985). Civil contempt thus is "a civil remedy to be utilized exclusively to enforce compliance with court orders," *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142, and the contemnor may terminate the penalty imposed "and discharge himself at any moment by doing what he had previously refused to do," *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418, 442, 55 L. Ed. 797, 806 (1911); *see also* N.C.G.S. § 5A-21(b) (1999) ("person found in civil contempt may be imprisoned as long as the civil contempt continues"). Criminal contempt, however, is punitive in purpose and the contemnor "cannot undo or remedy what has been done," *Gompers*, 221 U.S. at 442, 55 L. Ed. at 806, nor "shorten the term by promising not to repeat the offense," *id.*

Moreover, as acknowledged by the majority, although

> specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's *purging* himself would constitute civil relief,

Bishop v. Bishop, 90 N.C. App. 505, 506, 369 S.E.2d 106, 110 (1988) (emphasis added), a determinate suspended sentence, notwithstanding that it is accompanied by conditions, comprises criminal punish-

ment and is "not equivalent to a conditional sentence that would allow the contemnor to avoid or purge . . . sanctions," *Hicks ex. rel. Feiock v. Feiock*, 485 U.S. 624, 639 n.11, 99 L. Ed. 2d 712, 736 n.11 (1988); *see also id.* at 637, 99 L. Ed. 2d at 735 ("many convicted criminals [receive a suspended sentence and are placed on probation] for the purpose (among others) of influencing their behavior. [Yet,] . . . as long as [the criminal] meets the conditions of his informal probation, he will never enter the jail. Nonetheless, if the sentence is a determinate one, then the punishment is criminal in nature . . . .").

Finally,

> [i]n contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments upon a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order.

Id. at 635, 99 L. Ed. 2d at 734 (quoting *Gompers*, 221 U.S. at 443, 555 L.Ed. at 806).

Turning to the trial court's order at issue in light of the foregoing authorities, I initially deem it significant that the court imposed a determinate thirty-day term, *see id.* at 637, 99 L. Ed. 2d at 735, and suspended that sentence upon conditions, *see id.* at 639 n. ll, 99 L. Ed. 2d at 736 n.11, as opposed to ordering an indefinite period of incarceration terminated upon defendant's compliance with the court's previous orders, *i.e.*, allowing defendant, like the defendant in *Bishop*, *see* 90 N.C. App. at 506, 369 S.E.2d at 110, to "purge" himself by performance of certain acts such as payment of the arrearage, *see id.*, an act accomplished herein by defendant in advance of the contempt adjudication.

The distinction is critical. Upon a contemnor's "purging" himself of contempt, the contempt judgment is "lifted," *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142, or terminated. However, compliance with a suspended sentence simply ensures evasion of incarceration, but neither "lifts" nor terminates the sentence. *See id.* at 93, 265 S.E.2d at 143 (revocation of suspended sentence "generally spells commencement or resumption of a determinative, punitive sentence"); *see also Bishop*, 90 N.C. App. at 505, 369 S.E.2d at 109 (imprisonment for contempt "is punitive and thus criminal if the sentence is limited to a definite period of time without possibility of avoidance by contemnor's

performance of an act required by the court"). Thus defendant herein may not "shorten the term," *Gompers*, 221 U.S. at 442, 55 L. Ed. at 806, of the suspended sentence by compliance with its terms, but may merely evade revocation thereof, *see Jolly*, 300 N.C. at 93, 265 S.E.2d at 143.

Next, it is pertinent that the trial court characterized defendant's behavior as criminal contempt, *see Watkins v. Watkins*, 136 N.C. App. 844, 846, 526 S.E.2d 485, 486 (2000) (trial courts "urge[d] to identify whether contempt proceedings are in the nature of criminal contempt . . . or civil contempt"), concluded that defendant was "guilty beyond a reasonable doubt of criminal contempt," *see* N.C.G.S. § 5A-15 (f) (1999) (in criminal contempt proceeding, "[t]he facts must be established beyond a reasonable doubt"), and acknowledged it was unable to hold defendant in civil contempt by virtue of his pre-hearing compliance with prior support orders, *see Jolly*, 300 N.C. at 92, 265 S.E.2d at 142 (civil contempt order "lifted as soon as [the contemnor] decides to comply with the order of the court").

Moreover, the order at issue and the transcript of the proceedings herein reflect the trial court's clear and significant frustration with Reynolds' repeated past acts of wilful nonpayment causing multiple hearings which were unnecessary, time consuming (the instant record comprises one hundred eighty-four pages in addition to a transcript of one-hundred eighty-six pages, a one hundred twenty-five page deposition, and seventy-one exhibits), and without doubt impeded the administration of justice. *See O'Briant*, 313 N.C. at 434-35, 329 S.E.2d at 372 ("[c]riminal contempt is . . . where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice," and "[i]t is clear that the purpose of the contempt judgments [at issue] was to punish [] disobedience of the court's orders . . . , acts or omissions already accomplished which tended to interfere with the administration of justice"), and N.C.G.S. § 5A-1(a)(3) (1999) (criminal contempt is "wilful disobedience of, [or] resistance to . . . a court's lawful process, [or] order . . .").

For example, the court noted in its order that Reynolds "offered no legitimate excuse for his non-payment of cash child support on repeated occasions from 1993 through 1999," that he had "at all times" since the entry of the court's respective orders "the ability to comply with th[ose] orders," including "liquid assets approaching $1 million as of the date of th[e] hearing" in addition to real and personal property holdings, that his conduct "ha[d] been contemptuous," and that

he had failed to pay from time to time simply "as a means of punishing and/or harassing Flynn."

In addition, in the course of entering its judgment, the court addressed certain comments to Reynolds directly, including the following:

> . . . your conduct has been particularly egregious. I see a lot of people who don't pay child support, often for no good reason, but never before have I seen someone who had the ability to pay so easily and was so consistently—and I think consistently is the word—delinquent, and deliberately delinquent for an ulterior reason.

Moreover, I read the trial court's imposition of the maximum statutory term for criminal contempt, *see* N.C.G.S. § 5A-12(a) (1999) ("a person who commits criminal contempt . . . is subject to . . . imprisonment up to 30 days"), *cf.* N.C.G.S. § 5A-21(b)(b1)(b2) (1999) ("total" period of imprisonment for civil contempt "shall not exceed 12 months"), albeit suspended, *see Hicks*, 485 U.S. at 639 n.11, 99 L. Ed.2d at 736 n. 11 . . . , as signaling the court's punitive as opposed to remedial intent.

Turning to the conditions imposed upon the trial court's suspension of its thirty day sentence, both the assessment of counsel fees in the amount of $10,000.00 and of interest upon defendant's four delinquent child support payments in particular appear to be directed at and in punishment of defendant's past failure to pay child support, *see O'Briant*, 313 N.C. at 434, 329 S.E.2d at 372, and *Mauney v. Mauney*, 268 N.C. 254, 256, 150 S.E.2d 391, 393 (1966) (quoting *Dyer v. Dyer*, 213 N.C. 634, 635, 197 S.E. 157 (1938) ("criminal contempt is . . . where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice"). Regarding counsel fees, moreover, the parties had previously agreed in the 5 May 1999 consent order that

> if a contempt citation is successfully brought by either party against the other, the losing party shall be required to pay the reasonable counsel fees of the prevailing party.

See PCI Energy Services v. Wachs Technical Services, 122 N.C. App. 436, 442, 470 S.E.2d 565, 568 (1996) (counsel fees properly awarded in contempt proceeding where earlier consent judgment "contained an express provision" allowing recovery of costs associated with enforcing the judgment).

Contrary to the majority's assertion, moreover, the requirements that defendant post and maintain a cash bond as well as make each child support payment when due constitute enduring "disabilities that he cannot escape," *Hicks*, 485 U.S. at 639 n.11, 99 L. Ed. 2d at 736 n.11, *i.e.*, conditions which remain imposed upon defendant in consequence of the trial court's suspended sentence. Indeed, citing *Bishop*, 99 N.C. App. at 506, 369 S.E.2d at 110, the majority correctly states that "[a] contempt is [] criminal in nature if the relief is imprisonment and the imprisonment is suspended . . . , and *one* (emphasis in majority opinion) of the conditions of the suspended sentence [] requires the . . . contemnor to comply with the prior orders of the court" during the suspended sentence. To the extent that compliance with previous court orders may be deemed "remedial," moreover, "where both civil and criminal relief . . . are imposed," *id.* at 505, 369 S.E.2d at 109, " 'the criminal feature of the order is dominant and fixes its character' " upon the proceeding, *id.* at 505-06, 369 S.E. 2d at 109-10 (citing *Hicks*, 485 U.S. at 638 n. 10, 99 L. Ed.2d at 736 n.10 (in turn quoting *Nye v. United States*, 313 U.S. 33, 42-43, 85 L. Ed. 2d 1172, 1177 (1940))).

In short, I conclude that defendant's appeal of that portion of the trial court's order adjudicating him in criminal contempt is indeed criminal in nature and therefore not within the jurisdiction of this Court, *see Michael*, 77 N.C. App. at 843, 336 S.E.2d at 415, and vote to dismiss said appeal. However, defendant's appeal of that separate portion of the trial court's order awarding plaintiff $55,000.00 as counsel fees in the custody and support action appears to be properly before this Court, and I vote to affirm said award.

THE NORTH CAROLINA STATE BAR v. ROBERT M. TALFORD, ATTORNEY

No. COA00-952

(Filed 18 December 2001)

1. Attorneys— discipline by State Bar—appeal—standards

The State Bar's discipline of attorneys is governed by N.C.G.S. § 84-28, with the standard of proof in disciplinary and disbarment proceedings being clear, cogent, and convincing evidence. A finding of misconduct allows the Disciplinary Hearing Commission of the State Bar to impose sanctions which include

admonition, private reprimand, public censure, suspension of law license, or disbarment. Appellate review of State Bar orders is under N.C.G.S. § 84-28(h), which allows appeal on matters of law and legal inference. The appellate court does not sit as fact-finder and may only review for abuse of discretion where no issue of legal interpretation is raised, and the review is under the whole record test. In this case, the appellate court must determine whether the DHC's findings were supported by substantial evidence in the whole record, whether its findings support its conclusions of law, and whether the DHC abused its discretion in ordering defendant disbarred.

2. Attorneys— mismanagement of trust account—sufficiency of evidence

There was sufficient evidence for the Disciplinary Hearing Commission of the State Bar to conclude that defendant violated N.C. Revised Rules of Professional Conduct 1.15, which deals with trust accounts, where defendant testified that he did not reconcile his trust account, had not maintained accounting records, had commingled his own and his clients' money, had not always deposited settlement checks or paid creditors promptly, that there was money in his trust account of unknown origin, and that he had not escheated any of this money to this State.

3. Attorneys— trust account—management grossly negligent

An assignment of error to a State Bar Disciplinary Hearing Commission conclusion that defendant was grossly negligent in managing his trust account was overruled because the conclusion provided no independent basis for imposition of sanctions and there was substantial evidence that defendant violated the Rules of Professional Conduct.

4. Attorneys— disbarment—mismanagement of trust account

The Disciplinary Hearing Commission of the State Bar abused its discretion by disbarring an attorney who mismanaged his trust account where there were no findings or conclusions that established that any individual client was harmed, defendant's violations of the Rules of Professional Conduct did not evince an intent to defraud the court and did not affect proceedings in court, and the DHC's order made no findings that the defendant's actions threatened harm to the legal profession or to the administration of justice. No reported cases similar to this were found

in which an attorney was disbarred and lesser sanctions have been imposed for far more serious conduct.

Appeal by defendant from order entered 14 March 2000 by the North Carolina State Bar Disciplinary Hearing Commission in Wake County. Heard in the Court of Appeals 6 June 2001.

Clayton W. Davidson, III and Carolin Bakewell for plaintiff-appellee.

Irving Joyner for defendant-appellant.

BIGGS, Judge.

Robert M. Talford (defendant) appeals from an order entered by the Disciplinary Hearing Commission of the North Carolina State Bar (DHC) disbarring him from the practice of law. We affirm in part, and reverse and remand in part.

Defendant practiced law for over twenty years in the Charlotte area, having received a license to practice in 1976. His practice focused primarily on the representation of plaintiffs who filed claims for disability settlements such as workers' compensation, social security disability, and medical claims arising from accidents. Defendant operated his practice from a small house in Charlotte, and had no permanent employees. He had maintained a trust account since 1978. In 1998, the North Carolina State Bar (State Bar) audited defendant's trust account, and discovered discrepancies and irregularities in his bookkeeping practices.

On 19 October 1999 the State Bar filed a complaint against defendant, alleging the following misconduct:

1. That defendant failed to reconcile his trust account at least quarterly;

2. That defendant failed to maintain adequate records to determine whose funds were deposited into the account;

3. That defendant commingled his own funds with client funds;

4. That defendant was paying office expenses and personal expenses from the trust account in order to avoid having the funds seized by the Internal Revenue Service;

5. That defendant appropriated to his own use funds received in a fiduciary capacity, thus committing a criminal act re-

flecting adversely on his honesty, trustworthiness, and fitness as a lawyer;

6. That defendant entered into an unfair business transaction with a client;

7. That defendant engaged in willful attempts to evade or defeat payment of federal taxes, behavior involving dishonesty, fraud, deceit, or misrepresentation;

8. That defendant overpaid himself attorney's fees;

9. That defendant disbursed payment of client settlements before the settlement checks were received;

10. That defendant failed to pay certain of his clients' medical fees in a timely manner;

11. That defendant appropriated client funds to his own use; and

12. That defendant was grossly negligent in the management of his trust account, and benefitted from his own gross negligence.

At a hearing before the DHC on 25 February 2000, Edward White (White), an investigator with the State Bar, testified concerning his investigation of defendant's record keeping and accounting habits. White testified about defendant's business records in relation to some ten to fifteen clients. This evidence established that defendant had not maintained a financial ledger or other written record of his income and expenses, and had not reconciled his trust account on a quarterly basis, as required by North Carolina Revised Rules of Professional Conduct 1.15-1 and 1.15-2. White began his audit with defendant's records for 1994, at which time defendant's trust account balance was approximately $37,000. Defendant's records did not document the source of all of this money, nor whether any of this amount was owed to someone else. White termed this money "unidentified funds."

Defendant testified that none of his clients had ever claimed any of the "unidentified" funds in his trust account, that all his clients had been paid what was due to them, and that he had never misappropriated any client's funds. He contended that it was necessary to have some of his own money in the trust account to avoid bank charges, and prevent any checks from being returned for insufficient funds. Defendant acknowledged failing to regularly reconcile his trust account, but testified that he kept a sufficient "visual reconciliation"

to make this unnecessary. Defendant also conceded that he did not maintain a ledger or other written records for his trust account. He offered explanations for some of the bookkeeping discrepancies, but was unable to account for many of them.

The State Bar did not present evidence that any client or creditor had complained to the State Bar about defendant, nor that any client had failed to receive monies owed to him.

The DHC issued an order on 14 March 2000. Of the allegations in the complaint summarized above, the DHC dismissed numbers four, five, six, and seven, finding that they were not proven by clear, cogent, and convincing evidence. The allegations dismissed were those that alleged misappropriation of client funds; commission of criminal acts; conduct involving dishonesty, fraud, deceit, or misrepresentation; involvement in an unfair business transaction; and attempted evasion of federal income tax liability.

The DHC made extensive findings of fact regarding defendant's representation of twelve of his prior clients. The DHC's findings of fact were similar for each of these clients, and may be generally summarized as follows:

1. In 1994, defendant had approximately $37,000 in his trust account, for which he could identify neither the source nor the appropriate disposition of the money. These unidentified funds were never escheated to the State.

2. Defendant had on several occasions written checks attributable to expenses for a case prior to depositing a settlement check in the case, or for cases in which he never received a settlement check.

3. Defendant had on several occasions written checks attributable to his fees in a case, in excess of the amount that could be documented as owing to him for the settlement.

4. Defendant had several times been very dilatory in paying medical providers, on occasion delaying over a year after receipt of a settlement check in the case.

5. Defendant had on several occasions failed to deposit a settlement check into his trust account.

6. Defendant had written checks from the trust account attributable to a case in which he had been hired to perform legal

> research and writing, and for which no settlement check would be received.

The DHC also found that defendant generally had been grossly negligent in the management of his trust account and had benefitted from his own gross negligence. The DHC concluded that defendant's acts and omissions were in violation of the Rules of Professional Conduct in that he:

> (1) failed to maintain proper trust account records in violation of N.C. Revised Rules of Professional Conduct 1.15-1 and 1.15-2 (and superceded Rules 10.1 and 10.2); and
>
> (2) failed to preserve funds in a fiduciary capacity, failed to deposit trust funds into trust account when received, failed to properly disburse funds, failed to reconcile his trust account at least quarterly, and commingled client and personal funds, in violation of N.C. Revised Rules of Professional Conduct 1.15-1 and 1.15-2 (and superceded Rules 10.1 and 10.2).

The DHC further concluded that the defendant's "acts and omissions set forth herein were grossly negligent and committed in reckless disregard of his obligations under the [Rules of Professional Conduct.]"

In the dispositional part of its order, the DHC found several factors that aggravated defendant's violation of the Rules of Professional Conduct, including: (1) a pattern of misconduct, (2) the commission of multiple offenses, (3) a refusal to acknowledge the wrongfulness of his actions, (4) substantial experience in the practice of law, and (5) defendant's apparent indifference to determining the ownership of the "unidentified" funds and making any restitution that was owed. The DHC found as a mitigating factor that the defendant had no previous disciplinary record. The DHC concluded that the aggravating factors outweighed the mitigating factor, and ordered the defendant disbarred. From this order, defendant appeals.

I.

[1] We first review the law generally applicable to an appeal from a DHC order. The State Bar's discipline of attorneys is governed by N.C.G.S. § 84-28, which authorizes the State Bar to impose sanctions on attorneys who have engaged in acts constituting "misconduct." The statute defines misconduct to include (1) conviction of offenses showing professional unfitness, (2) violation of the N.C. Rules of

Professional Conduct, and (3) misrepresentation or evasion in response to a State Bar inquiry or complaint.

The standard of proof in disciplinary and disbarment proceedings is clear, cogent, and convincing evidence. 27 NCAC 1.0114(u). *See In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979) (adopting standard); *N.C. State Bar v. Beaman*, 100 N.C. App. 677, 398 S.E.2d 68 (1990). "Clear, cogent, and convincing" is an evidentiary standard that is stricter than "preponderance of the evidence," although not as high as the criminal burden of proof, "beyond a reasonable doubt." *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). "Clear, cogent, and convincing" evidence is "evidence which should fully convince." *Williams v. Building and Loan Assn*, 207 N.C. 362, 177 S.E. 176 (1934).

In the present case, discipline was based upon the State Bar's finding that defendant had violated certain Rules of Professional Conduct. A finding of misconduct allows the DHC to impose sanctions, which include admonition, private reprimand, public censure, suspension of law license, or disbarment.

Appellate review of State Bar orders is authorized under N.C.G.S. § 84-28(h) which provides that:

> There shall be an appeal of right from any final order imposing admonition, reprimand, censure, suspension, stayed suspension, or disbarment upon an attorney. . . . Review by the appellate division shall be upon matters of law or legal inference. The procedures governing any appeal shall be as provided by statute or court rule for appeals in civil cases. . . .

Appeal is thus allowed "on matters of law and legal inference," which is the generally established basis of appeals from a trier of fact. *See e.g.*, N.C.G.S. § 7A-26, (North Carolina Supreme Court and Court of Appeals have jurisdiction to review "matters of law or legal inference"); N.C.G.S. § 1-277, (granting appeal from district and superior court upon orders and judgments "involving a matter of law or legal inference"); N.C. Const. Art. IV, § 12 (the jurisdiction of appellate courts is generally limited to issues of "law or legal inference," while the superior court has "original general jurisdiction" except as otherwise provided by statute).

This Court does not sit as a fact-finder, and does not take new evidence or make new findings of fact. *Lamm v. Lorbacher*, 235 N.C.

728, 71 S.E.2d 49 (1952) (facts are those found by jury); *N.C. State Bar v. Speckman*, 87 N.C. App. 116, 360 S.E.2d 129 (1987) (factual findings of DHC conclusive on appeal if supported by substantial evidence). Where no issue of legal interpretation is raised, we may review only for abuse of discretion. *Smith v. Beaufort County Hosp. Ass'n*, 141 N.C. App. 203, 540 S.E.2d 775 (2000); *Kinsey v. Spann*, 139 N.C. App. 370, 533 S.E.2d 487 (2000). A ruling committed to the fact finder's discretion is to be accorded great deference, and "[a]n abuse of discretion occurs only when a court makes a patently arbitrary decision, manifestly unsupported by reason." *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994).

This Court's review of the record in appeals from a DHC order is conducted under the whole record test. *N.C. State Bar v. Dumont*, 304 N.C. 627, 286 S.E.2d 89 (1982) (adopting standard); *N.C. State Bar v. Maggiolo*, 124 N.C. App. 22, 475 S.E.2d 727 (1996). In *N.C. State Bar v. Speckman*, 87 N.C. App. 116, 119-20, 360 S.E.2d 129, 132 (1987), this Court summarized the whole record standard as applied to appeals from a DHC order:

> In attorney discipline and disbarment proceedings, findings of fact must be supported by clear, cogent, and convincing evidence drawn from the whole record. The "whole record test" is the standard for judicial review of attorney discipline cases and requires the reviewing court to consider the evidence which in and of itself justifies or supports the administrative findings and . . . also [to] take into account the contradictory evidence or evidence from which conflicting inferences can be drawn. . . . Under the whole record test there must be substantial evidence to support the findings, conclusions and result. . . . The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion. (citations omitted).

"Substantial evidence is 'more than a scintilla' and is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Williams v. Dept. of Env. and Natural Res.*, 144 N.C. App. 479, 483, 548 S.E.2d 793, 796 (2001) (citations omitted). Although the whole record test requires this Court to consider all the evidence in the record, it does not allow the Court to substitute its judgment for that of the DHC, even if the evidence is conflicting, and the Court might have reached a different conclusion. *North Carolina State Bar v. Nelson*, 107 N.C. App. 543, 421 S.E.2d 163 (1992).

In sum, this Court must determine whether the DHC's findings were supported by substantial evidence in view of the whole record; whether its findings support its conclusions of law; and whether the DHC abused its discretion in ordering defendant disbarred.

II.

[2] Defendant argues first the State Bar presented insufficient evidence to support its findings of fact and conclusion that he had violated the Rules of Professional Conduct. We disagree.

The DHC found that defendant had violated N.C. Revised Rules of Professional Conduct 1.15. This Rule requires, in pertinent part, that an attorney: (1) Keep clients' money segregated in a trust fund; (2) Deposit all settlement checks and other entrusted funds into the trust account promptly upon receipt; (3) Not commingle funds of the attorney in the trust account with client funds; (4) Maintain current, accurate, bookkeeping records, including quarterly reconciliation of the trust account, a ledger, and retention of receipts, canceled checks, and other documentation for the trust account; and (6) Escheat abandoned funds to the State.

The defendant testified during the hearing that he did not reconcile his trust account; that he had not maintained accounting records; that he had commingled his and his clients' money; that he had not always deposited settlement checks or paid creditors promptly; that there was money in his trust account whose origin he could not establish; and that he had not escheated any of this money to the State. We find that defendant's own testimony, in conjunction with that of White, amply established by clear, cogent, and convincing evidence that defendant was in violation of Rule 1.15 of the Rules of Professional Conduct. This assignment of error is without merit.

III.

[3] Defendant argues also that the State Bar failed to demonstrate by clear, cogent, and convincing evidence that he was grossly negligent in managing his trust account. The DHC specifically found that defendant had been grossly negligent in the management of his trust account, and that he had benefitted from his own gross negligence. Defendant correctly points out that the term "gross negligence" is not defined in the Rules of Professional Conduct or in the relevant statutes; that the DHC did not define the standard it was employing in its determination that defendant had been grossly negligent; and that

the record fails to establish what definition or standard was applied to the term "gross negligence." While this is true, we do not find it dispositive on the issue of whether a violation of the Rules of Professional Conduct occurred. DHC's conclusion that defendant was "grossly negligent" provides no independent basis for imposition of sanctions. In that we have concluded that there is substantial evidence that defendant violated the Rules of Professional Conduct, we overrule this assignment of error. However, we also note that the order fails to set forth what "benefit," if any, defendant derived. This is particularly relevant in light of the dismissal of allegations of misappropriation of funds.

IV.

[4] Defendant also asserts error in the DHC's imposition of disbarment, the most severe sanction available to the DHC. For the reasons that follow, we must agree.

N.C.G.S. § 84-28 authorizes the imposition of sanctions against an attorney who has engaged in misconduct, including violations of the Rules of Professional Conduct. Upon a finding of misconduct, the DHC has a choice of five possible sanctions. In order of increasing severity, the statutory definitions of these are as follows:

> 1. Admonition: An admonition is a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.
>
> 2. Reprimand: A reprimand is a written form of discipline more serious than an admonition issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct, but the protection of the public does not require a censure. A reprimand is generally reserved for cases in which the attorney's conduct has caused harm or potential harm to a client, the administration of justice, the profession, or members of the public.
>
> 3. Public Censure: A censure is a written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or members of the public, but the protection of the public does not require a suspension of the attorney's license.

4. Suspension for a period up to but not exceeding five years, any portion of which may be stayed upon reasonable conditions to which the offending attorney consents.

5. Disbarment.

N.C.G.S. § 84-28(c). The choice of which sanction is most appropriate rests in the discretion of the DHC and, accordingly, this Court will review the DHC's order of disbarment under an abuse of discretion standard. *See North Carolina State Bar v. Nelson*, 107 N.C. App. 543, 421 S.E.2d 163 (1992) (defendant alleges DHC abused its discretion in choice of sanction; Court holds that sanction may not be modified if within statutory range, and finds no abuse of discretion); *N.C. State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981) (defendant argues sanction imposed was unreasonably harsh; this Court evaluates sanction in context of defendant's actions and the range of sanctions available to DHC, and concludes it was properly imposed).

Our analysis of whether the DHC's decision to disbar defendant was 'supported by reason' is undertaken against the backdrop of the stated policy underlying the State Bar's imposition of sanctions against an attorney. The Rules of Professional Conduct state that sanctions against an attorney are not "intended as punishment for wrongdoing," but are imposed "for the protection of the public, the courts, and the legal profession." 27 NCAC 1.0101. *See also N.C. State Bar v. Talman*, 62 N.C. App. 355, 303 S.E.2d 175 (1983). Therefore, a sanction imposed by the DHC should be reasonably related to the "protection of the public, the courts, and the legal profession," in view of the nature and gravity of a defendant's misconduct, and of the other evidence in the record.

This policy is further reflected in the statutory guidelines articulated in N.C.G.S. § 84-28(c) for the DHC's determination of the most appropriate sanction. These include (1) whether the attorney's acts or omissions have caused harm or potential harm to a client, the administration of justice, the profession, or members of the public, (2) whether the attorney's acts or omissions have caused significant harm or significant potential harm to a client, the administration of justice, the profession, or members of the public, and (3) the extent to which the attorney's acts and omissions demonstrate a need to protect the public.

The DHC's order does not reference these factors; its findings and conclusions do not address the degree of potential harm that defend-

ant's acts and omissions might cause, why disbarment would be necessary to protect the public, or how the defendant's failure to maintain accurate records might threaten the public, the legal profession, or the administration of justice. Thus, the order does not disclose whether the DHC's decision to disbar defendant was connected to any of these considerations.

The DHC's order made no findings that the defendant's actions threatened harm to the legal profession or to the administration of justice. Our own examination of the record discloses no evidence that defendant's acts and omissions operated as a threat to our legal system, or undermined the administration of justice. Defendant's violations of the Rules of Professional Conduct did not evince an intent to defraud the court, and did not affect proceedings in court; instead, his errors were confined to his bookkeeping and to his attorney/client relationships. *Compare with, e.g., Disciplinary Hearing Comm'n, N.C. State Bar v. Frazier*, 141 N.C. App. 514, 540 S.E.2d 758 (2000) (attorney pressured witness to recant truthful testimony); *In re Paul*, 84 N.C. App. 491, 353 S.E.2d 254 (1987) (attorney solicited another to disrupt trial); *N.C. State Bar v. Talman*, 62 N.C. App. 355, 303 S.E.2d 175 (1983) (attorney offered false testimony, and counseled clients in illegal conduct).

The DHC's order also contains no findings or conclusions that establish that any individual client was harmed. It may be argued that the defendant's failure to keep accurate records poses an inherent risk of harm to clients; however, the record does not reveal any actual harm to any client.

The other factor articulated in N.C.G.S. § 84-28(c) is the degree to which defendant's acts and omissions demonstrate a need to protect the public from the attorney. In this regard, we find it most significant that those charges originally brought by the State Bar that alleged dishonesty, fraud, tax evasion, misrepresentation, unfair business transaction, misappropriation of funds, and deceit, were dismissed at the end of the hearing. We conclude that the dismissal of all charges implicating intentional malfeasance and moral turpitude reduces the apparent extent to which the public needs protection from defendant.

Finally, although N.C.G.S. § 84-28 does not require a "proportionality review," fundamental fairness requires that the DHC not act with unbridled license, and that its decisions not be arbitrary. To this end,

we examine the factual context of other cases in which sanctions were imposed against an attorney. Such review suggests that disbarment historically has been reserved for situations in which an attorney is shown by clear, cogent, and convincing evidence to have engaged in conduct that is dishonest, immoral, or criminal. We find that the present case appears to be an anomaly. This defendant was disbarred for violation of the accounting requirements of the Rules of Professional Conduct, although none of his clients had lodged a complaint against him, or were shown to have suffered any harm.

The most frequent predicate for disbarment appears to be proof of embezzlement. *See, e.g., In re Escoffery*, 216 N.C. 19, 3 S.E.2d 425 (1939); *In re Brittain*, 214 N.C. 95, 197 S.E. 705 (1938); *Boomer v. Caraway*, 116 N.C. App. 723, 449 S.E.2d 215 (1994); *GE Capital Mortgage Services v. Avent*, 114 N.C. App. 430, 442 S.E.2d 98 (1994); *N.C. State Bar v. Whitted*, 82 N.C. App. 531, 347 S.E.2d 60 (1986). Commission of other serious criminal offenses also has been the basis for disbarment. *See, e.g., In re Delk*, 336 N.C. 543, 444 S.E.2d 198 (1994) (extortion and conspiracy to commit extortion); *N.C. State Bar v. Harris*, 137 N.C. App. 207, 527 S.E.2d 728 (2000) (attorney steals settlement check from client who had previously discharged him); *Vann v. N.C. State Bar*, 79 N.C. App. 166, 339 S.E.2d 95 (1986) (attorney receives prison terms after pleading guilty to eleven felony forgery charges); *State v. Singletary*, 75 N.C. App. 504, 331 S.E.2d 166 (1985) (conspiracy and fraudulent burning of uninhabited house); *State Bar v. Temple*, 2 N.C. App. 91, 162 S.E.2d 649 (1968) (attempting to traffic in counterfeit money, preparation of false affidavits, altering note and deed of trust).

The North Carolina State Bar also has disbarred attorneys who demonstrated an intention to perpetrate a fraud upon the court, subvert the trial process, or disrupt the court's functioning. *See Attorney General v. Gorson*, 209 N.C. 320, 183 S.E. 392 (1936) (failure to disclose to North Carolina State Bar that attorney had previously been disbarred in Pennsylvania for reasons of "moral turpitude"); *Disciplinary Hearing Comm'n, N.C. State Bar v. Frazier*, 141 N.C. App. 514, 540 S.E.2d 758 (2000) (misappropriation of client funds, advising client not to attend hearing, and pressuring witness to recant prior truthful testimony); *N.C. State Bar v. Maggiolo*, 124 N.C. App. 22, 475 S.E.2d 727 (1996) (counseled client to commit fraud, advised unrepresented party, and engaged in conduct involving dishonesty, fraud, and deceit); *In re Paul*, 84 N.C. App. 491, 353 S.E.2d 254 (1987) (soliciting another to disrupt trial with loud outburst); *N.C. State Bar*

v. Talman, 62 N.C. App. 355, 303 S.E.2d 175 (1983) (false testimony about having paid estate taxes; counseling clients in fraudulently obtaining stock certificates).

In sum, disbarment generally serves to protect "the public, the courts, and the legal profession" from an attorney's misconduct. *Talman id.* However, our review has revealed no reported cases wherein an attorney was disbarred for conduct akin to this defendant's: violation of regulations for trust account management, unaccompanied by proof of injury to specific persons, or of dishonesty, fraud, or criminal behavior.

Suspension from practice for a period of time, and public censure, are less serious sanctions than disbarment. Like disbarment, suspension frequently has been imposed in response to proof that an attorney has engaged in dishonest or criminal behavior. *See, e.g., N.C. State Bar v. Dumont*, 304 N.C. 627, 286 S.E.2d 89 (1982) (six month suspension for procuring false testimony by a witness); *N.C. State Bar v. Mulligan*, 101 N.C. App. 524, 400 S.E.2d 123 (1991) (three year suspension for embezzling funds from client); *N.C. State Bar v. Speckman*, 87 N.C. App. 116, 360 S.E.2d 129 (1987) (three year suspension for conversion of client's funds, failure to honor subpoena); *N.C. State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985) (one year suspension for knowing use of perjured evidence, misleading tribunal, preparation of false affidavit); *N.C. State Bar v. Braswell*, 67 N.C. App. 456, 313 S.E.2d 272 (1984) (ninety day suspension for attorney who failed to perfect appeal; made knowing misrepresentations to client and to State Bar); *State Bar v. Combs*, 44 N.C. App. 447, 261 S.E.2d 207 (1980) (three year suspension for fraudulent real estate transaction).

Suspension also has been imposed upon attorneys whose acts and omissions have caused a client to suffer harm. *See, e.g., In re Hunoval*, 294 N.C. 740, 247 S.E.2d 230 (1977) (twelve month suspension for refusal to file application for writ of certiorari for client on death row, on grounds that he did not expect to be paid for its preparation); *N.C. State Bar v. Barrett*, 132 N.C. App. 110, 511 S.E.2d 15 (1999) (two year suspension, stayed, where attorney commingled personal funds with rent monies received on behalf of client); *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320 (1985) (three year suspension for failure to keep trust account records, failure to withdraw from case that he was neglecting, failure to disburse settlement funds).

Public censure, the third most severe sanction, also has been employed to protect others from an attorney who has been dishonest, unprofessional, or who has injured a client. *See, e.g., In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979) (public censure for failure to withdraw from case in which attorney knows that client intends to offer perjured testimony); *N.C. State Bar v. Shuping*, 86 N.C. App. 496, 358 S.E.2d 534 (1987) (censure for failure to file required documents in connection with settlement of estate, and failure to respond to repeated official notices about estate deadlines); *State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981) (public censure for suborning perjury).

Our examination of the reported cases involving discipline of an attorney for misconduct leads us to conclude that the sanction imposed in this case is an aberration. We find it significant that the charges implicating dishonesty were dismissed. We also note that none of defendant's clients had lodged a complaint, or were shown to have suffered any harm. Neither do the DHC's findings regarding aggravating and mitigating factors establish a readily apparent reason for disbarring defendant. In addition, we cannot discern the extent to which the DHC relied upon its finding of gross negligence in imposing the ultimate sanction against this defendant. However, assuming *arguendo* that defendant's conduct did rise to the level of gross negligence as found by DHC, our review shows that the lesser sanctions of suspension and public censure have been imposed for far more serious conduct than has been established in this case. Finally, the State Bar failed to establish that defendant has received any benefit from his actions.

The statutory framework for discipline of attorneys allows the DHC wide latitude in fashioning an appropriate and constructive sanction against an attorney who has engaged in misconduct. As fact-finder, the DHC has discretion to consider demeanor, credibility, and other intangible factors in its decision to sanction an attorney, and in its choice of sanction. Thus, the DHC is not required to "match" particular offenses to specific sanctions. However, this discretion cannot be exercised arbitrarily. We conclude that the imposition of the sanction of disbarment, based on the record before us, is such a departure from DHC's application of disbarment in prior cases, that we are unable to conclude that it is based upon a reasoned decision as to the sanction imposed. The record does not demonstrate a rational basis for disbarment; nor is such rational basis evident in the DHC order. Accordingly, we conclude that the imposition of disbarment was, on

the facts of this case, an abuse of discretion. Of particular note is the detailed discussion in the transcript, by counsel for both the State Bar and the defendant, regarding sanctions other than disbarment that might be appropriate. The State Bar, because of its enormous power to control one's ability to practice law, which is a property right, has a responsibility to be fair and evenhanded in the exercise of this power and, equally important, to exhibit the appearance of evenhandedness in its judgments.

The decision herein does not diminish the DHC's discretion. Nor does it do any damage to cases that have held that as long as the sanction is within the statutory parameters, this Court is without authority to enter a different sanction. We are not replacing disbarment with another sanction of our choosing, but are exercising our customary and established power to review discretionary rulings on appeal for abuse of discretion.

For the reasons discussed above, we hold that DHC's findings and conclusion that defendant violated Rule 1.15 of the Rules of Professional Conduct is supported by substantial evidence in the record; and we remand for the DHC to review the sanction imposed in light of the discussion herein, and for entry of a new order consistent with this opinion.

Affirmed in part, reversed and remanded in part.

Judges WYNN and CAMPBELL concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. MACK BLUE AND BRENDA BLUE, DEFENDANTS

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. PIERCE B. IRBY, ET AL., DEFENDANTS

No. COA00-995

(Filed 18 December 2001)

1. Appeal and Error— appealability—interlocutory order—sovereign immunity defense—substantial right

Although the trial court's orders in a condemnation proceeding case are interlocutory based on the fact that the orders left pending the Department of Transportation's condemnation

actions against defendants, appeals from interlocutory orders raising issues of sovereign immunity affect a substantial right sufficient to warrant immediate appellate review.

2. Eminent Domain— highway condemnation—arbitrary and capricious conduct—abuse of discretion—sovereign immunity defense

The trial court did not err in a condemnation proceeding by denying the Department of Transportation's (DOT) motion to strike under N.C.G.S. § 1A-1, Rule 12(f) defendant property owners' second defense alleging that DOT engaged in arbitrary and capricious conduct and abused its agency discretion even though DOT asserted the defense of sovereign immunity and defendants may not raise the National Environmental Policy Act for a state project, nor may it obtain judicial review of the environmental documents at issue as part of their defense in this action, because: (1) DOT acquired title to defendants' land under N.C.G.S. § 136-19; and (2) the legislature has implicitly waived DOT's sovereign immunity to the extent of the rights afforded in N.C.G.S. § 136-19.

3. Eminent Domain— highway condemnation—subject matter jurisdiction—judicial review of adverse agency determination

The trial court did not err in a condemnation proceeding by granting the Department of Transportation's (DOT) motion to dismiss defendants' counterclaims alleging violations of the National Environmental Policy Act (NEPA) and the North Carolina Environmental Policy Act (NCEPA) based on lack of subject matter jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(1), because: (1) although defendants have satisfied the three requirements for judicial review of an adverse agency determination under N.C.G.S. § 150B-43, defendants failed to file a petition with the superior court within thirty days of DOT's publication of the Final Environmental Impact Statement on 1 December 1995 as required by N.C.G.S. § 150B-45; and (2) the record supports the conclusion that defendants knew or should have known of DOT's action by 1 December 1995.

Appeal by plaintiff and defendants from orders entered 10 March and 30 May 2000 by Judge Catherine C. Eagles in Moore County Superior Court. Heard in the Court of Appeals 27 August 2001.

Attorney General Roy Cooper, by Assistant Attorney Generals Fred Lamar and Lisa C. Glover, for the State.

Cunningham, Dedmond, Petersen & Smith, LLP, by F. Marsh Smith, and Moser, Schmidly, Mason & Roose, LLP, by Stephen S. Schmidly, for defendants.

EAGLES, Chief Judge.

The North Carolina Department of Transportation ("NCDOT") and Mack Blue, Brenda Blue, and Pierce Irby (collectively, "defendants") each appeal from the trial court's orders denying NCDOT's motion to strike defendants' second defense, granting NCDOT's motion to dismiss defendants' counterclaims, granting defendants' motion to consolidate cases for purposes of discovery and G.S. § 136-108 hearing, denying defendants' motion to join necessary parties, allowing in part defendants' motion to modify the trial court's previous order, and allowing defendants' motion to certify this matter for immediate appeal pursuant to Rule 54. After a careful review of the record, briefs, and arguments of counsel, we affirm.

NCDOT has a program for improving transportation, which includes enlarging and constructing highways, known as the Transportation Improvement Program ("TIP"). *See* G.S. § 143B-350(f)(4). One TIP project, designated TIP R-210, was a transportation project intended to improve portions of United States Highway 1 from south of State Road 1853 near Lakeview, North Carolina, to State Road 1180 near Sanford, North Carolina. Planning for TIP R-210 began in 1989, and funding for the project was to be provided by the State. Throughout the planning process, NCDOT held public hearings and accepted public input on TIP R-210.

In 1991, NCDOT prepared and published a Draft Environmental Impact Statement ("DEIS") evaluating the environmental impact of various alternative routes for TIP R-210. Thereafter, on 22 April 1992, NCDOT issued a news release announcing its selection of the route designated "Alternative A" for TIP R-210. Then, on 1 December 1995, NCDOT prepared and published a Final Environmental Impact Statement ("FEIS"), as required by the North Carolina Environmental Policy Act ("NCEPA"), G.S. § 113A-1 *et seq.*, approving the selection of "Alternative A." Ultimately, on 21 March 1996, the U.S. Federal Highway Administration ("FHWA") approved NCDOT's selection of "Alternative A" as the "environmentally preferred alternative"

and issued a Record of Decision ("ROD") affirming its approval on that date.

Defendants each owned property located within the right-of-way of "Alternative A." After the selection of "Alternative A," NCDOT entered into negotiations with each defendant in an attempt to agree upon acceptable purchase prices for their parcels of land. After these negotiations failed, NCDOT filed separate condemnation actions against each defendant on 26 July 1999. On 26 October 1999, defendant Irby filed his answer and counterclaim, and thereafter, on 23 November 1999, defendants Mack and Brenda Blue filed their answers and counterclaims. In their answers and counterclaims, defendants alleged as a defense that NCDOT "engaged in arbitrary and capricious agency action and [] abused its agency discretion" ("defendants' second defense") and as a counterclaim that NCDOT violated NCEPA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, by preparing an inadequate FEIS, *inter alia*.

Defendants filed a motion to consolidate these cases for purposes of discovery and hearings. Subsequently, NCDOT filed motions to dismiss defendants' counterclaims pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) and motions to strike defendants' second defense pursuant to Rule 12(f). Defendants then filed a motion to join as necessary parties NCDOT Secretary David McCoy and NCDOT Project Development and Environmental Analysis Branch Manager William D. Gilmore. A hearing was held on all pending motions during the 28 February 2000 Civil Session of Moore County Superior Court, the Honorable Catherine C. Eagles presiding. By order entered 10 March 2000, the trial court denied NCDOT's motion to strike defendants' second defense, granted NCDOT's motion to dismiss defendants' counterclaims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), granted defendants' motion to consolidate cases for purposes of discovery and G.S. § 136-108 hearing, and denied defendants' motion to join necessary parties. In response to the order, defendants filed a motion to modify order, or in the alternative, to certify this matter for immediate appeal pursuant to Rule 54. After a hearing on this motion, Judge Eagles entered a second order on 30 May 2000 making a minor modification to her previous order and certifying this matter for immediate appeal. NCDOT and defendants appeal.

[1] At the outset, we note that these appeals are interlocutory in nature. "An interlocutory order is one made during the pendency of

an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Here, the trial court's orders did not dispose of the entire case; instead, the orders left pending NCDOT's condemnation actions against defendants. As further action by the trial court is pending to settle and determine the entire controversy, the trial court's orders are interlocutory.

"Generally, there is no right of immediate appeal from an interlocutory order." *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998). However, appeals from interlocutory orders raising issues of sovereign immunity affect a substantial right sufficient to warrant immediate appellate review. *See Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999). Here, NCDOT asserts that the defense of sovereign immunity bars defendants' second defense and counterclaims. Accordingly, this appeal warrants immediate appellate review.

At the heart of both NCDOT's appeal and defendants' cross-appeal is the propriety of the trial court's treatment of defendants' second defense and defendants' counterclaims. First, we address the trial court's denial of NCDOT's motion to strike defendants' second defense pursuant to Rule 12(f). Next, we address the trial court's grant of NCDOT's motion to dismiss defendants' counterclaims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

[2] As to the trial court's denial of NCDOT's motion to strike defendants' second defense, NCDOT argues that the trial court erred in denying the motion based on the doctrine of sovereign immunity. After careful review of this issue, we affirm the trial court.

Under Rule 12(f), the trial court "may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." G.S. § 1A-1, Rule 12(f). A motion under Rule 12(f) is a device to test the legal sufficiency of an affirmative defense. *See Trust Co. v. Akelaitis*, 25 N.C. App. 522, 525, 214 S.E.2d 281, 284 (1975). "If there is any question as to whether an issue may arise, the motion [under Rule 12(f)] should be denied." *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108 (1978).

Defendants' second defense alleges that NCDOT engaged in arbitrary and capricious conduct and abused its agency discretion. In

condemnation proceedings, "[e]ach owner is entitled to defend upon the ground his property does not qualify for the purpose intended, or that its selection was the result of arbitrary or capricious conduct on the part of the taking agency." *Redevelopment Commission v. Hagins*, 258 N.C. 220, 225, 128 S.E.2d 391, 395 (1962).

Nevertheless, NCDOT asserts the defense of sovereign immunity. "Sovereign immunity is a theory or defense established to protect a sovereign or state as well as its officials and agents from suit in certain instances." *Vest v. Easley*, 145 N.C. App. 70, 73, 549 S.E.2d 568, 572 (2001). Under the doctrine of sovereign immunity, "[t]he State of North Carolina is immune from suit unless and until it expressly consents to be sued." *State v. Taylor*, 322 N.C. 433, 435, 368 S.E.2d 601, 602 (1988).

Here, NCDOT acquired title to defendants' land pursuant to G.S. § 136-19. Section 136-19 "empowers [NCDOT] to acquire title to land that it deems necessary for the construction or maintenance of roads." *Ferrell v. Dept. of Transportation*, 334 N.C. 650, 655, 435 S.E.2d 309, 313 (1993). "In enacting this statutory scheme, the legislature has implicitly waived [NCDOT's] sovereign immunity to the extent of the rights afforded in [G.S.] § 136-19 []." *Id.* Consequently, NCDOT may not avail itself of this defense here.

Additionally, we note that defendants further alleged as part of their second defense that NCDOT's conduct in condemning their land was arbitrary and capricious based in part on NCDOT's alleged violations of NCEPA and NEPA. Significantly, TIP R-210 is a state project. The project was to be constructed with North Carolina Highway Trust Funds, and, as defendants alleged, NCDOT "shifted funds so that [TIP R-210] will be built without federal funds."

"The requirements of NEPA are inapplicable to the state. NEPA has no application to a project unless [] the action is federal." *Buda v. Saxbe*, 406 F.Supp. 399, 402 (E.D. Tenn. 1974) (citations omitted). Moreover, "NEPA . . . by its express language operates only upon federal agencies, and imposes no duties on the States or on municipalities, except to the extent that a non-federal entity is found to be acting in partnership with the federal government." *Town of North Hempstead v. Village of North Hills*, 482 F.Supp. 900, 903 (E.D.N.Y. 1979) (citations omitted); *see also Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971).

The record reveals that some federal funds were spent on planning for TIP R-210; that NCDOT planned to build and design the proj-

ect to meet federal standards; and that NCDOT left open the option to later request federal funds for the project. However, "use of limited federal funding during the planning and design stage of a highway project does not constitute 'major federal action' " invoking NEPA. *Hawthorn Environmental Preserv. Ass'n v. Coleman*, 417 F.Supp. 1091, 1099 (N.D. Ga. 1976), *aff'd per curiam*, 551 F.2d 1055 (5th Cir. 1977). Furthermore, "early coordination or compliance with the eligibility requirements for federal funding, or designing a project so as to preserve the option of federal funding in the future, standing alone, will not convert a project into a 'major federal action' " within the purview of NEPA. *Southwest Williamson County Community v. Slater*, 67 F.Supp.2d 875, 884-85 (M.D. Tenn. 1999), *aff'd and remanded*, 243 F.3d 270 (6th Cir. 2001). Because no major federal action was involved in TIP R-210, we hold that NEPA was inapplicable to NCDOT, a state agency, in this project. Consequently, defendants are barred from raising alleged violations of NEPA in this action.

As for the alleged NCEPA violations, this Court has held that in condemnation proceedings, a landowner's failure to assert a violation of NCEPA as a defense in their answer constitutes a waiver. *See State v. Williams and Hessee*, 53 N.C. App. 674, 680-81, 281 S.E.2d 721, 726 (1981). Here, defendants raised the defense in their answer. Thus, defendants are not precluded by the doctrine of waiver from proceeding with their defense that NCDOT's alleged violations of NCEPA made the condemnation of their land arbitrary and capricious.

However, "[a]dministrative and judicial review of an environmental document is incidental to, and may only be undertaken in connection with, review of the agency action. *No other review* of an environmental document is allowed." G.S. § 113A-13 (emphasis added). Significant for purposes of this appeal is the fact that the environmental documents (the DEIS, the FEIS, and the ROD) were all prepared during NCDOT's planning and selection of "Alternative A" for TIP R-210. NCDOT's selection of "Alternative A" was separate and distinct from its action in condemning defendants' land, which is the basis of its complaint here. Pursuant to G.S. § 113A-13, these environmental documents may be reviewed only in connection with review of NCDOT's selection of "Alternative A" for TIP R-210—the agency action for which they were created, and not NCDOT's condemnation of defendants' land. Thus, while defendants are entitled to a review of whether NCDOT's condemnation action was arbitrary and capricious, defendants may not obtain judicial review of the

environmental documents created during the planning and selection of "Alternative A" as part of the judicial review of the condemnation.

Accordingly, NCDOT is deemed to have waived its sovereign immunity in this condemnation action. Additionally, "allegations of arbitrary and capricious conduct or of abuse of discretion on the part of [NCDOT] render the issue subject to judicial review." *Dept. of Transportation v. Overton*, 111 N.C. App. 857, 859, 433 S.E.2d 471, 473 (1993). Nevertheless, defendants may not raise NEPA nor obtain judicial review of the environmental documents at issue as part of their defense in this action. Thus, we affirm that part of the trial court's order denying NCDOT's motion to strike defendants' second defense.

[3] Now, we turn to the trial court's grant of NCDOT's motion to dismiss defendants' counterclaims which allege violations of NCEPA and NEPA for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Defendants contend that the court erred in dismissing these counterclaims based on the North Carolina Administrative Procedure Act ("NCAPA"), G.S. § 150B-1 *et seq.* After careful review of this issue, we affirm.

When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings. *See Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998). However, if the trial court confines its evaluation to the pleadings, the court must accept as true the plaintiff's allegations and construe them in the light most favorable to the plaintiff. *See id.* We note that this Court's review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*, "except to the extent the trial court resolves issues of fact and those findings are binding on the appellate court if supported by competent evidence in the record." *See id.*

Here, defendants attach their NCEPA and NEPA claims as counterclaims to NCDOT's condemnation actions. Through these counterclaims, defendants "challenge[] [NCDOT's] selecting [A]lternative A to build" TIP R-210 and allege that NCDOT violated both NCEPA and NEPA by preparing an inadequate FEIS, *inter alia*. The North Carolina Environmental Policy Act ("NCEPA"), G.S. § 113A-1 *et seq.*, sets forth our State's environmental policy. Likewise, the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, sets forth the environmental policy of our federal government. NCEPA

and NEPA are "[s]imilar." D. Mandelker, NEPA Law and Litigation § 12.02[1] (2nd ed. 2001).

"The primary purpose of both the state and federal environmental statutes is to ensure that government agencies seriously consider the environmental effects of each of the reasonable and realistic alternatives available to them." *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 383, 265 S.E.2d 890, 911 (1980). Both acts require that government agencies—in North Carolina, those state agencies planning to spend public money on governmental projects—must issue environmental impact statements ("EIS") to "provide a full and fair discussion of significant environmental impacts and [] inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the environment." 1 N.C.A.C. § 25.0601; *see also* G.S. § 113A-4(2); 42 U.S.C. § 4332(C).

Notably, neither NCEPA nor NEPA contain explicit judicial review provisions. Nevertheless, federal courts "have long recognized that [they] have jurisdiction over NEPA challenges pursuant to the [federal] APA," 5 U.S.C. § 702. *Sierra Club v. Slater*, 120 F.3d 623, 630-31 (6th Cir. 1997); *see also Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999); *N.C. Alliance for Transp. Reform v. D.O.T.*, 151 F.Supp.2d 661, 678 (M.D.N.C. 2001). Likewise, this Court has adopted the view that judicial review of an alleged NCEPA violation is available under the NCAPA's judicial review provisions, particularly G.S. § 150B-43. *See Citizens Roadways v. Dept. of Transp.*, 145 N.C. App. 497, 550 S.E.2d 253 (2001); *Orange County*, 46 N.C. App. 350, 265 S.E.2d 890. Again, we note that since TIP R-210 was a state project, NEPA is inapplicable here. *See Buda v. Saxbe*, 406 F.Supp. 399, 402.

The NCAPA "establishes a uniform system of administrative rule making and adjudicatory procedures for agencies" and "applies to every agency" unless an agency is expressly exempted. G.S. § 150B-1(a) and (c). Under the administrative hearing provisions of the NCAPA,

> any dispute between an agency and another person that involves the person's rights, duties, or privileges . . . should be settled through informal procedures. . . . If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights,

> duties, or privileges, at which time the dispute becomes a 'contested case.'

G.S. § 150B-22. The administrative hearing provisions of this act (G.S. §§ 150B-22 to 150B-42) apply to all agencies and all proceedings except those expressly exempted. *See Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 586, 447 S.E.2d 768, 778 (1994). The General Assembly has expressly named the particular agencies exempted from the NCAPA and specified the extent of each such exemption. *See id.* at 587, 447 S.E.2d at 779.

" 'The Department of Transportation, except as provided in G.S. 136-29 (construction contract claims)' is expressly exempt from the contested case provisions." *Citizens Roadways*, 145 N.C. App. at 497, 499, 550 S.E.2d at 255 (quoting G.S. § 150B-1(e)(8)). Consequently, defendants "cannot petition for a hearing before the Office of Administrative Hearings ("OAH") in this case." *Id.* Nevertheless, judicial review of agency decisions in Superior Court, pursuant to G.S. § 150B-43, is proper in certain cases where no prior proceeding was held before the OAH. *See id.*; *see also Charlotte Truck Driver Training School v. N.C. DMV*, 95 N.C. App. 209, 212, 381 S.E.2d 861, 862-63 (1989); *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 345, 543 S.E.2d 169, 173 (2001).

Section 150B-43 of the NCAPA provides aggrieved parties an avenue for judicial review of adverse agency determinations. Before seeking review of an adverse agency determination under § 150B-43, a party must satisfy five requirements: "(1) the person must be aggrieved; (2) there must be a contested case; (3) there must be a final agency decision; (4) administrative remedies must be exhausted; and (5) no other adequate procedure for judicial review can be provided by another statute." *Huang v. N.C. State University*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992).

First, " '[p]erson aggrieved' means 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." G.S. § 150B-2(6). Clearly, defendants are "aggrieved" because (1) they own land within the proposed route for "Alternative A" for TIP R-210, (2) they "asserted their position as taxpayers," and (3) they share a sufficient geographical nexus to "Alternative A" for TIP R-210 so that they may be expected to suffer whatever adverse environmental effects TIP R-210 may have. *See Orange County*, 46 N.C. App. 350, 360-62, 265 S.E.2d 890, 899.

Second, a contested case is "(1) an agency proceeding, (2) that determines the rights of a party or parties." *Lloyd v. Babb*, 296 N.C. 416, 424-25, 251 S.E.2d 843, 850 (1979). NCEPA broadens "the definition of 'contested case' and expand[s] the scope of procedural remedies available under [the NCAPA], including the right to judicial review" provided in G.S. § 150B-43. *Orange County*, 46 N.C. App. at 375, 265 S.E.2d at 907. When violations of NCEPA are alleged, NCDOT's decision concerning location of a highway gives rise to a contested case under the NCAPA. *See id.* at 374-76, 265 S.E.2d at 906-07. Here, defendants, as aggrieved parties, alleged that NCDOT violated NCEPA in the process of selecting the "Alternative A" location for TIP R-210. Consequently, based on our precedent in *Orange County*, defendants have a contested case.

We note that since we decided *Orange County* in 1980, the General Assembly has exempted NCDOT from the contested case provisions of the NCAPA, except as provided in G.S. § 136-29. *See* 1991 N.C. Sess. Laws ch. 418, § 2; G.S. § 150B-1(e)(8). Nonetheless, a contested case hearing, from which NCDOT is expressly exempt, "is distinguishable from a contested case." *Community Psychiatric Ctrs. v. N.C. Dept. of Human Resources*, 103 N.C. App. 514, 515, 405 S.E.2d 769, 770 (1991). A contested case

> extends beyond an adjudicatory hearing to include "any agency proceeding, by whatever name called, wherein the legal rights, duties and privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing."

Id. (quoting *Charlotte-Mecklenburg Hosp. Authority v. N.C. Dept. of Human Resources*, 83 N.C. App. 122, 124, 349 S.E.2d 291, 292 (1986)). Defendants did not have an adjudicatory hearing before NCDOT here; however, NCDOT did hold public hearings on TIP R-210. Nevertheless, NCDOT's exemption from the contested case provisions of the NCAPA does not affect the fact that defendants have a "contested case" for purposes of satisfying *Huang v. N.C. State University*, 107 N.C. App. 710, 421 S.E.2d 812.

Third, in determining whether a particular agency action is final, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797, 120 L. Ed. 2d 636, 648 (1992) (U.S. Supreme Court analyzing final agency action under the federal APA and 5 U.S.C. § 704).

We note that TIP R-210 was a *state* project to be constructed with North Carolina Highway Trust Funds. In a case where only state highway funds are involved,

> an action to challenge the sufficiency of the environmental impact statement would be ripe when the Board of Transportation approved the location of the highway corridor following the preparation of a final environmental impact statement [FEIS].

Orange County, 46 N.C. App. at 367, 265 S.E.2d at 903. Here, NCDOT approved the location of "Alternative A" for TIP R-210 and published a FEIS on 1 December 1995. At this point, NCDOT had completed the decision making process and the result directly affected the parties. As such, NCDOT's action was sufficiently final when it issued the FEIS on 1 December 1995. *See Warren County v. State of N.C.*, 528 F.Supp. 276, 284 (E.D.N.C. 1981) (issuance of EIS was final agency determination).

We recognize that there is a disagreement between the parties as to whether the ROD constituted NCDOT's final agency decision in the case before us. "[I]t appears well-established that a [FEIS] or the ROD issued thereon constitute the 'final agency action'. . . ." *Sierra Club*, 120 F.3d 623, 631. "Final agency action" refers to the issuance of a "final agency decision." *See Howell v. Morton*, 131 N.C. App. 626, 634, 508 S.E.2d 804, 809 (1998). Under the Federal-Aid Highways Act ("FAHA"), 23 U.S.C. § 101 *et seq.*, FHWA has final approval authority over a state agency's FEIS, and FHWA memorializes approval of that FEIS and project location by issuing a ROD. *See Jersey Heights Neighborhood Ass'n*, 174 F.3d 180, 184. However, "[a]pproval of the [FEIS] is not a[] [FHWA] Action . . . and does not commit the [FHWA] to approve any future grant request to fund the preferred alternative." 23 C.F.R. § 771.125 (e); *see also* 23 C.F.R. § 771.113 (b). Here, NCDOT submitted the FEIS to FHWA for location approval to preserve the State's option of obtaining federal funding in the future. FHWA's subsequent issuance of the ROD did not change the nature of TIP R-210, a state project, into a federal project. Accordingly, for purposes of this appeal, we hold that the FEIS, not the ROD, was NCDOT's final agency decision.

Fourth, "as a general rule a party must exhaust all applicable administrative remedies before filing in the superior court." *Jackson v. Dept. of Administration*, 127 N.C. App. 434, 436, 490 S.E.2d 248, 249 (1997). NCEPA has no language providing a party with a right to

challenge a FEIS. However, the parties have at least two administrative remedies available. *See Orange County*, 46 N.C. App. at 376-77, 265 S.E.2d at 907-08 (one available administrative remedy, 1 N.C.A.C. § 25.0106 (the right to petition the Governor), cited in *Orange County* has since been repealed).

For instance, citizens have the opportunity to participate "in the agency's decision making process" by filing comments, requesting a public hearing, and speaking at the public hearing. *See Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 112 N.C. App. 566, 572-73, 436 S.E.2d 594, 599 (1993), *rev'd on other grounds*, 337 N.C. 569, 447 S.E.2d 768 (1994); *see also* 1 N.C.A.C. § 25.0604 (Public Hearing). Here, defendants had the opportunity to participate in NCDOT's decision making process. The record reflects that many citizens did participate by filing comments and speaking at NCDOT hearings. However, the record is unclear as to whether these defendants actually participated; although, the record does show that defense counsel did actively participate.

Additionally, G.S. § 136-62 provides that "[t]he citizens of th[is] State shall have the right to present petitions to the board of county commissioners, and through the board to [NCDOT], concerning additions to the system and improvement of roads." While the record is not clear as to whom the petition was presented, the record does reflect that a citizens' petition in opposition to "Alternative A" for TIP R-210 was before NCDOT. Accordingly, we hold that the available administrative remedies were exhausted here.

Finally, no other adequate procedure for judicial review of defendants' NCEPA challenge was provided by any other statute. Defendants contend that G.S. § 136-108 provides an adequate procedure for judicial review of their counterclaims. Section 136-108 provides that in condemnation proceedings, the trial court may hold a hearing to "determine any and all issues raised by the pleadings other than the issue of damages . . . ." Defendants contend that their NCEPA challenge is an issue that may be heard and determined in such a hearing. However, the environmental documents at issue were prepared for the administrative process by which NCDOT selected "Alternative A" for TIP R-210, not for the condemnation proceeding. Because review of an environmental document may be undertaken only in connection with review of the agency action for which the document was prepared, *see* G.S. § 113A-13 and 1 N.C.A.C. § 25.0605(f), section 136-108 does not provide an adequate pro-

cedure for judicial review of defendants' NCEPA challenge. The NCAPA does provide for judicial review.

In sum, defendants have satisfied the five requirements for judicial review of an adverse agency determination under G.S. § 150B-43. Pursuant to G.S. § 150B-45,

> [t]o obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides.
>
> The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision. A person who fails to file a petition within the required time waives the right to judicial review under this Article.

Defendants failed to file a petition with the superior court within thirty days of NCDOT's publication of the FEIS on 1 December 1995. In fact, defendants did not file any claim with the superior court until they filed their counterclaims in 1999—over three years after NCDOT's publication of the FEIS.

We hold that defendants' contention that they were not properly served with a written copy of NCDOT's decision is unavailing. The regulations under NCEPA allow for notice of a FEIS by publication. *See* 1 N.C.A.C. § 25.0605(c) ("Notice shall also be given in the Environmental Bulletin," which is published bi-monthly by the Department of Administration's State Clearinghouse); 1 N.C.A.C. § 25.0212. The record shows that NCDOT issued a news release announcing the selection of "Alternative A" for TIP R-210. This news release was followed by NCDOT's publication of the FEIS on 1 December 1995. Unlike defendants' contentions concerning notice and service of the ROD, defendants do not raise any notice challenges regarding the FEIS. Accordingly, we hold that the record supports the conclusion that defendants knew or should have known of NCDOT's action by 1 December 1995.

Defendants' failure to timely comply with the NCAPA's judicial review requirements is sufficient basis to affirm the trial court's dismissal of their counterclaims. *See Citizens Roadways*, 145 N.C. App. 497, 550 S.E.2d 253 (affirming trial court's dismissal of complaint against NCDOT alleging violations of NCEPA filed over thirty days after NCDOT's issuance of a Finding of No Significant Impact ("FONSI")). Accordingly, we affirm that part of the trial court's order

dismissing defendants' counterclaims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

Having carefully reviewed the remainder of the issues addressed by NCDOT and defendants in their briefs, we conclude that the trial court did not err. Therefore, we affirm the remainder of the trial court's orders.

Affirmed.

Judges TIMMONS-GOODSON and THOMAS concur.

DALLAS SWINSON, PLAINTIFF v. LEJEUNE MOTOR COMPANY, INC., DEFENDANT

No. COA00-1447

(Filed 18 December 2001)

Premises Liability— customer's trip and fall in parking lot— indentation in asphalt pavement—directed verdict

The trial court erred in a negligence case by granting a directed verdict under N.C.G.S. § 1A-1, Rule 50 in favor of defendant company arising out of an incident where plaintiff customer tripped, fell, and broke her arm based on her failure to see an indentation in the asphalt pavement while walking in the company's parking lot to get her car, because: (1) there are factual questions as to whether the condition of the pavement was open and obvious; and (2) there is conflicting evidence as to whether plaintiff acted as a reasonable person using ordinary care for her own safety under similar circumstances.

Judge McCULLOUGH dissenting.

Appeal by plaintiff from judgment entered 22 August 2000 by Judge Steve A. Balog in Superior Court, Onslow County. Heard in the Court of Appeals 10 October 2001.

Jeffrey S. Miller, for plaintiff-appellant.

Wallace, Morris & Barwick, P.A., by P.C. Barwick, Jr., for defendant-appellee.

WYNN, Judge.

To grant a directed verdict for a defendant under N.C. Gen. Stat. § 1A-1, Rule 50, the trial court must determine that the evidence, when considered in the light most favorable to the plaintiff, was insufficient for submission to the jury. *Smith v. Wal-Mart Stores, Inc.*, 128 N.C. App. 282, 495 S.E.2d 149 (1998). In this appeal, Dallas Swinson argues that a jury should have been allowed to determine whether her trip and fall resulted from an obvious condition, and whether she was contributorily negligent in causing her injury. Since the record shows controverted issues of fact for a jury to decide, we reverse the trial court's directed verdict favoring defendant.

This appeal arises from allegations that after having her car serviced by Lejeune Motor Company, Ms. Swinson tripped, fell and broke her arm while walking in the company's parking lot to get her car. However, at the close of her evidence during the trial, the trial court granted directed verdict in favor of Lejeune Motor stating that "the plaintiff has failed to offer any evidence from which a jury might find actionable negligence on the part of the defendant and the plaintiff's evidence shows that the plaintiff was contributorily negligent as a matter of law."

In ruling on a motion for directed verdict under N.C. Gen. Stat. § 1A-1, Rule 50, the trial court must consider "whether the evidence, when considered in the light most favorable to the plaintiff, was sufficient for submission to the jury." *Smith v. Wal-Mart Stores, Inc.*, 128 N.C. App. at 285, 495 S.E.2d at 149. "The plaintiff must receive the benefit of every inference which may reasonably be drawn in his favor." *Hill v. Williams*, 144 N.C. App. 45, 54, 547 S.E.2d 472, 477 (2000). The trial court should deny a motion for directed verdict when it finds any evidence more than a scintilla to support plaintiff's prima facie case. *See Broyhill v. Coppage*, 79 N.C. App. 221, 339 S.E.2d 32 (1986); *Clark v. Moore*, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

"Directed verdict in a negligence case is rarely proper because it is the duty of the jury to apply the test of a person using ordinary care." *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 138, 539 S.E.2d 331, 333 (2000). "[A] landowner has a duty to any lawful visitor on his property 'to take reasonable precautions to ascertain the condition of [his] property and to either make it reasonably safe or give warnings as may be reasonably necessary to inform . . . of any foreseeable danger.' " *Hussey v. Seawell*, 137 N.C. App. 172, 175, 527 S.E.2d 90, 92 (2000) (quoting *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161,

516 S.E.2d 643, 645, *cert. denied*, 351 N.C. 107, 541 S.E.2d 148 (1999)). Moreover, a store owner has a duty of "ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963). However, "[t]here is no duty to protect a lawful visitor against dangers which are either known to him or so obvious and apparent that they reasonably may be expected to be discovered." *Lorinovich v. K Mart Corp.*, 134 N.C. App. at 162, 516 S.E.2d at 646.

Applying this case law which requires looking at the evidence in the light most favorable to Ms. Swinson, we hold that she presented sufficient evidence to submit this case to the jury. The record reveals there are factual questions as to whether the condition in the sidewalk was open and obvious. In their brief, Lejeune Motor Company argued that the condition of the pavement was obvious because nothing blocked the view of where Ms. Swinson was walking. It contended that Ms. Swinson should have or could have seen any defect, hole or elevation in the pavement and avoided the area. The president of Lejeune Motor, Leonard O. Stevenson, described the condition in the pavement where Ms. Swinson fell as being "probably three-quarters of an inch to an inch." Mr. Stevenson testified that the area was not a hole, where Ms. Swinson fell but that the area was raised or elevated. Mr. Stevenson was aware that the condition was present in the parking lot for many years and had never taken any steps toward repairing it or providing warnings. Mr. Stevenson also testified that he did not see Ms. Swinson fall, and personally he did not know where she fell in the parking lot.

At trial, Ms. Swinson testified that on the day of the incident, she was looking for her car and did not see the depression. She stated that she "just stepped into it." She referred to the depression as a hole, and stated that "I didn't look back to see how deep it was." She also testified that no one warned her about the hole in the parking lot. Indeed, the depression was in the asphalt pavement of the parking lot. The asphalt had come off the concrete and the depression was eight to twelve inches wide and several feet long. Moreover, there were no markers to indicate its presence. After a careful review of the record, we find that the resolution of these factual issues are for the jury to discern. "Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury

rather than the trial judge." *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976).

In her final argument, Ms. Swinson contends that the trial court erred in granting defendant's motion for directed verdict on the grounds that plaintiff's evidence did not show that plaintiff was contributorily negligent as a matter of law. For issues of contributory negligence, a motion for directed verdict is appropriate when the "plaintiff's evidence, considered in the light most favorable to him, together with inferences favorable to him that may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn." *Wilburn v. Honeycutt*, 135 N.C. App. 373, 375, 519 S.E.2d 774, 775 (1999). "Consequently, the issue of contributory negligence is ordinarily a question for the jury rather than an issue decided as a matter of law." *Hill v. Williams*, 144 N.C. App. at 56, 547 S.E.2d at 479.

"As a general rule, one who has capacity to understand and avoid a known danger and fails to take advantage of that opportunity . . . is chargeable with contributory negligence." *Presnell v. Payne*, 272 N.C. 11, 13, 157 S.E.2d 601, 602 (1967).

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

Clark v. Roberts, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965). "Circumstances may exist under which forgetfulness or inattention to a known danger may be consistent with the exercise of ordinary care, as . . . where conditions arise suddenly which are calculated to divert one's attention momentarily from the danger." *Walker v. Randolph*, 251 N.C. 805, 808, 112 S.E.2d 551, 553 (1960). When a plaintiff does not discover and avoid an obvious defect, that plaintiff will usually be considered to have been contributorily negligent as a matter of law. However, where there is some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition, the general rule does not apply. *Price v. Jack Eckerd Corp.*, 100 N.C. App. 732, 736, 398 S.E.2d 49, 52 (1990).

In the case at bar, again we note the controverted evidence of what Ms. Swinson actually saw or should have seen in the exercise of ordinary care. Ms. Swinson testified that she was looking for her automobile in defendant's parking lot. When she initially surrendered her car at Lejeune Motor she was at the entrance to the service department. However, when the repairs were completed, no one told her where her car was located. It was difficult for Ms. Swinson to find her car in the parking lot because her car was white and there were a lot of white cars in the lot. Lejeune Motors argues that plaintiff should have or could have seen the condition of the parking lot because there was nothing blocking her view of the area where she was walking.

"The basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for [her] own safety." *Wal-Mart*, 128 N.C. App. at 287, 495 S.E.2d at 152 (citing *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981)). The question is not whether a reasonably prudent person would have seen a depression in the parking lot had he or she looked but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the condition of the pavement. *See Smith v. Wal-Mart*, 128 N.C. App. at 287, 495 S.E.2d at 152.

Applying these principles to this case, the question is whether the evidence in the light most favorable to the plaintiff allows no reasonable inference except her negligence; i.e., whether "a reasonably prudent and careful person exercising due care for his or her safety would have looked down" and seen the indentation of the pavement. *Id.* Because there is conflicting evidence of whether or not Ms. Swinson acted as a reasonably prudent person would have acted under like circumstance, this is an issue for a jury to resolve. *Id.* Directed verdict is not appropriate for defendant because the evidence is insufficient, as a matter of law, to support a verdict for the moving party. *See Hill v. Williams*, *supra*.

The dissent's comparison to *Grady v. J.C. Penney Co.*, 260 N.C. 745, 133 S.E.2d 678 (1963), fails to note the obvious difference between a plaintiff failing to see a stairway and the case at bar, where the plaintiff did not see an indentation in asphalt pavement. An appellate court examining the cold record would indeed find it quite difficult to believe that plaintiff would not see a stairway in front of her; in the case such as the one at hand, however determining whether a plaintiff could not see an indentation in a pavement of the size and

color of this one requires a jury voice; not ours. Moreover, recently our Court in *Barber v. The Presbyterian Hospital*, 147 N.C. App. 86, 555 S.E.2d 303 (2001), held that the trial court erred in granting a directed verdict for defendant, where the plaintiff was unfamiliar with the layout of the hospital and had never gone down the staircase and through the doorway in question. When the plaintiff pushed the door open, she looked straight ahead and stepped through the doorway. As she stepped forward with her left foot to go through the door, she lost her balance and fell forward; she twisted her ankle and landed on her left knee. Our Court distinguished *Barber* from *Grady* by stating that "[I]n the present case, plaintiff did not take any steps before falling down, and the step down was not in plain view when she opened the door." Our Court in *Barber* pointed out that the plaintiff looked straight ahead as she pushed the bar on the door and proceeded through the doorway. Based on those facts, our Court in Barber concluded that:

> It is not for us to say whether plaintiff behaved reasonably. We believe that "[r]easonable men may differ as to whether plaintiff was negligent at all . . . . What would any reasonably prudent person have done under the same or similar circumstances? Only a jury may answer that question . . . ."

Barber (quoting *Rappaport*, 296 at 387, 250 S.E.2d at 249). In the present case, we also find that is not for us to say whether Ms. Swinson behaved reasonably.

"When more than one interpretation of the facts is possible the issues of negligence and contributory negligence are matters to be decided by a jury." *Maness v. Fowler-Jones Const. Co.*, 10 N.C. App. 592, 179 S.E.2d 816, *cert. denied*, 278 N.C. 522, 180 S.E.2d 610 (1971). Based on the foregoing, we must conclude that Ms. Swinson is entitled to a new trial.

Reversed.

Judge BRYANT concurs.

Judge McCULLOUGH dissents in a separate opinion.

McCULLOUGH, Judge, dissenting.

The majority cites the correct law and appropriate standard for reviewing directed verdicts in negligence and contributory negligence

cases, but holds that there was sufficient evidence of a question of fact to go to the jury. Because I would hold that there were no questions of fact for the jury, I respectfully dissent.

"As a general proposition, there is no duty to protect a lawful visitor against dangers which are either known to him or so obvious and apparent that they reasonably may be expected to be discovered." *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 (1999).

"For issues of contributory negligence, a motion for directed verdict is appropriate when the 'plaintiff's evidence, considered in the light most favorable to him, together with inferences favorable to him that may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn.' " *Wilburn v. Honeycutt*, 135 N.C. App. 373, 375, 519 S.E.2d 774, 775 (1999) (quoting *Peeler v. Railway Co.*, 32 N.C. App. 759, 760, 233 S.E.2d 685, 686 (1977)).

The majority held that there are factual questions as to whether the condition in the sidewalk was open and obvious, and whether plaintiff acted as a reasonably prudent person would have acted.

The record shows that the president of Lejeune Motors testified that the place in the parking lot in which plaintiff fell was three-quarters of an inch to an inch deep, eight to twelve inches wide, and several feet long. The judge had photographs that were admitted into evidence which showed the place plaintiff "stubbed her toe" and fell.

In the majority's review of plaintiff's testimony, it recites the facts that she was not warned by employees or markers about the potential irregularities in the parking lot. Plaintiff was just looking for her car and fell.

Further review of the record shows the rest of the picture that the trial court had before it. In response to the question of why she did not see the hole, plaintiff testified, "I wasn't looking for a hole. I was looking for the car." The record shows that the area in which plaintiff fell was an open area, anywhere from 30 to 70 feet. Plaintiff testified that:

> [PLAINTIFF]: I come out of the door and looked around, and I saw these white cars parked over to the right, and I went over to the right to look for [her car].
>
> . . . .

And I didn't see it over where they park—they park it at a lot of times, so I looked to the right and looked over that way and finally saw it. About that time, I fell in the hole.

Further testimony followed:

[QUESTION]: All right. Now, you had been to the dealership on numerous occasions, had you not?

[PLAINTIFF]: Yes, sir.

[QUESTION]: In fact, y'all had bought several cars from this dealership, had you not?

[PLAINTIFF]: Yes.

[QUESTION]: And on the day in question here, you took [her car] there, I believe, for some maintenance and also a warranty item?

[PLAINTIFF]: Yes, sir.

[QUESTION]: Now, the weather was dry, pretty, was it not?

[PLAINTIFF]: Yes, sir.

[QUESTION]: Parking lot at the time of this accident was dry?

[PLAINTIFF]: Yes, sir.

[QUESTION]: When you left—when you were given the keys to the vehicle—you said you paid your bill and were given the keys?

[PLAINTIFF]: Yes, sir.

[QUESTION]: And you walked out of the service door?

[PLAINTIFF]: Yes, sir.

[QUESTION]: Out into the parking lot and took a right; is that right?

[PLAINTIFF]: Yes, sir.

[QUESTION]: And started looking for your car?

[PLAINTIFF]: Sure, did.

[QUESTION]: There were no cars parked in the area you were walking in, were there?

[PLAINTIFF]: No, sir.

[QUESTION]: I believe I asked you earlier about the distance. If there were testimony in this case that the distance from the point you were walking out to where the raised—the asphalt is is [sic] about 50 feet—45 or 50 feet, you would not object to that?

[PLAINTIFF]: It could be that. I do not know for sure.

[QUESTION]: And while you were walking that distance, whatever it was, you were looking for your car?

[PLAINTIFF]: Yes, sir.

[QUESTION]: Were you talking to anybody?

[PLAINTIFF]: No, sir. I was alone.

[QUESTION]: Anything to keep you from looking down to see—

[PLAINTIFF]: No, sir.

[QUESTION]: —what was on the pavement?

[PLAINTIFF]: Just looking for the car.

I do not find that sufficient evidence of a question of fact existed and thus would vote to affirm the trial court's decision. This case seems to be more like *Grady v. Penney Co.*, 260 N.C. 745, 133 S.E.2d 678 (1963). In that case, the plaintiff fell down a flight of stairs. There was no sign posted indicating a stairway, and an exit sign previously above the door had been removed. No employee had mentioned or warned the plaintiff of the stairway. Plaintiff admitted to taking two steps on the stairs before falling and that there was nothing to prevent her from seeing the stairs if she had just looked. The Court held that the stairs were in plain view and obvious, and I would hold the same here. Plaintiff had the "capacity to exercise ordinary care for [her] own safety against injury," and was required by law to do so. *See Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965).

The majority's reliance on *Barber v. The Presbyterian Hospital*, 147 N.C. App. 86, — S.E.2d — (6 November 2001) is misplaced. The plaintiff in *Barber* was entering a doorway in which the door completely blocked the potential dangerous condition. The first step could not be seen prior to opening the door regardless of due diligence by the plaintiff in keeping a lookout. The step dropped down without warning. Thus, there are no factual similarities between *Barber* and the instant case where the accident occurred in an open

parking lot on a clear, dry day with no obstructions in view. Likewise, the majority's quotation of *Walker v. Randolph*, 251 N.C. 805, 112 S.E.2d 551 (1960) adds little to the case as there is no evidence of a "sudden condition." The evidence shows the plaintiff was eye searching the parking lot for her car and was inattentive to where she was walking at the time she fell. *See Benton v. Building Co.*, 223 N.C. 809, 28 S.E.2d 491 (1943).

For the reasons set forth above I would affirm the trial judge's granting of a directed verdict for defendant as I believe plaintiff's testimony with the other evidence in the record establishes contributory negligence as a matter of law.

STATE OF NORTH CAROLINA v. ANGEL SANCHEZ, JR.

No. COA00-1075

(Filed 18 December 2001)

1. **Evidence— investigatory stop—informant's tip—contraband in briefcase—motion to suppress**

The trial court did not err in a trafficking in cocaine case by denying defendant's motion to suppress evidence obtained from his briefcase during an investigatory stop of a vehicle based on reliable and accurate information the police received from an informant's tip, because: (1) the informant spoke to the detective in person, revealing his identity and admitting to using and dealing cocaine with defendant; (2) although the informant had not been previously relied upon by officers, the face-to-face encounter provided the detective with an opportunity to assess the informant's reliability and demeanor; (3) the informant provided specific details concerning not only existing conditions, but also predictions of defendant's future behavior; and (4) there was sufficient police corroboration of the tip before the stop was made.

2. **Search and Seizure— investigatory stop—scope—show of force—officers drawing weapons—occupants of vehicle put in handcuffs**

The trial court did not err in a trafficking in cocaine case by concluding that the officers' actions did not exceed the scope of

an investigatory stop even though the officers made a show of force by drawing their weapons and placed the occupants of the vehicle in handcuffs, because: (1) the officers were justified in order to protect themselves when the suspect was considered armed and dangerous based on information provided by an informant; (2) the occupants of the vehicle were uncuffed and the officers put away their handguns once the officers ensured their safety; and (3) defendant's consent to the search of his briefcase was not a product of coercion and was voluntarily given.

3. Search and Seizure— home of another—overnight guest—standing

The trial court did not err in a trafficking in cocaine case by finding that defendant lacked standing to object to the search of his coparticipant's home where contraband was found under the stairwell located in the laundry room even though defendant contends he was an overnight guest temporarily residing in a living area located in the basement area which was connected to the garage and a laundry room, because: (1) defendant has failed to show that he personally has an expectation of privacy in the place searched and that his expectation was reasonable; and (2) at most, the evidence established that defendant was legitimately on the premises.

Appeal by defendant from judgment entered 24 February 2000 by Judge James Webb in Forsyth County Superior Court. Heard in the Court of Appeals 20 August 2001.

Attorney General Roy A. Cooper, by Assistant Attorney General William McBlief, for the State.

Lawrence J. Fine for defendant-appellant.

TIMMONS-GOODSON, Judge.

Angel Sanchez, Jr., ("defendant") was convicted of trafficking in cocaine by possession and transportation and conspiracy to traffick in cocaine. Defendant appeals.

The State's evidence presented at trial tended to show the following: On 5 October 1995, Detective Joseph Walls ("Detective Walls") of the Narcotics Division of the Kernersville Police Department, received information from an informant that defendant intended to transport cocaine from Miami to Greensboro on 7

October 1998 by airplane. The informant identified himself as Robert Segura ("Segura"). Segura admitted using and dealing cocaine for defendant in Kernersville and indicated that he "wanted out of the situation." He stated that he and his wife were in danger and the situation was "getting too big too quick." Segura, therefore, informed Detective Walls that defendant would either fly into the Greensboro airport with the cocaine or that the cocaine would arrive via next day mail. Segura also provided Detective Walls with the following information: (1) that defendant would likely have the cocaine secreted in blueprint tubes; (2) the name of the air carrier, the flight number and the arrival and departure time; (3) the name of defendant's traveling companion, Regina Cardo ("Cardo"); (4) that Frank ("Frank") and Mary Ann ("Mary Ann") Devita (collectively, "the Devitas") would meet defendant at the Greensboro airport; (5) descriptions of the Devitas' vehicles; (6) that Frank did not have a valid driver's license; (7) identified several people who would receive the cocaine from defendant; (8) that the Devitas possessed firearms; and (9) that on prior occasions, defendant has possessed plastic explosives.

Detective Walls and the other officers of the Kernersville Police Department (collectively "the officers") verified the information provided by Segura. The officers checked the criminal histories of Segura and the defendant. They obtained a photograph of defendant, verified the flight information and confirmed the Devitas' vehicle ownership. The officers also ran a license check which revealed that, in fact, Frank did not have a driver's license. On 7 October 1998, Detective Walls placed the Devita residence and the airport under surveillance. The Devitas drove to the Greensboro airport where they met defendant and Cardo during the morning of 7 October 1998, as forecasted by Segura. When Frank left the airport with Mary Ann, Cardo, and defendant, the officers followed the car.

Just two houses short of the Devitas' home, Detective Walls and seven officers stopped the Devitas' station wagon. Working in pairs, the officers removed the occupants from the vehicle. One officer placed the defendant and the occupants of the vehicle on the ground and handcuffed them while another officer covered the occupants with his handgun. The officers then frisked the occupants and searched the station wagon for weapons.

Having determined that there were no weapons, the officers put away their handguns and uncuffed the defendant and the occupants of the vehicle. No individual remained in cuffs for more than five minutes. Detective Walls then spoke to each occupant of the vehicle

separately, informing each that they were suspected of possessing cocaine. Detective Walls asked permission to search the vehicle and the belongings in the vehicle. Frank consented to the search of the station wagon, Cardo consented to the search of her purse, and defendant consented to the search of his briefcase.

The officers searched the station wagon, Cardo's purse, and defendant's briefcase but found no cocaine. However, they found several items that corroborated Segura's statement that the cocaine might arrive by overnight mail. This included a receipt in Cardo's purse dated 1 October 1998 for a post office box in her name at Mailbox Etc., Kernersville, NC. In defendant's unlocked briefcase the officers found two documents: a check stub dated 7 October 1998 showing payment to Mailbox, Etc., for a Federal Express package and a ledger showing several of the names previously provided by Segura. The officers did not seize the items but instead copied the information verbatim. The officers then returned the items to defendant and Cardo. The stop and search lasted approximately forty-five (45) minutes. Before permitting the four to leave, a citation was issued to Frank for driving without a license.

Detective Walls then asked Frank if he could search his nearby residence. After negotiating the number of officers permitted to enter his home, Frank consented to the search. The officers did not find any cocaine; however, they discovered several handguns and assault rifles.

On 8 October 1998, the day following the stop, Detective Walls assigned two officers to watch the Devita home while he and another officer waited at Mailbox Etc. Later that morning, Federal Express delivered a package to the Devita home. Detective Walls immediately ordered "a freeze" of the Devita home while he secured a search warrant. While Detective Walls left to obtain a search warrant, the officers remained inside the house to monitor the residence. One officer remained upstairs with the Devitas while another officer remained with the defendant and Cardo in the basement. Although they did not search the house, the officers observed empty Federal express packages and a plate of "white powder residue" located downstairs.

After Detective Walls arrived with the warrant, the officers searched the entire house, including the basement. In a closet located at the bottom of the stairs, an officer found two blueprint tubes that contained cocaine. Together, the tubes held 496 grams of cocaine.

Prior to trial, defendant moved to suppress the items recovered from his briefcase and from the Devita residence. After a lengthy *voir dire*, the trial court denied defendant's motion to suppress. Defendant was subsequently convicted as charged. Defendant appeals.

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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 from his briefcase. Specifically, defendant argues that the actions of the Kernersville Police Department during the traffic stop of the Devita vehicle far exceeded the allowable scope of an investigatory stop. Thus, defendant contends that probable cause was therefore necessary to support the resulting search. These arguments are without merit.

The scope of appellate review of an order suppressing evidence is strictly limited. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). This Court must determine whether the trial judge's findings of facts are supported by competent evidence. *Id.* Factual findings which are supported by competent evidence are deemed binding on appeal. *Id.* "While the trial court's factual findings are binding if sustained by the evidence, the court's conclusions based thereon are reviewable *de novo* on appeal." *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000).

The Fourth Amendment to the Constitution of the United States and Section 20 of Article I of the North Carolina Constitution prohibits unreasonable searches and seizures. *State v. Garner*, 331 N.C. 491, 506-07, 417 S.E.2d 502, 510 (1992), *cert denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996). They apply to "seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994). "A court must consider 'the totality of circumstances—the whole picture' in determining whether reasonable suspicion to make an investigatory stop exists." *Id.* (quoting *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981), *cert denied*, 455 U.S. 923, 71 L. Ed. 2d 464 (1982)). To determine whether the information relied on by the officers in the instant case was sufficiently reliable to create reasonable suspicion justifying the stop, we must probe the reliability and content of the informant's tip.

An informant's tip may provide the reasonable suspicion necessary for a *Terry* stop. *See Alabama v. White*, 496 U.S. 325, 328, 110 L. Ed. 2d 301, 305 (1990) (holding that the informant's tip carried

sufficient "indicia of reliability" to justify an investigatory stop even if insufficient to support an arrest or search warrant). "Although reasonable suspicion is less stringent than probable cause, it nevertheless requires that statements from tipsters carry some 'indicia of reliability[.]' " *State v. Watkins*, 120 N.C. App. 804, 809, 463 S.E.2d 802, 805 (1995) (quoting *White*, 496 U.S. at 330, 110 L. Ed. 2d at 309).

In evaluating the reliability of an informant's tip, due weight must be given to the informant's veracity, reliability, and basis of knowledge as highly relevant factors in determining whether an informant's tip is sufficient from the totality of circumstances. *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983). There must also exist sufficient police corroboration of the tip before the stop is made. If reasonable suspicion exists before the stop is made, there is no violation of the Fourth Amendment. *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000).

In this case, a review of the facts establishes that the tip provided by Segura was sufficiently reliable to create reasonable suspicion to justify the stop. First, Segura spoke to Detective Walls in person, revealing his identity and admitting to using and dealing cocaine with defendant. Though the informant in the present case had not previously been relied on by the officers, the face-to-face encounter provided Detective Walls an opportunity to assess his reliability and demeanor. Second, Segura provided specific details concerning not only existing conditions but also predictions of defendant's future behavior. He indicated that defendant and Cardo would fly from Miami to Greensboro on 7 October 1998 on a particular flight, and that the Devitas would pick up defendant and Cardo at the airport. He stated that the cocaine would arrive by next day mail in Kernersville. Segura also provided the names of several people who would receive cocaine from defendant.

Based upon the information the officers received from Segura, Detective Walls verified the air carrier, flight number, arrival time, departure time, and traveling companion. The officers also verified the Devita's residence and vehicle and defendant's description and criminal history. Detective Walls recognized several names of the persons who Segura alleged would receive cocaine from defendant. Lastly, the officers corroborated Segura's report that Frank did not possess a valid driver's license. Based on this information and corroboration, the officers had reasonable grounds to believe the tip was

accurate and reliable, and that the investigatory stop of the vehicle was justified.

[2] We next determine whether following the stop of defendant's vehicle, the officers' actions exceeded the scope of an investigatory stop. Defendant argues that because the actions of the officers exceeded the scope of a valid investigatory stop, such as in drawing weapons and using handcuffs, the defendant's consent to search was involuntary. We disagree.

An investigatory stop must be "based on specific and articulable facts, as well as rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70. If upon detaining the individual, the officer's personal observations confirm that criminal activity may be afoot and suggest that the person detained may be armed, the officer may frisk him as a matter of self-protection. *State v. Streeter*, 283 N.C. 203, 210, 195 S.E.2d 502, 507 (1973). The United States Supreme Court has held that in conducting *Terry* stops, the investigating officers may take steps reasonably necessary to maintain the status quo and to protect their safety including the drawing of weapons. *See U.S. v. Hensley*, 469 U.S. 221, 235, 83 L. Ed. 2d 604, 616 (1985) (holding that the officers were justified in approaching defendant's vehicle with pistols drawn when suspect was described as "armed and dangerous"). The scope of the intrusion varies with the facts and circumstances of each case. *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983). However, an investigative detention should last no longer than is necessary to "effectuate the purpose of the stop." *Id.*

In this case, the officers were justified in making a show of force to protect themselves when the suspect was considered armed and dangerous. Through the information provided by Segura, the officers had reasonable grounds to believe that defendant was armed and dangerous and that criminal activity may be afoot. First, Segura informed the officers that Frank was driving without a valid driver's license. The officers verified this information which provided reasonable suspicion to stop the vehicle. Second, Segura informed the officers that defendant might be heavily armed and might possess explosives. On *voir dire* Detective Walls testified that the officers conducted a felony traffic stop for their safety where they placed the occupants of the vehicle in handcuffs, placed them on the ground, searched them for weapons, and then searched the vehicle for weapons.

Once the officers ensured their safety, they uncuffed the defendant and the occupants of the vehicle and put away their own handguns. Thus, defendant and the occupants of the vehicle spent no more than five minutes in handcuffs. Based on these facts, we hold that the officers were justified in making a limited investigative detention of defendant and the occupants of the vehicle and this detention did not exceed the scope of an investigatory stop.

Moreover, defendant's consent to search his briefcase was not the product of coercion. The State has the burden of proving that a consent to search was voluntarily given. *State v. Morroco*, 99 N.C. App. 421, 429, 393 S.E.2d 545, 549 (1990). When a defendant's detention is lawful, the State need only show "that defendant's consent to the search was freely given, and was not the product of coercion." *State v. Munoz*, 141 N.C. App. 675, 683, 541 S.E.2d 218, 223, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001).

In the instant case, the facts demonstrate no coercion by the officers in obtaining defendant's consent. Once the officers determined that there were no explosives or weapons in the vehicle, the handcuffs were removed. Detective Walls then asked defendant for permission to search his briefcase and defendant unequivocally responded "yes." There is no evidence that defendant at any time objected to the search. Moreover, the officers did not use coercive tactics in obtaining defendant's consent to search the briefcase. We agree with the trial court that the evidence supports a finding that the consent was voluntarily given. The subsequent search was therefore lawful and this assignment of error is overruled.

[3] Defendant next assigns error to the trial court's finding that he lacked standing to object to the search of the Devita home. Further, defendant contends that the search warrant was issued without probable cause. These arguments are without merit.

The United States Supreme Court has held that the touchstone of the Fourth Amendment analysis on standing is whether a person has a "constitutionally protected reasonable expectation of privacy." *Oliver v. U.S.*, 466 U.S. 170, 177, 80 L. Ed. 2d 214, 223 (1984). "The Amendment does not protect the merely subjective expectation of privacy, but only those expectation[s] that society is prepared to recognize as 'reasonable.' " *Id.* (quoting *Katz v. U.S.*, 389 U.S. 347, 360, 19 L. Ed. 2d 576, 587 (1967)). In order for defendant to establish standing to contest the search of the premises, he must show that he has a legitimate expectation of privacy *in the premises*. *Rakas v.*

Illinois, 439 U.S. 128, 143, 58 L. Ed. 2d 387, 401 (1978) (emphasis added). However, when a defendant fails to assert a property or possessory interest in the property searched, or a showing of circumstances giving rise to his reasonable expectation of privacy in the premises searched, he fails in his burden of proving standing. *State v. Jones*, 299 N.C. 298, 306, 261 S.E.2d 860, 865 (1980).

Defendant, relying on *Minnesota v. Olson*, 495 U.S. 91, 109 L. Ed. 2d 85 (1985), contends that he has standing to object to the issuance of the search warrant on the grounds that he was an overnight guest. We disagree.

The United States Supreme Court has recognized that "status as an overnight guest alone is enough to show that [defendant] has an expectation of privacy in the home that society is prepared to recognize as reasonable." *Olson*, 495 U.S. at 96-7, 109 L. Ed. 2d at 93. We are cognizant of *Minnesota v. Olson*; however, we decline to extend *Olson* to the present case because defendant has failed to show that "he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88, 142 L. Ed. 2d 373, 379 (1998).

The facts indicate that defendant was temporarily residing in a living area located in the basement area which was connected to the garage and a laundry room. The laundry room was separated by a door to the basement and garage area. The contraband was found under the stairwell located in the laundry room. Defendant has not presented any evidence or alleged any facts which would support a finding that he had a reasonable expectation of privacy with respect to the contraband hidden under the stairwell which was a common area in the Devita residence. At most the evidence presented established that defendant was legitimately on the premises; however, this fact standing alone does not create the requisite expectation of privacy that would permit him to assert a Fourth Amendment violation.

Having held that defendant lacked standing to object to the search, we do not address defendant's remaining assignments of error.

No error.

Chief Judge EAGLES and Judge THOMAS concur.

HOPINEAL HINES BEST, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF H. B. BEST, PLAINTIFFS v. WAYNE MEMORIAL HOSPITAL, INC., DOUGLAS M. RUSSELL, M.D., JOHN DOE I, JOHN DOE II, JOHN DOE III, DEFENDANTS

No. COA00-1337; No. COA00-1449

(Filed 18 December 2001)

1. **Medical Malpractice— Rule 9(j) certification—extension of statute of limitations**

The trial court erred in a medical malpractice action by granting defendants' motion to dismiss based on its ruling that plaintiff's 120-day extension of the statute of limitations under N.C.G.S. § 1A-1, Rule 9(j) was defective even though Rule 9(j) is now void, because: (1) plaintiff must be accorded a reasonable period of time to file suit; (2) plaintiff's reliance upon the extension located in Rule 9(j) will be honored as being filed within the time limits previously in effect; and (3) the case remains viable since the total elimination of the statute of limitations extension would be an inherent violation of due process.

2. **Medical Malpractice— Rule 9(j) certification—failure to comply with requirements—resident superior court judge**

The trial court erred in a medical malpractice action by granting defendants' motion to dismiss based on plaintiff's alleged failure to comply with N.C.G.S. § 1A-1, Rule 9(j)'s requirement to have a resident superior court judge hear the motion for extension of time when a judge assigned to the pertinent county by the Chief Justice of the Supreme Court heard the motion instead of the resident superior court judge of that county, because: (1) although a Rule 9(j) extension motion is to be heard by a resident judge when one is available, it is proper for the duly appointed presiding superior court judge to hear and sign the motion when the resident judge is unavailable or nonexistent; and (2) N.C.G.S. § 7A-47 provides that a presiding superior court judge duly assigned by the Chief Justice of the Supreme Court acts with the power of the resident superior court judge.

Appeal by plaintiff from order entered 1 May 2000 by Judge Benjamin G. Alford in Wayne County Superior Court. Heard in the Court of Appeals 17 October 2001.

Burford & Lewis, P.L.L.C., by Robert J. Burford, for plaintiff appellant.

Heilig, McKenry, Fraim and Lollar, by Robert E. Moreland, for defendant appellee Wayne Memorial Hospital, Inc.

Walker, Clark, Allen, Herrin & Morano, L.L.P., by Mark R. Morano, for Douglas M. Russell, M.D., defendant appellee.

Beaver, Holt, Sternlicht, Glazier, Carlin, Britton & Courie, P.A., by Richard B. Glazier, amicus curiae for The North Carolina Academy of Trial Lawyers.

McCULLOUGH, Judge.

Plaintiff appeals from the orders of dismissal entered by Judge Alford at the 7 February and 17 April 2000 Sessions of Wayne County Civil Superior Court.

On 12 November 1997 in Wayne County Superior Court Hopineal Hines Best (hereinafter plaintiff) brought a wrongful death suit individually and as administratrix of the estate of H. B. Best against defendants Wayne Memorial Hospital (the Hospital), Douglas M. Russell, M.D. (the Doctor), and other defendants who at that time had not been named. Previously, on 7 July 1997, plaintiff had filed a Rule 9(j) motion to extend the statute of limitations prior to filing her complaint. This motion was granted by Judge Ernest B. Fullwood on 7 July 1997, and filed on 11 July 1997. Judge Fullwood had been assigned to Wayne County by the Chief Justice of the Supreme Court of the State of North Carolina.[1] Judge Fullwood was the Resident Superior Court Judge for New Hanover County, not Wayne County, nor has he ever been the Resident Superior Court Judge of Wayne County. The sole Resident Superior Court Judge of Wayne County at all relevant times was Judge Paul Wright.

In his affidavit, plaintiff's attorney, Robert Burford, testified that he searched the Wayne County Courthouse for Judge Wright, only to learn that he was on vacation.[2] Mr. Burford then called the Administrative Office of the Courts (AOC) for guidance as to the situation. The AOC advised Mr. Burford to get the presiding judge to rule on the order and sign it because "he was the only judge assigned to Wayne County." Judge Fullwood then heard the motion and ordered

1. Judge Quentin Sumner was originally assigned to Wayne County for the relevant times, but was replaced by Judge Fullwood for reasons not in the record.

2. Judge Wright maintains a general policy to recuse himself from all medical malpractice cases that arise in Wayne County. Thus, had he been present on the 7th, Judge Wright presumably would not have heard the motion.

the statute of limitations extended pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. The plaintiff then filed her complaint on 12 November 1997, and defendants filed their respective answers, the Hospital's answer on 18 December 1997, and the Doctor's answer on 8 January 1998. Among other things, defendants alleged that plaintiff's claim was time barred by the statute of limitations.

Approximately two years later, both defendants filed motions to dismiss on the grounds of failure to comply with Rule 9(j) (the Doctor on 7 February 2000 and the Hospital on 8 March 2000). Specifically, they claimed that Judge Fullwood had no authority to hear the motion because he was not a Resident Superior Court Judge of Wayne County as required by Rule 9(j). While heard separately, the Doctor on 16 March 2000 and the Hospital on 1 May 2000, essentially the same order was entered for both defendants by Judge Benjamin Alford. Judge Alford's order concluded that, since Judge Fullwood was not a Resident Superior Court Judge of Wayne County, he did not have authority to grant the motion. Thus, no order had been entered to extend the statute of limitations, and plaintiff's cause of action was barred by the applicable statute of limitations. It is from these orders that plaintiff appeals.

The plaintiff makes the following assignments of error: that the trial court erred in (I) dismissing the plaintiff's action on grounds of noncompliance with N.C. Gen. Stat. § 1A-1, Rule 9(j) (1999); (II) ruling that plaintiff's extension of the statute of limitations pursuant to Rule 9(j) was defective for the reason that the extension order lacked the signature of the sole resident superior court judge who recused himself; (III) ruling that the "resident judge" requirement for extension of the statute of limitations under Rule 9(j) does not violate constitutional protections afforded by the Constitution of the State of North Carolina; (IV) ruling that the "resident judge" requirement for extension of the statute of limitations under Rule 9(j) does not violate constitutional protections afforded by the Constitution of the United States of America; (V) ruling that Rule 9(j) is constitutional under the Constitution of the State of North Carolina; (VI) ruling that Rule 9(j) is constitutional under the Constitution of the United States of America; and (VII) ruling that one superior court judge has the power to directly or indirectly overrule the rulings of another superior court judge on issues regarding N.C. Gen. Stat. § 1A-1, Rule 9(j).

Discussion of *Anderson v. Assimos*

This Court notes from the outset that the decision of *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001), finding Rule 9(j) to be unconstitutional and therefore void, is binding and controlling in the present case. The *Anderson* Court found that Rule 9(j) violated the open access to the courts provision found in N.C. Const. art. I, § 18, and the equal protection clause of the United States and North Carolina Constitutions.

As to access to the courts, *Anderson* held that the General Assembly had

> placed a restriction on a party's right to file a malpractice claim against a "health care provider" [that] impairs, unduly burdens, and in some instances, where the injured party is 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.

Anderson, 146 N.C. App. at 344-45, 553 S.E.2d at 67-68.

Under equal protection, *Anderson* concluded that Rule 9(j) classified malpractice actions into two groups: medical and non-medical. *Id.* at 345, 553 S.E.2d at 68. *Anderson* also determined that a fundamental right was involved from the above violation of the access to the courts provision. *Id. Anderson* held that Rule 9(j) was not the least restrictive means for the General Assembly to achieve its interest in preventing frivolous lawsuits. *Id.*

The plaintiff in *Anderson* had her complaint dismissed for failure to comply with the certification requirements of Rule 9(j). The plaintiff did file for an extension of time pursuant to Rule 9(j), but it was not pertinent on appeal. The *Anderson* Court reversed the dismissal and remanded the case for trial.

[1] Defendant Dr. Russell, in the present case, through memorandum of additional authority, cites this Court to the *Anderson* case and contends that the dismissal of plaintiff's action below should now be affirmed. Defendant Dr. Russell reasons that because Rule 9(j) is now void, it follows that the 120-day extension contained in Rule 9(j) is also void, and plaintiff cannot now rely on this extension. This being the case, plaintiff's action was filed after the statute of limitations had run, and is time barred.

Similar problems have confronted the judicial system occurring primarily when the Legislature enacted new statutes which shortened the statute of limitations. In *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980), the Legislature had changed the statute of limitations that was applicable to the plaintiff in that case. The *Flippin* Court stated that "[i]f the new statute shortens the period . . . it must, to comport with due process, provide a reasonable time for filing actions which have accrued but which have not been filed when the new statute takes effect." *Flippin*, 301 N.C. at 113, 270 S.E.2d at 486; *Barnhardt v. Morrison*, 178 N.C. 563, 101 S.E. 218 (1919).

In *Flippin*, if the new statute had been applicable to the plaintiff, it would have effectively barred plaintiff's action immediately upon the statute's taking effect. There the plaintiff only had 39 days in which to bring her claim after the new law went into effect. Our Supreme Court held this time period to be constitutionally insufficient and unreasonable.

That is essentially the same situation we have here in *Best*. According to defendant, as soon as the *Anderson* decision became law, the Best claims were effectively barred because the extension of time relied upon by plaintiff was no longer viable. Plaintiff would not have had any time to file, much less 39 days. Therefore under the rule set forth in *Flippin*, plaintiff must be accorded a reasonable period of time to file suit. Plaintiff filed within the time allowed by Rule 9(j). We hold that the Due Process Clause of the Fourteenth Amendment of the United States Constitution, as well as its North Carolina counterpart would be violated if this Court were to deprive plaintiff of her opportunity to file suit within a reasonable period of time.

The same sort of reasoning was recognized and followed in *Reunion Land Co. v. Village of Marvin*, 129 N.C. App. 249, 497 S.E.2d 446 (1998). In *Reunion*, the Court stated that:

> In North Carolina, where the legislature shortens the statute of limitations for the filing of an action, a party with a claim at the time of the amendment has a reasonable time to file that claim, but such reasonable time cannot exceed the limitations period allowed under the new law.

Id. at 250, 497 S.E.2d at 447; *see Culbreth v. Downing*, 121 N.C. 205, 28 S.E. 294 (1897).

In *Reunion*, the statute of limitations was shortened from nine months to two months. The facts were that one month after the cause of action had accrued, while plaintiff had eight more months to file, the Legislature changed the statute of limitations from nine to two months. *Reunion* held, relying on *Culbreth*, that from the time the law was enacted, the plaintiff had two months to file. *Reunion*, 129 N.C. App. at 251, 497 S.E.2d at 447-48. Since the plaintiff did not comply with this, they were indeed time barred. *Id.*

Applying the *Reunion* reasoning to the present case, plaintiff Best had 120 days from when she got the extension. When *Anderson* took effect declaring Rule 9(j) unconstitutional, the extension was gone—no longer on the books. There was no new statute of limitations to go by. Thus, plaintiff's reliance upon the extension located in Rule 9(j) will be honored as being filed within the time limits previously in effect in light of *Flippin* and *Reunion*.

For all litigants situated as is plaintiff in this case, having relied on Rule 9(j)'s extension provision, their cases remain viable as the total elimination of the statute of limitations extension would be an inherent violation of due process. Therefore, the extension granted in this case was not invalidated by *Anderson*.

It thus becomes necessary for this Court to address the "resident" judge issue originally raised.

Discussion of the Extension of Time

[2] Both plaintiff and The North Carolina Academy of Trial Lawyers in their Amicus Curiae brief argue that to uphold Rule 9(j)'s constitutionality as to the extension of time, it must be construed to allow a "nonresident" superior court judge to sign a motion to extend time for a pre-filing expert certification when a "resident" superior court judge in the county where the cause of action arose is unavailable or nonexistent. We agree.

Rule 9(j) of the North Carolina Civil Procedure allows the extension of the statute of limitations in medical malpractice cases:

> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, *a resident judge of the superior court of the county in which the cause of action arose* may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determina-

> tion that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (emphasis added).

Defendants and the trial court followed a literal interpretation of the statute and concluded that *only* the resident superior court judge has the authority to rule on such a motion. It followed that since Judge Fullwood was not a Resident Superior Court Judge of Wayne County, he could not have had the authority to grant the motion.

This Court has recently said that "Rule 9(j) was 'intended, in part, to protect defendants from having to defend frivolous medical malpractice actions' by requiring that a qualified medical expert review a potential plaintiff's complaint." *Stewart v. Southeastern Reg'l Med. Ctr.*, 142 N.C. App. 456, 462, 543 S.E.2d 517, 521 (2001) (quoting *Webb v. Nash Hosp., Inc.*, 133 N.C. App. 636, 639, 516 S.E.2d 191, 194, *disc. reviews denied*, 351 N.C. 122, 541 S.E.2d 471 (1999)). The *Stewart* case continued by stating that:

> In order to comply with Rule 9(j), the collateral extension provision grants plaintiffs additional filing time to gather the medical expertise that they need to support legitimate claims. Thus the rule was intended both to protect defendants from frivolous suits as well as to protect plaintiffs with meritorious cases from losing their rights.

Id. This being the case, we do not believe that our Legislature intended for some plaintiffs to have more or better access to the courts of our state for this extension.

It is a basic tenet that our laws are to treat all of our citizens equally. N.C. Const. art. I, § 19. Within this tenet is the equally important right that all citizens have an equal opportunity to avail themselves of the law. N.C. Const. art. I, § 18.

It is a reality in North Carolina that some counties have several resident superior court judges while other counties have but one. Some counties are included in a judicial district, but have no resident superior court judge at all. If we were to follow defendants' interpretation, the plaintiffs in counties without a resident superior court judge would not receive a benefit conferred by the Legislature upon the plaintiffs in other counties with resident superior court judges. By the same token, counties with only one resident superior court

judge, such as the case here with Wayne County, could find plaintiffs potentially deprived of the benefit of the extension depending upon the schedule and/or health of that judge, or even the judge's willingness to hear such motions. Such would have been the case here: Wayne County would have been effectively without a resident superior court judge in this limited area because of Judge Wright's longstanding policy to recuse himself from all discretionary matters involving medical malpractice in Wayne County.

Our decision today, however, does not rest on constitutional grounds. "We rely, instead, on the familiar canon of statutory construction that '[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted.' " *Delconte v. North Carolina*, 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985) (quoting *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977)).

> "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same.*"

Id. (quoting *In re Dairy Farms*, 289 N.C. 456, 465-66, 223 S.E.2d 323, 328-29 (1976) (quoting *NLRB v. Jones and Loughlin Steel Corp.*, 301 U.S. 1, 81 L. Ed. 893 (1936))).

We are mindful that "[w]e are not at liberty to give a statute a construction at variance with [the Legislature's] intent, even though such construction appears to us to make the statute more desirable and free it from constitutional difficulties." *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E.2d 338, 350 (1978). We also analyze this case in light of two other principles, in addition to the ones listed above.

First, this Court has a "general policy of liberality in construing our rules of civil procedure." *Stewart*, 142 N.C. App. at 462, 543 S.E.2d at 521 (2001); *see Johnson v. Johnson*, 14 N.C. App. 40, 187 S.E.2d 420 (1972) (citing with approval the general policy of the rules is to disregard technicalities and form and determine the rights of litigants on the merits). The other principle is that "[i]t is presumed that the legislature acted in accordance with reason and common sense and that it did not intend an unjust or absurd result . . . ." *King v. Baldwin*, 276 N.C. 316, 325, 172 S.E.2d 12, 18 (1970).

The Legislature presumably had a reason to direct Rule 9(j) extension motions to the resident superior court judge. It is not entirely clear what those reasons were. Defendants attempt to list reasons they feel are behind the language, including that resident judges know the doctors, lawyers, availability of experts, and numerous other contingencies in their home counties better than any other judge. Certainly the Legislature did not intend to close off the extension benefit from a large portion of the citizenry by using the designation "resident." Thus, we conclude that Rule 9(j) extension motion is to be heard by a resident judge when one is available, but when the resident judge is unavailable or nonexistent, it is proper for the duly appointed presiding superior court judge to hear and sign the motion.

Defendant Dr. Russell cites many instances in his brief where the Legislature has used the "resident" designation, arguing that the Legislature's wishes are to be respected. The Doctor missed the one provision that is relevant to this case. N.C. Gen. Stat. § 7A-47, titled "Powers of regular judges holding courts by assignment or exchange" reads:

> A regular superior court judge, duly assigned to hold the courts of a county, or holding such courts by exchange, shall have the *same powers* in the district or set of districts . . . in which the county is located, in open court and in chambers as *the resident judge* or any judge regularly assigned to hold the courts of the district or set of districts . . . and his jurisdiction in chambers shall extend until the session is adjourned or the session expires by operation of law, whichever is later.

N.C. Gen. Stat. § 7A-47 (1999) (emphasis added).

According to the above statute, a presiding superior court judge, duly assigned by the Chief Justice of the Supreme Court, acts with the power of the resident superior court judge. Thus, Judge Fullwood was technically acting in a "resident" capacity when he ruled on plaintiff's motion.

We reverse the trial court's granting of defendants' motions to dismiss and remand for trial.

Judges BRYANT and JOHN concur.

STATE OF NORTH CAROLINA v. BENJAMIN ALEXANDER COLE

No. COA00-1311

(Filed 18 December 2001)

1. Witnesses— leading questions—no abuse of discretion

The trial court did not improperly permit the State to ask leading questions in a first-degree murder prosecution where the questions at issue were not leading or were permissible to develop a witness's testimony.

2. Criminal Law— prosecutor's argument—defendant as drug dealer—factual basis

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's objections to portions of the State's closing argument as not being based on facts in evidence. The State specifically outlined the evidence which formed the basis of the inference that defendant was a drug dealer and defendant invited the issue by offering an alibi and suggesting that the victim's "drug-related killing" could have been committed by a "disgruntled client." Moreover, the impropriety of the statements was not so extreme as to prejudice the jury.

3. Identification of Defendants— eyewitness testimony—expert witness rejected

The trial court did not err in a first-degree murder prosecution by not allowing defendant's proffered expert testimony on identification testimony where the court found that the witness was in no better position than the jury to determine the weight to be given the identifications in this case, that the witness's testimony would not provide any appreciable assistance to the jury in evaluating the identifications, and that his testimony was outweighed by the risk of confusing the jury.

4. Criminal Law— instructions—reasonable doubt

The trial court did not err in a first-degree murder prosecution in its instructions as to the meaning of "reasonable doubt" where the State in its argument quoted from two Supreme Court decisions, the trial court originally used the Pattern Jury Instructions definition, the jury first requested a copy of the language to which the State had referred, then asked the court to reconcile the language from the two opinions, and the court responded by reading the language from the two opinions and

instructing the jury that it was to interpret each in its own context. There is nothing in the record to indicate that the jury was confused after the court's further instructions and the two Supreme Court cases accurately defined reasonable doubt.

5. Identification of Defendants— eyewitness testimony—percentages of certainty

The trial court did not err in a first-degree murder prosecution by allowing the State to ask a witness to give percentages of certainty to the words "sure" and "pretty sure" in her identification testimony.

6. Identification of Defendants— photographic—computer generated display

The trial court did not err in a first-degree murder prosecution by admitting a witness's pre-trial and in-court identifications of defendant where the display contained 19 thumbnail photographs generated from a computerized system which matched descriptions given by witnesses and the detective merely asked if anyone looked like one of the perpetrators but did not make any comments or suggestions.

Appeal by defendant from judgment entered 20 December 1999 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 11 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General Buren R. Shields, III, for the State.

Leonard Law Firm, by Robert K. Leonard, for defendant-appellant.

WALKER, Judge.

Defendant appeals his conviction for first degree murder under the felony murder rule. The State's evidence presented at trial tends to show the following: On the evening of 22 May 1998, Tonya Luther (Luther), Alesia Clapp (Clapp), and Tina Clapp were visiting with Calvin Jenkins (Jenkins) in his Greensboro apartment. At approximately 9:10 p.m., Luther decided to leave and check on her nearby apartment. As she was walking out, there was a knock at the front door. Jenkins opened the door and two black males entered. One was noticeably shorter than the other. Luther said "Hi" to the men as she walked out. The men then spoke briefly with Jenkins and left.

A short time later, Luther returned to Jenkins' apartment and saw the same two men standing in the parking lot. After about ten minutes, there was another knock at the front door. Jenkins again answered and the two men entered. The three women were talking in the kitchen near the apartment's entrance. Luther and Clapp heard one of the men say "Give me some money" and observed Jenkins raise his hands. They next heard a gun shot and saw Jenkins fall to the floor. The shorter of the two men approached the women and asked, "Where's the money at?" The taller man began to search the kitchen. After he found "three or four bags of marijuana," the two men left.

When the police arrived at the apartment, Luther and Clapp provided them with a description of the two men. Four days later, Luther and Clapp went to the Greensboro Police Department where they gave further descriptions. The police then entered a composite description of each man into a computerized photographic database known as the "Spillman system." This system matched the descriptions to photographs maintained in a computer database. It then displayed approximately nineteen photographs at one time on a seventeen-inch computer screen. At this time, Luther and Clapp viewed more than one thousand photographs but did not see one which depicted either of the two men.

The next day, Luther returned to the police department and continued viewing photograph displays. After some time, she selected a photograph which she identified as depicting the shorter of the two men. She continued to view several displays but did not see a photograph of the second man. Later that evening, a Greensboro detective went to Clapp's place of work and showed her the display from which Luther had made her identification. Clapp selected the same photograph as Luther. Defendant was the individual shown in the photograph.

At trial, both Luther and Clapp identified defendant as being the shorter man in Jenkins' apartment on the evening of 22 May 1998. Forensic evidence also showed that Jenkins died of a single gunshot wound to the chest. From the apartment, crime scene technicians recovered 175.9 grams of marijuana, a scale which is similar to those used in weighing marijuana, approximately one thousand dollars in cash, and several boxes of pistol cartridges.

Defendant presented evidence which tended to show that he had been in Dayton, Ohio, for three to four months prior to June 1998. A

recording engineer also testified that he billed defendant for the use of a studio in Dayton for the same date that Jenkins was killed.

[1] With his first assignment of error, defendant contends the trial court erred by permitting the State to ask leading questions of its witnesses and to argue facts during closing argument which were not in evidence.

Our appellate courts have consistently held that control over the course and conduct of a trial is the responsibility of the trial court and will not be disturbed absent an abuse of discretion. *State v. Covington*, 290 N.C. 313, 334-35, 226 S.E.2d 629, 644 (1976); *State v. Davis*, 77 N.C. App. 68, 74, 334 S.E.2d 509, 513 (1985); *State v. Dickens*, 346 N.C. 26, 44, 484 S.E.2d 553, 563 (1997)("[r]ulings concerning the admissibility of leading questions are in the sound discretion of the trial court and should not be disturbed absent an abuse of that discretion"); *State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979)("control of the arguments of counsel must be left largely to the discretion of the trial judge"). An abuse of discretion occurs only where the trial court's ruling is "so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985). Even in situations where the trial court does err, a defendant is not entitled to a new trial unless such error is material and prejudicial. *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983).

Defendant first asserts that he is entitled to a new trial by arguing that the trial court abused its discretion in allowing the State to ask leading questions of its witnesses. Specifically, defendant identifies thirteen questions asked of six different witnesses which he contends were leading.

After carefully reviewing each of these questions, we agree with the trial court's conclusion that they were either not leading questions or were permissible to develop a witness' testimony. *State v. Smith*, 135 N.C. App. 649, 655, 522 S.E.2d 321, 326 (1999), *disc. review denied*, 351 N.C. 367, 543 S.E.2d 143 (2000). Defendant has also failed to demonstrate how the trial court's allowing these questions resulted in prejudicial error. *Dickens*, 346 N.C. at 44, 484 S.E.2d at 563.

[2] Defendant next asserts that he is entitled to a new trial based on the State's presenting to the jury facts which were not in evidence.

During his closing argument, defendant argued that Jenkins' death was a "drug-related killing." He maintained that Jenkins was a

drug dealer, that people were constantly in and out of his apartment, and that he was likely killed by a disgruntled client. Defendant also argued that he could not possibly have killed Jenkins because he was in Dayton, Ohio, on the day of the shooting.

In its argument and in response to these assertions, the State recounted for the jury the testimony of witnesses who stated that defendant smoked marijuana, was frequently seen coming and going from Jenkins' apartment, and maintained a high life style without any known job or visible source of income. The State also noted there was testimony that defendant's father had flown into town every couple of weeks and stayed in the exact same motel. After outlining this testimony, the State asked a number of rhetorical questions to which defendant made two objections: "[E]ver wonder what his [father's] business might be? . . . Might common sense tell you that he might be a Jamaican drug dealer? . . . Might you infer that his son is involved in his father's business? . . . I mean, remember the demand? 'Where's the money at?' You think that might sound Jamaican?" The State concluded by suggesting to the jury that it might infer from the evidence that defendant was selling drugs to Jenkins and that Jenkins' killing had "all the earmarks of a drug killing."

Defendant contends the trial court erred by failing to sustain his objections to this portion of the State's argument. However, after considering the State's comments within the context in which they were made, we conclude the trial court did not abuse its discretion in failing to sustain defendant's objections. *See State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560, *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1994)("Prosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they refer"). The State specifically outlined the evidence which formed the basis of the inferences it argued. Moreover, defendant invited this line of discussion by offering an alibi and first suggesting to the jury in his own closing argument that Jenkins' "drug-related killing" could have been committed by a "disgruntled client." *See State v. Larrimore*, 340 N.C. 119, 165, 456 S.E.2d 789, 814 (1995) (noting prosecutor is allowed to respond to arguments made by defense counsel).

Further, even assuming *arguendo* that these statements were improper, their impropriety was not so extreme as to prejudice the jury in its deliberations. *State v. Ingle*, 336 N.C. 617, 650-51, 445

S.E.2d 880, 898 (1994), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995) (holding a defendant is not entitled to a new trial because of an improper prosecutorial comment, properly objected to, unless the comment amounted to prejudicial error). This assignment of error is overruled.

[3] In his second assignment of error, defendant asserts the trial court erred by not allowing the testimony of his expert witness. During his presentation of evidence, defendant sought to offer the testimony of Dr. Reed Hunt, a professor of psychology at the University of North Carolina at Greensboro. During *voir dire*, Dr. Hunt testified that he was not a licensed or clinical psychologist. He further testified that he had attempted to testify in State court on three previous occasions but had been permitted to testify only once. On that occasion, the circumstances did not involve a photographic lineup but rather an in-court identification. Dr. Hunt stated there are several factors which affect an eyewitness identification and that witnesses often state they are sure of their identification when, in fact, they are wrong. He added that when the crime involves a weapon, the accuracy of the identification is "considerably lower." The trial court denied defendant's motion to admit Dr. Hunt's testimony finding that: (1) he was in no better position than the jury to determine the weight to be given to the identifications of Luther and Clapp; (2) his testimony would not provide any appreciable assistance to the jury in evaluating the identifications; and (3) his testimony, even if probative, was outweighed by the risk it carried of confusing the jury.

Our Supreme Court has held, "It is undisputed that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified." *State v. Locklear*, 349 N.C. 118, 147, 505 S.E.2d 277, 294 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999) (*quoting State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984)); N.C. Gen. Stat. § 8C-1, Rule 702(a) (1999). This Court has previously addressed the issue of the admissibility of expert testimony on eyewitness identifications and has held that "the admission of expert testimony regarding memory factors is within the trial court's discretion, and the appellate court will not intervene where the trial court properly appraises probative and prejudicial value of the evidence under Rule 403 and the Rules of Evidence." *State v. Cotton*, 99 N.C. App. 615, 621, 394 S.E.2d 456, 459 (1990), *affirmed*, 329 N.C. 764, 407 S.E.2d 514 (1991) (*citing State v. Knox*, 78 N.C. App. 493, 495-96, 337 S.E.2d 154, 156 (1985)). Our review of the trial court's findings reveals

that it considered Dr. Hunt's testimony and found that any probative value was outweighed by the risk of confusing the jury. We conclude the trial court did not abuse its discretion in not allowing Dr. Hunt's proffered testimony.

[4] With his third assignment of error, defendant contends the trial court erred in its instructions to the jury as to the meaning it should give to "reasonable doubt." During its closing argument, the State quoted language from our Supreme Court's decisions in *State v. Adams*, 335 N.C. 401, 439 S.E.2d 760 (1994) and *State v. Bishop*, 346 N.C. 365, 488 S.E.2d 769 (1997), which offered explanations as to how a jury was to interpret "reasonable doubt." Here, following closing arguments, the trial court, in its instructions to the jury, defined reasonable doubt using the North Carolina Pattern Jury Instruction (Criminal) 101.10. During its deliberations, the jury requested a copy of the language to which the State had referred in its closing argument. Over defendant's objection, the trial court provided the jury with a copy of the language used in both *Adams* and *Bishop*. After further deliberations, the jury asked the trial court to reconcile the language from *Adams* "nor is it proof beyond a shadow of a doubt nor proof beyond all doubts. . . ." 335 N.C. at 420, 439 S.E.2d at 770, with the language from *Bishop* "fully satisfies or entirely convinces you. . . ." 346 N.C. at 399, 488 S.E.2d at 787. The trial court responded by reading the pertinent language from both *Adams* and *Bishop* and instructing the jury that it was to interpret each within its own context.

Defendant maintains that the jury apparently believed that the language of *Adams* and *Bishop* could not be reconciled, therefore demonstrating a reasonable likelihood that it applied a standard of proof less than "beyond a reasonable doubt." However, there is nothing in the record to indicate that the jury was confused about the standard of proof after the trial court's further instructions. Both *Adams* and *Bishop* accurately define "proof beyond a reasonable doubt." Thus, we conclude the trial court committed no error in its instructions to the jury on the definition of reasonable doubt.

[5] In his fourth assignment of error, defendant argues the trial court erred in allowing the State to ask Clapp questions which defendant maintains were beyond her personal knowledge.

Defendant identifies three specific questions which were asked of Clapp concerning the certainty of her pre-trial and in-court identifications. The first question occurred after Clapp had described

her opportunity to view the defendant on the evening of 22 May 1998:

> Q: . . . what kind of look were you able to get at the person's facial features during that . . . approximate three minute period?
>
> A: A glance.
>
> Q: Do you feel personally that you got a good look at the person should you see them [sic] again?

The trial court overruled defendant's objection.

> A: Yes.

The second question occurred following Clapp's testimony concerning her identification of defendant from the photograph display:

> Q: At the time you picked out the photograph, Ms. Clapp, how certain or how sure were you that the person you picked out . . . was what you're describing as [the defendant]?
>
> A: Pretty sure.
>
> Q: All right. If you had to put pretty sure in some kind of a percent—could you do that?

The trial court overruled defendant's objection.

> Q: So we know what you mean by pretty sure. I mean are we talking—
>
> A: Sure.
>
> Q: —70 percent, 90 percent, 95 percent? What are we talking?
>
> A: 95 percent.

The final question occurred after defendant cross-examined Clapp concerning her in-court identification:

> Q: Now, what is your degree of certainty when you pointed to the defendant seated over there at the table . . . as to him being . . . the person you saw [the evening of 22 May 1998]?
>
> A: Pretty sure.
>
> Q: Is that equal to more than sure?

The trial court overruled defendant's objection.

> A: Yes.

Defendant asserts that the trial court should have sustained his objections and prevented Clapp from providing answers and percentages with respect to her degree of certainty for the reason that such a precise calculation was beyond her personal knowledge.

Under our rules of evidence, a witness "may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (1999). The purpose of Rule 602 is to prevent a witness from testifying to a fact of which he has no direct personal knowledge. *See* N.C. Gen. Stat. § 8C-1, Rule 602 (Commentary) (1999). "[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." *Id.* Here, each of the State's questions were designed to ascertain from Clapp the degree of certainty she attached to the words "sure" and "pretty sure" in relation to what she observed about defendant in Jenkins' apartment on the evening of 22 May 1998. Such information was within her personal knowledge. Therefore, we overrule defendant's assignment of error.

[6] Finally, defendant contends the trial court erred in admitting Clapp's pre-trial and in-court identifications of defendant, arguing that each was "impermissibly suggestive."

With regard to a pre-trial identification, such evidence must be excluded where the "facts reveal a pretrial identification procedure [which is] so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). Accordingly, in the context of a photograph display, a positive identification must be suppressed where the display is both: "(1) impermissibly suggestive, and (2) so suggestive that irreparable misidentification is likely." *State v. Roberts*, 135 N.C. App. 690, 693, 522 S.E.2d 130, 132 (1999) (*citing State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987)).

Defendant argues that the photograph display from which Clapp identified defendant was impermissibly suggestive in that "[t]here is no evidence that any of the other photos even came close to matching the original description" which Clapp gave to police. The evidence shows that the display contained nineteen thumbnail-sized photographs. These photographs were generated from a computerized system which matched photographs similar to the descriptions Clapp and Luther provided to police. The evidence also shows that the detective did not make any comments or suggestions to Clapp when

he showed her the display but merely asked her if anyone looked like one of the perpetrators. *See generally State v. Goodson*, 101 N.C. App. 665, 670-71, 401 S.E.2d 118, 122 (1991). Therefore, the trial court properly concluded that Clapp's pre-trial identification was not impermissibly suggestive and we find no error with its admission.

Defendant also argues that the trial court should not have permitted Clapp to make an in-court identification because it was tainted by the impermissibly suggestive pre-trial identification. However, having found no merit to defendant's claim concerning Clapp's pre-trial identification, we likewise conclude that the trial court did not err in permitting her to make an in-court identification. *See Roberts*, 135 N.C. App. at 694-95, 522 S.E.2d at 133 (where pre-trial identification is not impermissibly suggestive, a subsequent in-court identification cannot be considered "fruit of the poisonous tree").

In sum, we find defendant received a trial free of prejudicial error.

No error.

Judges MARTIN and TYSON concur.

STATE OF NORTH CAROLINA v. DAVID CHARLES DIEHL

No. COA98-1626-2

(Filed 18 December 2001)

1. **Criminal Law— reference to another crime—motion for mistrial—curative instructions**

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in a prosecution for first-degree murder and armed robbery where the State referred to another armed robbery during cross-examination of a detective. The court gave two curative instructions to the jury.

2. **Criminal Law— prosecutor's cross-examination—subsequent offense—not bad faith**

A prosecutor's questions of a detective about defendant's subsequent offense during a first-degree murder and armed robbery prosecution did not amount to misconduct, even though the trial

court correctly sustained defendant's objection, where there was no bad faith or illegitimate purpose on the State's part.

3. Evidence— subsequent offense—similarity to charged offense

The trial court did not abuse its discretion in a prosecution for first-degree murder and armed robbery by allowing the State to cross-examine defendant about a subsequent armed robbery where the second robbery was sufficiently similar to the first.

Judge GREENE concurring in the result.

Appeal by defendant from judgment entered 10 March 1998 by Judge W. Douglas Albright in Randolph County Superior Court. Originally heard in the Court of Appeals 16 November 1999. An opinion vacating the judgment of the trial court and ordering a new trial was filed by this Court on 18 April 2000. Pursuant to N.C. Gen. Stat. 7A-30(2), the State appealed to the Supreme Court, which also granted discretionary review of additional issues. Heard in the Supreme Court 14 February 2001. An opinion reversing the judgment of the Court of Appeals and remanding for consideration of issues not previously addressed by this Court was filed by the Supreme Court on 4 May 2001.

Attorney General Roy Cooper, by Assistant Attorney General Buren R. Shields, III, for the State.

Mary March Exum for defendant appellant.

TIMMONS-GOODSON, Judge.

On 16 January 1996, David Charles Diehl ("defendant") was indicted for first-degree murder. At trial, the jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation and, after a capital sentencing proceeding, recommended life imprisonment without parole. On 10 March 1998, the trial court sentenced defendant accordingly, from which judgment defendant appealed. In a split decision, the Court of Appeals vacated defendant's conviction and judgment and remanded the case for a new trial. Pursuant to N.C. Gen. Stat. § 7A-30(2), the State appealed to the North Carolina Supreme Court, which also granted discretionary review of additional issues. On 4 May 2001, the Supreme Court filed an opinion reversing the decision of the Court of Appeals and remanding defend-

ant's case for consideration of remaining issues previously unaddressed by this Court.

The facts pertinent to this appeal are as follows: At trial, the State presented evidence that in the early morning hours of 23 December 1995, police officers discovered the dead body of Jake Spinks ("Spinks") at his residence in Asheboro, North Carolina. Spinks, a dealer in crack cocaine, had been stabbed sixty-four times. Deoxyribonucleic acid ("DNA") analysis of blood stains found in the home led police investigators to identify defendant as the perpetrator. In addition to the first-degree murder indictment, the State charged defendant for robbing Spinks with a dangerous weapon.

At trial, defense counsel made a motion to prohibit any reference to an unrelated charge pending against defendant, in which defendant allegedly committed armed robbery on 27 December 1995, five days after Spinks' murder. At issue was defense counsel's cross-examination of Detective Ron Nicholson, who testified that he had taken a statement from defendant on 4 January 1996. According to defendant, the 4 January 1996 statement he had given to law enforcement officers referred to events occurring on both the 22nd and the 27th of December, a point defense counsel wished to emphasize on cross-examination without referring to the specific charge for which defendant was in custody at the time and without "opening the door" to questions by the prosecution on the nature of the 27 December 1995 charge. In response to defense counsel's motion, the trial court stated that, "substantive questions about some collateral offense are not relative. That would be best—It would be best to keep it out of it." The trial court cautioned defense counsel concerning the proposed cross-examination of Detective Nicholson, however, noting that "at some point you're skirting on opening the door, to be honest with you." When defense counsel attempted to elicit pre-approval by the court for specific anticipated cross-examination questions, the court refused, but further warned, "You're likely to open the door. I'm hesitant to tell anybody what questions to ask. If you are asking me are you at the line, my attitude would be [you're] straggling."

In response to subsequent cross-examination, Detective Nicholson revealed that on 4 January 1996, defendant was "in custody for another charge." Detective Nicholson stated further, "I took the statement from Jeff Brady in reference and his statement was in reference to a robbery." On re-direct examination of Detective Nicholson by the State, the following colloquy occurred:

Q [the State]: Before lunch, Detective Nicholson, [defense counsel] asked you about possibly [defendant] being confused while he was being questioned, and you referred to him being charged with an incident on the [27th] of December 1995, right?

A [Detective Nicholson]: Yes, sir.

Q: An armed robbery?

A: Yes, sir.

[Defense counsel]: I object, Your Honor, and move to strike. I would ask that the jury be told to disregard that answer, Your Honor.

The Court: Disregard that answer, members of the jury.

The trial court denied defendant's motion for a mistrial, but gave the following, more detailed instruction to the jury:

Now, members of the jury, the Court is going to sustain the objection to that portion of the question that seeks to elicit the nature of some collateral charge upon which the defendant is not currently on trial. I admonish you to disregard that particular question and disabuse it from your mind and do not consider it further and do not consider any response to that question if one was given. Disregard it. Do not consider it. Disabuse it from your mind. All right. Clean up the question.

The State continued with its re-direct examination of Detective Nicholson. The trial court later approved the State's cross-examination of defendant about his involvement in the armed robbery on 27 December 1995, finding that the event was "sufficiently similar" to the 22 December 1995 robbery to "indicate a pattern of acts that would tend to establish the identity of the defendant as the perpetrator of both crimes." Defendant appeals, assigning error.

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[1] Defendant argues that the trial court erred in denying his motion for a mistrial and by allowing the State to cross-examine defendant regarding the 27 December 1995 armed robbery. For reasons discussed herein, we conclude the trial court committed no error.

Defendant contends the trial court should have granted his motion for a mistrial after the State referred to the 27 December 1995 armed robbery during its re-direct examination of Detective Nicholson. Defendant argues the State's deliberate elicitation of in-

formation concerning an unrelated charge against defendant was prejudicial and expressly violated the trial court's instructions. Defendant asserts the State's question to Detective Nicholson amounts to prosecutorial misconduct, thereby entitling defendant to a new trial. Further, defendant contends that the evidence was not relevant for any permissible purpose under Rule 404(b) of the North Carolina Rules of Evidence and that, instead, the evidence tended to prove only that defendant possessed the character and disposition to commit the murder. We conclude that the trial court properly denied defendant's motion for a mistrial.

The decision to grant or deny a mistrial rests within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing by the defendant that the court abused its discretion. *See State v. Upchurch*, 332 N.C. 439, 453, 421 S.E.2d 577, 585 (1992); *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986). Such a showing is made only where the trial court's ruling is "so arbitrary that it could not have been the result of a reasoned decision." *Barts*, 316 N.C. at 682, 343 S.E.2d at 839. A trial court should grant a defendant's motion for mistrial only when there are improprieties in the trial so fundamental that they substantially and irreparably prejudice the defendant's case, making it impossible for the defendant to receive a fair and impartial verdict. *See State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991); *see also* N.C. Gen. Stat. § 15A-1061 (1999) (requiring a showing of "substantial and irreparable prejudice to the defendant's case" in order to grant a mistrial).

The trial court did not abuse its discretion in refusing to grant defendant's motion for a mistrial. The trial court gave not one, but two curative instructions to the jury. Generally, when a trial court properly instructs jurors to disregard incompetent or objectionable evidence, any error in the admission of the evidence is cured. *See Upchurch*, 332 N.C. at 450, 421 S.E.2d at 584.

[2] Moreover, we disagree with defendant's assertions that the State's actions amounted to prosecutorial misconduct. During the cross-examination of Detective Nicholson, defense counsel repeatedly referred to defendant's 4 January 1996 statement, attempting to show that some of defendant's statement referred to incidents occurring on the 22nd of December, while other parts of defendant's statement referred to events on the 27th of December. Thus, defense counsel attempted to demonstrate that defendant was confused when he gave his statement to law enforcement officers. Upon re-direct examina-

tion, the State attempted to show that defendant was not confused when he gave his statement regarding the 22 December 1995 murder. Detective Nicholson's affirmation that the 27 December 1995 incident concerned only an armed robbery, and not a murder, demonstrated that defendant would have been unlikely to confuse the two incidents when he gave his statement. Thus, although we agree that the trial court correctly sustained defense counsel's objection, we do not discern any bad faith or other illegitimate purpose on the State's part. *See State v. Bronson*, 333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992) (noting that a prosecutor's questions are presumed to be proper unless the record shows that they were asked in bad faith).

Because defendant has failed to show prejudice arising from the State's question to Detective Nicholson, we hold the trial court properly denied defendant's motion for a mistrial. Accordingly, we overrule defendant's assignment of error.

[3] Defendant further argues the trial court erred in allowing the State to cross-examine defendant about the 27 December 1995 armed robbery charge. Defendant contends the armed robbery charge was dissimilar to the 22 December 1995 murder, and that its prejudicial effect outweighed its probative value. Again, we must disagree with defendant.

At trial, the court made specific findings of fact and conclusions of law concerning the evidence regarding the 27 December 1995 armed robbery charge. After arguments by counsel, the trial court determined that

> [t]he evidence regarding the robbery on 12-22-95 and 12-27-95 was sufficiently similar in representing—or sufficiently similar in representation in the conduct of the defendant as to indicate a pattern of acts that would tend to establish the identity of the defendant as the perpetrator of both crimes.
>
> . . . .
>
> The crimes on 12-22-95 and 12-27-95 are not so remote in time as to dilute the commonality between them. The acts of the defendant on 12-22-95 and 12-27-95 are sufficiently similar to establish a modus operandi and thus shed light on the identity of the killer in the present cases.

The trial court then allowed the State to cross-examine defendant concerning the 27 December 1995 armed robbery. Defendant

now contends that the trial court's findings were inadequate to support its conclusion that the evidence was probative, and that, if relevant, the prejudicial effect of such evidence outweighed its probative value.

"The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court." *State v. Alston*, 341 N.C. 198, 237, 461 S.E.2d 687, 708 (1995). Accordingly, unless the defendant can demonstrate an abuse of discretion, the ruling will not be disturbed on appeal. *See id.* Moreover, the ultimate test for admissibility of evidence concerning prior acts is "whether the prior incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial." *State v. Moseley*, 338 N.C. 1, 42, 449 S.E.2d 412, 437 (1994). The similarities between the incidents must support a reasonable inference that the same person committed both crimes. *See id.* at 43, 449 S.E.2d at 437-38.

In *State v. Davis*, 340 N.C. 1, 14, 455 S.E.2d 627, 633-34 (1995), the Court approved admission of evidence tending to show that the defendants had robbed a restaurant one week prior to the attempted robbery with a dangerous weapon and first-degree murder for which the defendants were on trial. In comparing the events, the Court noted that "[i]n both incidents, the defendants entered the premises armed and waited until near closing time . . . to commit the crime. Defendants initially carried on as though they were on the premises to conduct legitimate business." *Id.* at 14, 455 S.E.2d at 633-34. Further, one of the defendants did not speak during either crime. Based on these factors, the Court concluded that the two events were sufficiently similar to allow admission of evidence concerning the prior robbery.

We detect no abuse of discretion in the trial court's decision in the instant case allowing the admission of evidence pertaining to the 27 December 1995 armed robbery, as it was sufficiently similar to events on 22 December 1995. In each incident, evidence indicated that defendant was driven to the crime scene and picked up afterwards by a single accomplice who did not come into the crime scene. Further, defendant used a long butcher knife during each incident. Both events occurred in the same general area and at nighttime. Finally, the two crimes occurred within five days of each other. Based on these facts, we hold the trial court properly allowed the State to cross-examine defendant concerning the 27 December 1995 robbery and we therefore overrule this assignment of error.

In summary, we hold defendant received a fair trial, free from prejudicial error. In that trial we find

No error.

Judge WALKER concurs.

Judge GREENE concurs in the result.

GREENE, Judge, concurring in the result.

I agree with the majority that there was no error in the trial court's denial of defendant's motion for a mistrial or the admission of the 27 December 1995 armed robbery charge. I write separately, however, to address the admissibility of the 27 December 1995 armed robbery[1] in light of its relevancy under Rule 404(b) and potential for unfair prejudice.

I

A

Relevancy

Evidence of other crimes, wrongs, or acts is admissible if it is relevant for purposes other than to show the defendant " 'has the propensity or disposition to commit an offense [of] the nature of the crime charged,' " *State v. Chavis*, 141 N.C. App. 553, 563, 540 S.E.2d 404, 412 (2000) (citation omitted); N.C.G.S. § 8C-1, Rule 404(b) (1999), and if it proves "a material fact in issue in the crime charged," *State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1986). In determining the relevancy of the evidence, there must be a connection between the extraneous criminal transaction and the crime charged. *Chavis*, 141 N.C. App. at 563, 540 S.E.2d at 412.

In this case, the trial court admitted evidence of the 27 December 1995 armed robbery for the purpose of "establish[ing] a modus operandi and . . . shed[ding] light on the identity of the [perpetrator] in the present case[]." Evidence of other crimes may be offered to establish a "defendant's identity as the perpetrator when the *modus operandi* is similar enough to make it likely that the same person committed both crimes." *State v. Sokolowski*, 351 N.C. 137, 150, 522

1. Evidence of the 27 December 1995 armed robbery was excluded during the State's examination of Detective Nicholson but was later admitted during the State's cross-examination of defendant.

S.E.2d 65, 73 (1999). "This theory of admissibility requires 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes.' " *State v. Carter*, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994) (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995).

In this case, there are similarities between the 22 December 1995 armed robbery and murder and the 27 December 1995 armed robbery. In both instances, the perpetrator of the offense used a long butcher knife to commit the offense, which occurred in the same general area at nighttime. Furthermore, in both instances, there is evidence defendant was driven to the crime scene by an accomplice who did not enter the premises but later picked up defendant from the crime scene. Moreover, there was testimony that after the commission of both crimes, defendant gave the knife to another person for disposal. Accordingly, the trial court properly concluded evidence of the 27 December 1995 armed robbery was admissible under Rule 404(b) to establish the identity of the perpetrator of the 22 December 1995 armed robbery and murder.

B

Unfair prejudice

Although I believe the 27 December 1995 armed robbery is relevant under Rule 404(b), "it may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Chavis*, 141 N.C. App. at 564, 540 S.E.2d at 413. "The question of whether evidence is unfairly prejudicial 'is a matter left to the sound discretion of the trial court.' " *Id.* (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)).

In this case, the trial court admitted the evidence for the limited purpose of establishing identity and found the two offenses "sufficiently similar" and "not so remote in time as to dilute the commonality." The trial court then determined "the probative value substantially outweigh[ed] the danger of unfair prejudice." In light of the limited purpose of the evidence and the trial court's findings, I do not believe the trial court abused its discretion in admitting evidence of the 27 December 1995 armed robbery.

KENNETH G. BRYANT, AND WIFE PAMELA W. BRYANT, PLAINTIFFS-APPELLANTS v. DON GALLOWAY HOMES, INC., DEFENDANT-APPELLEE

No. COA00-1076

(Filed 18 December 2001)

Construction Claims— statute of repose—defective construction—last act or omission

The trial court did not err by granting defendant company's motion for summary judgment and by dismissing plaintiffs' complaint filed 25 November 1998 alleging damages for defective construction of their residence based on the expiration of the six-year real property improvement statute of repose under N.C.G.S. § 1-50(a)(5)(a) which began to run in November 1991 when defendant completed construction of the house and received a certificate of compliance, because: (1) the statute of repose did not begin to run upon the last act or omission of defendant, which was defendant's attempted repairs on the front door and foyer; and (2) to allow the statute of repose to run from the date of defendant's last repairs to the foyer in August 1994 would be tantamount to resetting the starting date of the statute of repose.

Judge GREENE concurring in a separate opinion.

Appeal by plaintiffs from order entered on 26 April 2000 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 August 2001.

Sellers, Hinshaw, Ayers Dortch & Lyons, P.A., by Robert C. Dortch, Jr. for plaintiff-appellant.

Dean & Gibson, L.L.P., by Christopher J. Culp for defendant-appellee Don Galloway Homes, Inc.

Frost, Brown & Todd LLC, by Kathy Kendrick for defendant-appellee Don Galloway Homes, Inc.

BRYANT, Judge.

On 25 November 1991, defendant completed construction of a residence in Huntersville, North Carolina, and received a certificate of occupancy from the Charlotte/Mecklenburg County Building Standards Department. Defendant used the residence as a model home for a year. In September 1992, plaintiffs entered into a contract

to purchase the residence, and closed on the sale on 4 December 1992.

In February 1994, plaintiffs submitted to defendant a one-year walk-through form in which they indicated that the "[h]ardwood floors in [the] foyer, right inside the door, appear to be buckling." In July 1994, water intruded into the same area where the floors had buckled. In August 1994, defendants attempted to repair the problem. In July 1996, plaintiffs again discovered water damage, this time in the wall adjacent to the front door in the foyer. Plaintiffs learned that the wallboard was wet, the framing members were wet and mildewed and there was significant damage to structural members. On 10 February 1998, plaintiffs performed a moisture intrusion test, which revealed excessive moisture greater than nineteen percent. Plaintiffs estimate that repairs would cost between $11,291.00 and $97,342.69.

On 25 November 1998, plaintiffs filed a complaint against defendant alleging damages due to defective construction. Plaintiffs alleged seven causes of action related to the exterior installation and finish system [EIFS] on the house: 1) breach of express warranty; 2) breach of implied warranty of habitability and workmanlike construction; 3) breach of implied warranty of merchantability; 4) breach of implied warranty of fitness for a particular purpose; 5) negligence; 6) negligent failure to warn; and 7) unfair and deceptive trade practices. Specifically, plaintiffs alleged that water penetrated behind the EIFS on the house because of defects caused by defendant during the construction of the house.

On 18 February 2000, defendant moved for summary judgment on the grounds that plaintiffs' claims were outside the statutes of repose and limitation. The trial court granted defendant's motion for summary judgment on 26 April 2000 and dismissed plaintiffs' complaint with prejudice. Plaintiffs filed notice of appeal on 25 May 2000.

Plaintiffs assign as error the trial court's holding that a genuine issue of material fact did not exist as to: 1) when the house was substantially complete, or when defendant's last acts or omissions occurred for purposes of the statute of repose; and 2) whether the statute of limitations barred plaintiffs' claims. We disagree, and hold that the trial court did not err in granting defendant's motion for summary judgment.

Upon motion, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1999). An issue is material if "the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). An issue is genuine if it is supported by substantial evidence. *Id.*

Plaintiffs' first argument is that the trial court erred in dismissing the complaint as barred by the statute of repose. Plaintiffs argue that the statute actually began to run: 1) sometime after the closing on 4 December 1992, when the house could be used for its intended purpose; or 2) in August 1994, when defendant attempted repairs. We disagree.

A statute of repose is a condition precedent that must be specifically pled. *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 118, 446 S.E.2d 603, 605, (1994), *aff'd*, 340 N.C. 257, 456 S.E.2d 308 (1995); *see* N.C.G.S. § 1A-1, Rule 8(c) (1999). It is a substantive limitation that establishes a time frame in which an action must be brought to be recognized. *Id.* The repose period begins to run when an event occurs, regardless of whether or not there has been an injury. *Id.* at 117, 446 S.E.2d 604. The issue of whether the statute of repose has expired is a question of law. *Colony Hill Condo. I Ass'n v. Colony Co.*, 70 N.C. App. 390, 392, 320 S.E.2d 273, 275 (1984) (citing *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871-72 (1983)). Summary judgment is proper if the pleadings or proof show without contradiction that the statute of repose has expired. *Id.* The moving party has the burden of producing evidence sufficient to show that summary judgment is justified. *See Sidney v. Allen*, 114 N.C. App. 138, 143, 441 S.E.2d 561, 564 (1994), *aff'd*, 341 N.C. 190, 459 S.E.2d 237 (1995). The burden then shifts to the non-moving party to " 'set forth specific facts showing that there is a genuine issue for trial.' " *Id.* (quoting *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992)).

A statute of repose prevents a plaintiff from bringing an action a certain number of years after the defendant's act or omission, regardless of whether the plaintiff has suffered an injury. *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 240, 515 S.E.2d 445, 449 (1999). In the case at bar, the applicable statute of repose is the

North Carolina real property improvement statute, which states in pertinent part:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C.G.S. § 1-50(a)(5)(a) (1999). The statute defines "substantial completion" as

> that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended.

N.C.G.S. § 1-50(a)(5)(c) (1999). Although the statute does not define "last act or omission," this Court has stated that "[i]n order to constitute a last act or omission, that act or omission must give rise to the cause of action." *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 79, 518 S.E.2d 789, 793 (1999), *review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000). The purpose of section 1-50(a)(5) is to protect from liability those persons who make improvements to real property. *Id.*

Plaintiffs first argue that the statute of repose did not expire before the complaint was filed because the repose period began to run on or after 4 December 1992, the date of purchase. Plaintiffs base this argument on *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 518 S.E.2d 789 (1999). In *Nolan*, defendant Paramount Homes, Inc. [Paramount], constructed a house in Durham, North Carolina. The Durham City-County Inspections Department issued a Certificate of Compliance on 6 June 1991, stating that the house was in substantial compliance with building and zoning ordinances. Paramount sold the house to the plaintiff, Barbara B. Nolan, on 9 December 1991. In March or April 1992, Paramount completed work pursuant to a punch list.

Nolan filed suit on 23 October 1997 for breach of implied warranty of habitability and workmanlike construction. Paramount moved for summary judgment, raising the statute of repose as a defense. Nolan argued that the statute of repose did not start to run until the house was substantially completed, i.e., when Paramount

finished work on the punch list. The trial court disagreed, and granted Paramount's motion. *Id.*

On appeal, this Court stated that the house was substantially completed when it could be used for its intended purpose. *Id.* The house could be used for its intended purpose—a residence—upon issuance of the certificate of compliance. *Id.* Furthermore, Paramount's last act or omission occurred when it defectively built the walls, not when it completed work on the punch list. *Id.* at 79, 518 S.E.2d at 793. Nolan had the burden of establishing a direct connection between the alleged harm and Paramount's last act or omission and failed to carry that burden. *Id.* at 77, 518 S.E.2d at 792.

In this case, plaintiffs argue that *Nolan* creates a rebuttable presumption that a house is substantially complete upon issuance of the certificate of compliance because it is at that time that the house can be used for its intended purpose. We find two problems with this argument. First, plaintiffs have offered no evidence that they were prevented from using the house as a residence. In fact, the record indicates otherwise. Plaintiffs lived in the house for six years before bringing this complaint. Second, plaintiffs point to no specific language in *Nolan* in support of their argument that a *rebuttable* presumption arises. We therefore decline to address this argument which is not adequately supported by the record. *See* N.C. R. App. P. 28(a), (b)(5).

Plaintiffs next argue that the statute of repose began to run upon the last act or omission of defendant, i.e., defendant's attempted repairs on the front door and foyer. We disagree. In *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 515 S.E.2d 445 (1999), the defendant general contractor, Paramount Homes, Inc. [Paramount], sold a house to the original owner in August 1990. The original owner then sold the house to Monson in 1993. Monson brought suit against Paramount alleging, inter alia, that Paramount used defective materials and improperly installed the windows and doors. Paramount subsequently learned that Carolina Builders Corporation [CBC] had repaired and replaced the windows and doors. Paramount filed a third party complaint for indemnification against CBC on 29 October 1997. CBC moved for dismissal for failure to state a legal claim. The trial court dismissed Paramount's claim as outside the statute of repose. Paramount appealed.

On appeal, Paramount argued that CBC's last act or omission occurred when it completed repairs in 1994; therefore, the claim was

within the six-year repose period because it was filed in 1997. The issue on appeal was whether a repair qualified as a last act or omission under North Carolina General Statute section 1-50(a)(5). The *Monson* court held that CBC's last act or omission occurred upon substantial completion when CBC supplied Paramount with the materials for the original construction of the house, not when CBC made repairs in 1994. *Id.* at 242, 515 S.E.2d at 450. "To allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose such as N.C. Gen. Stat. § 1-50(5)."[1] *Id.* at 240, 515 S.E.2d at 449 (referring to what is now North Carolina General Statute section 1-50(a)(5), which was amended by Act of June 19, 1995, ch. 291, s. 1, 1995 N.C. Sess. Laws 587 (adding, among other things, subsection (a))).

Applying the holding of *Monson* to this case, to allow the statute of repose to run from the date of defendant's last repairs to the foyer in August 1994 would be tantamount to resetting the starting date of the statute of repose for the installation of the EIFS. The repose period began to run in November 1991 when defendant completed construction of the house and received a certificate of compliance. Therefore, the statute of repose had expired when plaintiffs brought this claim on 25 November 1998.

We therefore hold that the trial court did not err in dismissing the complaint based on the expiration of the statute of repose. Because the expiration of the statute of repose is sufficient to bar plaintiffs' claim, we will not review the second assignment of error regarding the statute of limitations.

Affirmed.

Judge CAMPBELL concurs.

Judge GREENE concurs in the result with a separate opinion.

GREENE, Judge, concurring in the result.

I agree that summary judgment for defendant was proper because the statute of repose had run before plaintiffs filed their

1. We note that a repair may qualify as a last act under section 1-50(a) if required by the parties under an improvement contract. *Monson*, 133 N.C. App. at 241, 515 S.E.2d at 450.

complaint. I write separately to note my disagreement with two aspects of the majority's analysis.

Substantial Completion

The majority reads *Nolan v. Paramount Homes, Inc.*, 135 N.C. App. 73, 518 S.E.2d 789 (1999), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 214 (2000), to establish a conclusive presumption that the issuance of a certificate of occupancy evidences the date of substantial completion. I disagree. The issuance of the certificate of occupancy raises only a rebuttable presumption of substantial completion, entitling a party to present evidence showing the residence was not yet usable for the purpose for which it was intended. *See id.* at 76-77, 518 S.E.2d at 791-92 (items on punch list could prevent or materially interfere with the plaintiff's use of the house as a residence, even though certificate of occupancy had already been issued).

In this case, plaintiffs presented no evidence challenging the rebuttable presumption of substantial completion on the date of the certificate of occupancy. Because no genuine issue of fact was raised, summary judgment as to this aspect of the statute of repose was properly granted for defendant. *See* N.C.G.S. § 1A-1, Rule 56(c) (1999).

Last Act

The majority appears to read *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 235, 515 S.E.2d 445 (1999), as holding that repairs can never "toll or start the running [of the statute of repose] anew." I disagree. A failed attempt to repair an alleged existing "defective or unsafe condition of an improvement to real property" starts the running of the statute of repose anew, as the attempted repair is the "last act . . . giving rise to the cause of action." N.C.G.S. § 1-50(a)(5)a (1999); *see New Bern Assoc. v. The Celotex Corp.*, 87 N.C. App. 65, 70-71, 359 S.E.2d 481, 484-85 (in reversing summary judgment the court necessarily found repair of defective roof material for "last act" analysis under section 1-50(a)(5)a), *disc. review denied*, 321 N.C. 297, 362 S.E.2d 782 (1987). Also, a repair made after the date of substantial completion pursuant to a continuing obligation under the original improvement contract represents the "last act" within the meaning of section 1-50(a)(5)a. *Monson*, 133 N.C. App. at 241, 515 S.E.2d at 450.

In this case, the evidence shows the repairs attempted by defendant in August 1994 were not to the stucco, the alleged defective condition created by defendant, but instead to the floors in the

house. Because no genuine issue of fact was raised, summary judgment as to this aspect of the statute of repose was properly granted for defendant. *See* N.C.G.S. § 1A-1, Rule 56(c).

STATE OF NORTH CAROLINA v. DAVID BARTLEY YEARWOOD

No. COA00-1307

(Filed 18 December 2001)

1. **Evidence— child sexual assault victim—prior agency record—cross-examination of psychologist limited**

The trial court did not abuse its discretion in a prosecution for first-degree statutory sexual offense with a child under 13, indecent liberties, and first-degree statutory rape in limiting defendant's cross-examination of the victim's psychologist by precluding any reference to evidence contained in agency records regarding allegations that the victim was exposed to sexual situations as a young child by her father. The psychologist testified on voir dire that she was aware of social services records involving the victim, but that she did not base her opinion that the victim's behavior was consistent with having been assaulted on events occurring before the date of the alleged assault. Additionally, there was abundant evidence that the victim had been sexually assaulted and there was no evidence of another rapist; defendant merely claimed that exposure to her father's nudity years earlier could have caused the behavior referred to by the psychologist. Finally, there was no indication in the record that this evidence was relevant to the victim's credibility.

2. **Evidence— audiotape—audible**

The trial court did not abuse its discretion in a prosecution arising from a sexual assault on a child by admitting a videotape of a therapy session with the child where defendant contended that the tape was largely inaudible.

3. **Indecent Liberties; Sexual Offenses— unanimity of verdicts—more than one act**

There was no plain error in a prosecution arising from the sexual abuse of a child where the court's instructions did not require unanimous verdicts regarding the sexual acts of first-

degree sexual offense and taking indecent liberties with a child. Indecent liberties proscribes any immoral, improper, or indecent liberty, so that a finding by some jurors of one type of sexual conduct and a findings by other jurors of another type of conduct would be sufficient. Similarly, a defendant may be convicted of first-degree sexual offense even if the trial court instructs the jury that more than one sexual act may comprise an element of the offense.

Appeal by defendant from judgments entered 30 March 2000 by Judge James C. Spencer, Jr., in Durham County Superior Court. Heard in the Court of Appeals 11 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Lisa Miles for defendant-appellant.

MARTIN, Judge.

Defendant was charged with felony breaking or entering, first degree statutory sexual offense (with a child under 13), indecent liberties with a child, and first degree statutory rape (with a child under 13). Defendant entered a plea of not guilty.

Briefly summarized, the evidence at trial tended to show that the victim, "C.B.," who was twelve years old at the time of the events at issue, was at home alone on 23 July 1999 and answered the front door in response to defendant's knocking on the door. C.B. recognized defendant because he had mowed their lawn previously. C.B. told defendant that her mother was not home and for him to go away. He then pushed his way into the house. Defendant asked C.B. if she wanted a massage. At this point, C.B. was sitting in a chair and defendant knelt before her. He kissed her leg and put his hand on her leg. He then put his hand under her dress. C.B. closed her arms on her knees to keep her dress down, but defendant was able to get his other hand under her dress. C.B. testified that defendant massaged her back and then placed his hand on her breast. C.B. managed to free herself and ran to her mother's bedroom, where she attempted to call her mother at work. C.B. testified that defendant followed her and entered the bedroom "really mad." He took the phone from C.B. and told her he was going to "f—" her. Defendant grabbed her dress and ripped it, the force of which lifted C.B. off the bed. He ripped off her panties and, according to C.B.'s testimony, performed cunnilingus on

her. He then inserted his fingers inside her, and moments later inserted his penis.

C.B. testified that her mother came home and defendant got off her and began buttoning his pants. C.B.'s mother testified that she entered the bedroom and asked defendant what he was doing in her house. According to her testimony, defendant answered, "I just came by to—I didn't do nothing." Defendant left the house, and C.B.'s mother called 911.

Officer T.D. Douglass testified that he arrived at the scene while C.B.'s mother was on the phone with the 911 operator. He testified that C.B. was visibly upset and "crying uncontrollably." Officer Douglass stated that he heard C.B. explain that the perpetrator was a white male who had done yard work for their family; he also testified that either C.B. or her mother told the officers that the suspect's name was "Dave" and that he lived on Alabama Avenue. Later that day, Officer Douglass found defendant slumped in a chair on the front porch of his home on Alabama Avenue, smelling of alcohol. Following a struggle, Officer Douglass and two fellow officers were able to subdue defendant and arrest him.

Lynn Patterson, an employee for Durham County Emergency Medical Services, testified that on their way to the hospital C.B. told her that her clothes had been ripped off and that she had been penetrated vaginally. Winifred Walker, a sexual assault nurse examiner at Duke Hospital, testified that C.B. recounted the narrative of events at the beginning of the examination. Walker collected an SBI rape kit from C.B. and noticed a redness in her vaginal area. According to Walker, this redness indicated an irritation and it was her opinion that C.B. had been sexually assaulted.

Dr. Betty Phillips was permitted to testify as an expert in child psychology and testified that she was introduced to C.B. on 27 July 1999. Dr. Phillips stated that C.B. was extremely distressed and agitated when they met four days after the assault. It was Dr. Phillips' opinion that C.B.'s behavior was consistent with patterns observed in sexually assaulted victims. During *voir dire*, Dr. Phillips admitted that she was aware that C.B.'s mother claimed C.B. had lied to her in the past. She also admitted to some knowledge of alleged incidents involving C.B. and her father, where the father would allegedly strip in front of C.B. and expose her to pornographic material. The trial court permitted defendant to cross examine Dr. Phillips concerning C.B.'s alleged lying and stealing, but did not allow defend-

ant to explore the area of C.B.'s purported sexual abuse by her father, which allegedly occurred four to seven years prior to the present incident.

Defendant did not offer evidence. He was found guilty of felony breaking or entering, first degree statutory sexual offense, taking indecent liberties with a child, and first degree statutory rape. The trial court entered judgments on the verdicts imposing active terms of imprisonment. Defendant appeals.

Defendant brings forward six assignments of error in three separate arguments. Defendant has not presented arguments in support of the remaining thirteen assignments of error contained in the record on appeal and they are deemed abandoned. N.C.R. App. P. 28(b)(5).

I.

[1] Defendant first contends the trial court erred in limiting his cross examination of Dr. Betty Phillips, the victim's treating psychologist, by precluding reference to evidence contained in agency records regarding alleged past sexual abuse of C.B. Defendant argues the evidence is relevant to cast doubt on the credibility of Dr. Phillips. We reject this argument.

"A witness may be cross-examined on any matter relevant to any issue in the case." N.C. Gen. Stat. § 8C-1, Rule 611(b). A trial court, however, "has broad discretion over the scope of cross-examination." *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998) (citation omitted). Further, it is well settled in North Carolina that the trial court's rulings regarding the scope of cross examination "will not be held in error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination." *State v. Woods*, 307 N.C. 213, 221, 297 S.E.2d 574, 579 (1982) (citations omitted).

In the present case, defendant has made no showing that the trial court's limitation of the cross examination of Dr. Betty Phillips could have improperly influenced the jury's verdict. Defendant sought permission to cross examine Dr. Phillips regarding agency records which indicated that C.B. had been exposed to potentially abusive sexual situations years earlier involving her father when C.B. was between the ages of five and eight. Defendant suggests this exposure may have been the cause of C.B.'s behavior which led Dr. Phillips to conclude that C.B. had been sexually assaulted. During *voir dire*, Dr. Phillips

stated that she was aware social services records existed involving C.B. and her father, but that she did not base her opinion that C.B.'s behavior was consistent with victims of sexual assault on any events occurring before 23 July 1999. The trial court permitted defendant to cross examine Dr. Phillips regarding information indicating that C.B. may have lied to her mother in the past, but denied defendant's request to introduce any evidence that C.B. was exposed to sexual situations as a younger child, finding there was no evidence C.B. was touched, fondled, or molested beyond the allegations of exposure to nudity listed above.

Dr. Phillips testified that C.B. was very distressed and traumatized in the days following 23 July 1999, and that she could not sleep or control her anger. Dr. Phillips explained that she arrived at the conclusion that C.B. had been sexually assaulted based on interviews with C.B. and C.B.'s mother, as well as making observations about the victim's behavior during 29 therapy sessions. Although Dr. Phillips testified that C.B. exhibited behavior consistent with victims of sexual assault, she did not testify as to the identity of the perpetrator.

In addition, there was abundant evidence, even without the testimony of Dr. Phillips, that C.B. had been sexually assaulted. Officer Douglass testified that he arrived at the scene while C.B.'s mother was on the phone with the 911 operator and that C.B. was visibly upset and "crying uncontrollably." Officer Douglass overheard C.B. explain that the perpetrator was a man named "Dave" who had done yard work for their family. Lynn Patterson, an employee for Durham County Emergency Medical Services, testified that on their way to the hospital C.B. told her that her clothes had been ripped off and that she had been penetrated vaginally. Nurse Winifred Walker testified that she conducted an SBI rape kit on the victim on 23 July 1999 and noticed a redness in her vaginal area. Walker testified that this redness indicated an irritation and that it was her opinion that C.B. had been sexually assaulted. This evidence was more than adequate to support the conclusion that C.B. had been the victim of a sexual assault, and the trial court's limitation of the scope of cross examination of the State's expert witness could not have improperly influenced the jury's verdict.

The facts of this case are easily distinguished from the facts of *State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986). In *Ollis*, the trial court did not permit the defendant to cross examine the victim

regarding her testimony, given at an in-camera hearing, that another individual raped her on the same day that the defendant allegedly raped her. Because this second alleged rape could have provided an alternate explanation for the medical evidence of the rape, the Supreme Court granted the defendant a new trial. *See* N.C. Gen. Stat. § 8C-1, Rule 412(b)(2). No evidence of another rapist was presented by defendant in the present case; rather, defendant merely claimed that C.B.'s exposure to her father's nudity years earlier could have caused the behavior which led the State's expert witness to conclude that C.B. had been sexually assaulted. In addition, although the evidence in the agency records was not excluded by North Carolina Rule of Evidence 412, which is concerned with the sexual *activity* of the complainant, the trial court nevertheless did not abuse its discretion in refusing to permit defendant from introducing such evidence because there is no indication in the record that this evidence was relevant to C.B.'s credibility. *See State v. Thompson*, 139 N.C. App. 299, 533 S.E.2d 834 (2000). Defendant's argument is overruled.

II.

[2] Defendant next contends the trial court erred in admitting into evidence a videotape of a therapy session interview between C.B. and Dr. Phillips. He contends that the tape was largely inaudible and, therefore, could have served no corroborative purpose. We discern no abuse of discretion in admitting the videotape.

A witness' prior statements may be admitted to corroborate the witness' trial testimony. *State v. Gell*, 351 N.C. 192, 524 S.E.2d 332, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). To be admissible at trial, a tape recording of a prior statement must be audible and properly authenticated. *State v. Womble*, 343 N.C. 667, 473 S.E.2d 291 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997). "Whether a tape recording is sufficiently audible to be admitted is a matter left to the discretion of the trial court." *Id.* at 689, 473 S.E.2d at 303 (citation omitted).

> The general rule is that the fact that a recording may not reproduce an entire conversation or may be indistinct or inaudible in part does not render it inadmissible unless the defects are so substantial as to leave the recording without probative value or to render the recording as a whole untrustworthy.

State v. Hammette, 58 N.C. App. 587, 590, 293 S.E.2d 824, 826-27 (1982) (citations omitted).

In the present case, the videotaped interview between Dr. Betty Phillips and the victim, C.B., was made part of the record on appeal by stipulation. After reviewing this videotape, which appears to us to be sufficiently audible, we note that it was within the trial court's authority to determine whether it was sufficiently audible to be admitted at trial, and we hold the trial court did not abuse its discretion by admitting the recording of the victim's interview to corroborate the victim's trial testimony. Defendant's assignment of error is overruled.

III.

[3] In his final argument, defendant alleges the trial court committed plain error by not requiring unanimous verdicts regarding the acts of first degree sexual offense and taking indecent liberties with a minor. This argument has no merit.

Defendant concedes that counsel made no objection to the jury instruction at trial. Rule 10(b)(2) of the Rules of Appellate Procedure states that "[a] party may not assign as error any portion of a jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict." Nevertheless, a party may assign error to a jury instruction if the party alleges the error in the instruction amounts to plain error. N.C.R. App. P. 10(c)(4). In order to prevail under a plain error analysis, the defendant must show that "(1) there was error and (2) without this error, the jury would probably have reached a different verdict." *State v. Jackson*, 139 N.C. App. 721, 729, 535 S.E.2d 48, 53 (2000) (citation omitted), *rev'd in part on other grounds*, 353 N.C. 495, 546 S.E.2d 570 (2001).

The North Carolina Constitution requires that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." Art. 1, § 24. Nevertheless, our Supreme Court has held that the threat of a non-unanimous verdict does not arise in the case of an indecent liberties charge because the statute for that offense does not list separate crimes in the disjunctive. *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990) (distinguishing sexual offense and indecent liberties statutes from the drug trafficking statute). Rather, the indecent liberties statute, G.S. § 14-202.1, proscribes "any immoral, improper, or indecent liberties." Thus,

> [e]ven if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unani-

> mously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." Such a finding would be sufficient to establish the first element of the crime charged.

Hartness, 326 N.C. at 565, 391 S.E.2d at 179. Similarly, the Supreme Court has held that a defendant may be convicted of first degree sexual offense even if the trial court instructs the jury that more than one sexual act may comprise an element of the offense. *See State v. Foust*, 311 N.C. 351, 317 S.E.2d 385 (1984) (holding that the trial court did not deny the defendant a unanimous verdict when it instructed the jury that either "oral or anal sex" would qualify as a sexual act to support a finding that the defendant was guilty of first degree sexual offense), *overruled by State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), *overruling abrogated by State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990).

Defendant concedes in his brief to this Court that the trial court's instructions comport with North Carolina case law. Nevertheless, defendant cites *Richardson v. United States*, 526 U.S. 813, 143 L. Ed. 2d 985 (1999), for support of his argument that the verdicts against him do not comply with federal constitutional law. *Richardson*, however, involved the interpretation of a federal criminal statute, 21 U.S.C. § 848, which forbids any person from engaging in a "continuing criminal enterprise." The criminal enterprise is defined as the violation of federal drug laws. *Id.* The Supreme Court held that, based on the language of the federal statute, a jury must unanimously agree on each of the violations making up the "continuing series of violations." *Id.* at 815, 143 L. Ed. 2d at 991. However, the Court recognized that a jury in other cases "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Id.* at 817, 143 L. Ed. 2d at 992 (citations omitted). The holding in *Richardson* is therefore limited to federal prosecutions under 21 U.S.C. § 848, and does not apply to the case *sub judice.*

The trial court in the present case set forth the elements for taking indecent liberties with a child, defining an indecent liberty as "an improper or indecent touching by the defendant upon the child." Thus, the trial court made explicit in its instructions that the jury must find that defendant touched the victim in an improper or indecent way in order to convict.

With regard to the charge of first degree sexual offense, the trial court defined a sexual act as:

> cunnilingus, which is any touching, however, slight, by the lips or the tongue of one person to any part of the female sex organ of another, or any penetration, however slight, by an object into the genital opening of a person's body. I instruct you that an object may include a finger or fingers.

In order to find defendant guilty of first degree sexual offense, therefore, the jury was required to find either that defendant performed cunnilingus on the victim or that defendant penetrated the victim's genitals with an object, such as a finger. This instruction comports with G.S. § 14-27.1(4), which defines a sexual act as "cunnilingus, fellatio, analingus, or anal intercourse," as well as "penetration, however slight, by any object into the genital or anal opening of another person's body." The trial court committed no error in its instruction to the jury concerning the charges of indecent liberties with a child and first degree sexual offense. Defendant's assignments of error to the contrary are overruled.

No error.

Judges WALKER and TYSON concur.

STATE OF NORTH CAROLINA v. MASON ARNOLD

No. COA00-1514

(Filed 18 December 2001)

1. Animals— participating in dogfight as spectator—not an invalid exercise of police power

The statute prohibiting participation as a spectator in an exhibition featuring a dog fight, N.C.G.S. § 14-362.2(c), is not an invalid exercise of the police power because it protects dogs without infringing on constitutional freedoms.

2. Animals— participating in dogfight as spectator—not unconstitutionally vague

The plain language of the statute prohibiting participation as a spectator in an exhibition featuring a dog fight, N.C.G.S.

§ 14-362.2(c), is not unconstitutionally vague and is adequate to convey a clear understanding of what conduct is unlawful.

3. Animals— participating in dogfight as spectator—not unconstitutionally overbroad

The statute prohibiting participation as a spectator in an exhibition featuring a dog fight, N.C.G.S. § 14-362.2(c), is not constitutionally overbroad in that the criminalization of participating as a spectator is necessary to achieve the objective of outlawing and preventing dogfighting and there was no prohibition of a protected right. People have the right to peacefully assemble for lawful purposes, but the people in this case were assembled for an unlawful purpose.

4. Animals— participating in dogfight as spectator—sufficiency of evidence

The trial court correctly refused to dismiss a charge of participating as a spectator in an exhibition featuring a dog fight where defendant contended that he did not know that a dogfight was taking place and was on the site for only a brief time before being arrested. However, it is clear from the evidence that defendant was on the second floor of a barn where a dogfight occurred long enough for a deputy sheriff to drive up to the barn, park his vehicle, survey the area outside, and inspect the first floor. The deputy arrested a group of men, including defendant, who were in an enclosed space where the dogfight was taking place.

Judge WYNN dissents.

Appeal by defendant from judgment entered 12 September 2000 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 28 November 2001.

Roy Cooper, Attorney General, by Floyd M. Lewis, Assistant Attorney General, for the State.

William D. Spence for defendant-appellant.

THOMAS, Judge.

Defendant, Mason Arnold, appeals from a conviction of participating as a spectator at an exhibition featuring dog fighting. Among his three assignments of error, defendant argues the statute under which he was convicted is unconstitutional.

The State's evidence tended to show the following: On 20 February 2000, Steven Holbrook (Holbrook), a deputy with the Greene County Sheriff's Department, received a report of a dogfight in progress. Holbrook drove to the site of the alleged dogfight, an old, two-story barn on Lilly Pad Road. After he exited his vehicle, Holbrook heard "yelping dogs and human voices talking loudly." He proceeded into the barn to investigate. On the first floor, Holbrook noticed cages built of fencing material and lots of trash, but no one was there. The noise he continued to hear was coming from the second floor.

Holbrook then climbed a ladder to the second floor, saw several men, and heard "the dogs yelping and the men . . . encouraging them to do their fighting." After pulling out his revolver, he called out "Sheriff's Office" and ordered those in attendance to put up their hands and stand against the wall. He arrested all seven of those present, including defendant.

The evidence for defendant, meanwhile, tended to show the following: Defendant and four other men went riding in a vehicle operated by Theodore Moore (Moore). Defendant had no particular plans and did not know where they were going. When they finally arrived at the barn, Moore and the other three occupants went into the barn, but defendant, who still did not know why they had stopped there, stayed outside. He heard dogs barking, and after approximately fifteen minutes, went inside the barn to see what the other men were doing.

When he reached the second floor, defendant heard dogs barking and growling. Even though he was standing in a position where he could have viewed the dogfight, he never actually saw the dogs. Within a short time, Holbrook came and announced his order of arrest. Holbrook admitted he had not noticed which way defendant was looking.

Defendant was found guilty of unlawfully, willfully and feloniously participating as a spectator at an exhibition featuring dog fighting. He had nine prior record points and was sentenced to an active prison term of eight to ten months.

[1] By defendant's first assignment of error, he argues the trial court erred in refusing to dismiss the charges because N.C. Gen. Stat. § 14-362.2(c) is unconstitutional. He claims the statute is an invalid exercise of police power, and that it is unconstitutionally vague and overbroad. We disagree.

"It is well-settled that 'the State possesses the police power in its capacity as a sovereign, and in exercise thereof, the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society.' " *Armstrong v. North Carolina Board of Dental Examiners*, 129 N.C. App. 153, 159, 499 S.E.2d 462, 468 (1998), *cert. denied*, 525 U.S. 1103, 142 L. Ed. 2d 770 (1999) (quoting *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949)). "As the North Carolina Supreme Court has said, 'the state has the power to do whatever may be necessary to protect public health, safety, morals, and the general welfare.' " *Id.* at 160, 499 S.E.2d at 468.

The General Assembly enacted N.C. Gen. Stat. § 14-362.2 in 1997. It provides "[a] person who participates as a spectator at an exhibition featuring the fighting or baiting of a dog is guilty of a Class H felony." N.C. Gen. Stat. § 14-362.2(c) (1999). When reviewing the legislature's exercise of police power, "the only duty of the courts is to ascertain whether the act violates any constitutional limitation, the question of public policy being solely one for the legislature." *State v. Stewart*, 40 N.C. App. 693, 695-96, 253 S.E.2d 638, 640 (1979).

It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures. However poised and eager we may be at times to launch our agenda, judges have not been entrusted by the people of this State to be legislators. Certainly there is a duty to examine a statute and determine its constitutionality when the issue is properly presented. However, "[i]n considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity." *State v. Lueders*, 214 N.C. 558, 561, 200 S.E. 22, 24 (1938). *See also In re Belk*, 107 N.C. App. 448, 420 S.E.2d 682, *appeal dismissed and review denied*, 333 N.C. 168, 424 S.E.2d 905 (1992); *Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E.2d 631, 632 (1968), *aff'd*, 275 N.C. 234, 166 S.E.2d 686 (1969). This Court "must assume that acts of the General Assembly are constitutional and within its legislative power until and unless the contrary clearly appears." *State v. Anderson*, 275 N.C. 168, 171, 166 S.E.2d 49, 50 (1969).

The statute at issue protects dogs without infringing on any constitutional freedoms. It is a valid exercise of the State's police power. "In support of the prohibition against animal fighting as a sport, statutes have been enacted making it a crime to be a spectator at such an event." 4 Am. Jur. 2d *Animals* § 33 (1995) (citing *Peck v. Dunn*, 574

P.2d 367 (Utah, 1978), *cert. denied*, 436 U.S. 927, 56 L. Ed. 2d 770 (1978); *People v. Superior Court*, 201 Cal. App. 3d 1061, 247 Cal. Rptr. 647, *cert. denied*, 488 U.S. 1030, 102 L. Ed. 2d 970 (1988); *Brackett v. State*, 236 S.E.2d 689 (Ga., 1977); *Reynolds v. State*, 569 N.E.2d 680 (Ind. App. 1991)). "The validity of statutes prohibiting cruelty to animals has been sustained as a valid exercise of the police power, their aim being not only to protect these animals, but also to conserve public morals, both of which are proper subjects of legislation." 3A C.J.S. *Animals* § 99 (1973). "It has been held to constitute cruelty for the owner of a dog to permit it to [fight] another dog." *Id.* (Citing *Commonwealth v. Thornton*, 113 Mass. 457 (1873)).

If a statute is to be sustained as a legitimate exercise of the police power, however, it must be substantially related to the valid object sought to be obtained." *State v. Stewart*, 40 N.C. App. 693, 696, 253 S.E.2d 638, 640 (1979) (citing *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002, 45 L. Ed. 2d 666 (1975)). The valid object sought to be obtained by section 14-362.2(d) is to discourage spectators at dogfights. In discouraging spectators, the act of organizing dogfights will be discouraged. If no one attended the dogfights, either for amusement or profit, dogfighting as a group activity would be in jeopardy. We hold that this is a valid exercise of the State's police power and reject defendant's argument.

[2] Defendant also contends section 14-362.2(d) is unconstitutionally vague. Our Supreme Court has held that a statute is not vague if it gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *State v. Elam*, 302 N.C. 157, 161, 273 S.E.2d 661, 664 (1981) (citations omitted). The statute provides, "[a] person who participates as a spectator at an exhibition featuring the fighting or baiting of a dog is guilty of a Class H felony." N.C. Gen. Stat. § 14-362.2(d). Words undefined in the statute should be given their plain and ordinary meaning. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). The key words in the statute are "participates," "spectator," and "exhibition." "Participate" means "to take part; join or share with others[.]" American Heritage Dictionary 905 (2d. 1985). It would therefore not include a passerby who simply inadvertently viewed the event and immediately went on his way. A "spectator" is "[a]n observer of an event." *Id.* at 1173. Finally, to "exhibit" is defined as "to show externally; display." *Id.* at 475. We therefore hold the plain language of the statute is not vague and is adequate to convey a clear understanding of what conduct is unlawful.

[3] Defendant further contends the statute is overbroad. A statute is overbroad if "it sweeps within its ambit not solely activity that is subject to government control, but also includes within its prohibition the practice of a protected constitutional right." *State v. Hines*, 122 N.C. App. 545, 552, 471 S.E.2d 109, 114 (1996), *rev. improv. all'd*, 345 N.C. 627, 481 S.E.2d 85 (1997) (quoting *Treants Enterprises, Inc. v. Onslow County*, 94 N.C. App. 453, 458, 380 S.E.2d 602, 604 (1989)). Moreover, defendant asserts that the statute criminalizes activity that should not be prohibited, namely stumbling across a dogfight and being arrested as a spectator. However, the criminalization of participating as a spectator, as well as being an organizer, dog owner, or gambler involved in the dog fighting scheme, are all necessary to achieve the objective. That valid objective here is to outlaw and prevent dogfighting in general. We find no prohibition of a protected constitutional right, as discussed above, including the right to freedom of speech and right to peacefully assemble. We note people have the right to peacefully assemble for lawful purposes. *State v. Leary*, 264 N.C. 51, 140 S.E.2d 756 (1965). However, in the case at bar, people, including defendant, were assembled for an *unlawful* purpose. *See also People v. Bergen*, 883 P.2d 532 (Col. 1994) (where a reporter arrested for being a spectator at a dogfight argued videotaping and reporting on dogfighting was protected by the First Amendment and the court held the statute was constitutional in that it did not prevent the reporter from gathering information about dogfighting, but rather prohibited attendance by anyone at any dogfight presented for profit or entertainment). Defendant bases his argument on *State v. Stewart*, 40 N.C. App. 693, 253 S.E.2d 638 (1979), where this Court found unconstitutional a statute prohibiting shining a light at a deer at night. We note that in *Stewart*, the prohibited conduct is legal if separated. In other words, shining a light at night is legal and looking at a deer at night is legal. However, together, the conduct was prohibited before the statute was declared unconstitutional. *Stewart* is thus distinguishable from the instant case, where the underlying conduct, dogfighting, is illegal. We hold section 14-362.2(d) is constitutional and reject defendant's argument.

[4] By his second assignment of error, defendant argues the trial court erred in failing to dismiss the charge against defendant at the close of all the evidence for insufficiency of the evidence to sustain a conviction. We disagree.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2)

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

The elements of defendant's charge of participating as a spectator at a dogfight are: (1) that the defendant participated as a spectator; and (2) at an exhibition featuring the fighting or baiting of a dog. *See* N.C. Gen. Stat. § 14-362.2(d). When considering the evidence in the light most favorable to the State, there is substantial evidence showing that defendant was present at a dogfight as a spectator.

Defendant testified that he did not know a dogfight was taking place and that he was on the second floor of the barn for only ten seconds. However, he later testified that he was there for ten *minutes*. Clearly from the evidence, defendant was on the second floor, where the dogfight was taking place, long enough for Holbrook to drive up to the barn, after getting within its view, park his vehicle, survey the area outside, and inspect the first floor. Holbrook testified he arrested a group of men, including defendant, who were in an enclosed area where the dogfight was taking place. Holbrook found and played a videotape of the dogfight for the jury. Further, there was photographic evidence of where the dogs were kept and their appearance. The evidence was substantial that defendant participated as a spectator at an exhibition featuring the fighting or baiting of dogs. Accordingly, we reject defendant's argument.

NO ERROR.

Judge WYNN dissents.

Judge WALKER concurs.

WYNN, Judge dissenting.

While I agree with the majority that the statute in question passes constitutional muster, I must dissent on the issue of sufficiency because at best, and in a light most favorable to the State, this evi-

dence only shows that defendant was present for some period of time during an organized dogfight. Mere presence is not enough to obtain a criminal conviction under this statute. To obtain a conviction under the subject statute, the State must present evidence that the defendant actually *participated as a spectator*, which the majority defines as "to take part, join or share with others" as "an observer of an event."

The State's brief on appeal points out that about "three and a half minutes to four minutes elapsed from the time Deputy Holbrook pulled next to the barn and the time he announced 'Sheriff's Office' and arrested defendant on the second floor of the barn." The officer testified that he did not observe whether defendant was actually watching the dogfight. On other hand, defendant testified that he rode with friends to the barn; was unaware of the activities going on in the barn; remained in the car for sometime after his friends went into the barn; heard the dogs barking; left the vehicle to see what was going on; went upstairs in the barn; never saw the dogs fighting and was immediately arrested. The State provided no evidence to controvert defendant's testimony. The State's evidence therefore permitted no more than a suspicion that defendant participated in the dogfight as a spectator; as our courts have long held, mere suspicion that defendant committed the offense is insufficient to support a guilty verdict. *See State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983).

While the State has a constitutionally sound interest in criminalizing participation by spectators in dogfights, the State's duty to prove such participation beyond a reasonable doubt remains unabated. This evidence falls well short of that proof. I respectfully dissent.

BRENDA STAINBACK CROWDER v. ROBERT H. CROWDER

No. COA00-1186

(Filed 18 December 2001)

1. Divorce— equitable distribution—reconsideration of value—logging company

The trial court did not err in an equitable distribution case by reconsidering the value of defendant husband's logging company in the trial court's amended judgment, because: (1) the Court of

Appeals' prior holding reversing and remanding the case to the trial court did not explicitly affirm or uphold any part of the trial court's order, findings, or conclusions; and (2) the trial court was authorized to reconsider the logging company's value when the original equitable distribution order received a blanket reversal.

2. Divorce— equitable distribution—valuation of logging company—estimated expenses for possible future sale

The trial court erred in an equitable distribution case by considering in its determination of the value of defendant husband's logging company on the date of separation the estimated expenses associated with the possible future sale of the logging company including deductions for sales commissions, income taxes, or wind up expenses, because: (1) estimated expenses connected with events that have neither occurred by the date of separation, nor are imminent, may not be incorporated into the trial court's valuation of marital property; and (2) there is no evidence in this case that liquidation is imminent, nor that it will be required by the trial court's equitable distribution order.

Appeal by plaintiff from judgment entered 28 July 2000 by Judge J. Henry Banks in Vance County District Court. Heard in the Court of Appeals 23 August 2001.

Kirk, Kirk, Gwynn & Howell, by C. Terrell Thomas, Jr. for plaintiff-appellant.

Stainback & Satterwhite, by Paul J. Stainback for defendant-appellee.

BIGGS, Judge.

Plaintiff, Brenda Crowder, appeals from an Amended Judgment of Equitable Distribution. We affirm in part, and reverse and remand in part.

Plaintiff and Robert Crowder (defendant) were married in 1984, separated in 1995, and divorced in 1997. During their marriage, plaintiff was employed initially in a fast food restaurant, and later for a semiconductor manufacturer; she earned between $10,000 and $23,000 annually. Defendant started the Crowder Logging Company (the logging company) in 1962, and operated the business throughout the marriage. Although plaintiff was never an employee of the logging company, she occasionally assisted defendant with minor duties

pertaining to the company, and also took responsibility for most of the homemaking tasks. No children were born of the marriage, although both had adult children from prior marriages.

Upon their separation, the parties stipulated to the value and distribution of most of their significant marital assets, with the exception of the logging company. The parties agreed that the logging company's value was $102,000 on the date of their marriage, but could not agree on its value at the date of separation, nor on its proper distribution. On 27 April 1998, following a trial, the court entered a judgment of equitable distribution. The court's order gave effect to the parties' agreement, valuing and distributing marital property in accord with their stipulation. The court also stated that the value of the logging company at the time of marriage was $102,000, and found its value on the date of separation to be $649,000, resulting in an appreciation during the marriage of $547,000. The court determined that an equal division of marital property, including the logging company's appreciation, would not be equitable. The trial court based this conclusion upon three findings:

1. Defendant was 42 years old and plaintiff was 33 when they married; they were married for eleven years.

2. Plaintiff made only "minimal contributions" to the logging company.

3. The logging company had a debt ratio of approximately 2-1.

The trial court concluded that plaintiff was entitled to ten percent of the logging company's active appreciation during the marriage, or approximately $54,700.

Plaintiff appealed from the equitable distribution order. This Court, in *Crowder v. Crowder*, 132 N.C. App. 822, 519 S.E.2d 785 (1999), *unpublished*, held that the trial court had erred by (a) failing to determine the net market value of the total marital estate on the date of separation; (b) relying on the debt ratio of the logging company as a factor supporting its unequal distribution in favor of the defendant, and; (c) rendering an unequal distribution, without making specific findings of fact on the method used to determine plaintiff's share. This Court's final mandate was as follows:

> In sum, the equitable distribution judgment is reversed and remanded to allow the trial court to: (1) determine the net value of the marital estate with supporting findings of facts, (2) deter-

mine an equitable division of the marital-active-net appreciation of Crowder Logging Company without a consideration of the debt ratio of the company, and (3) reassess its calculation of the parties' shares of the appreciation and provide more specific findings regarding the method used to determine these shares. Reversed and remanded with instructions.

On remand, the trial court entered an amended equitable distribution judgment. This order was entered 28 July 2000 and included, in pertinent part, findings and conclusions summarized as follows:

1. The court found the net value of the total marital estate to be $368,153.

2. The court valued and distributed marital assets in accord with the parties' previous stipulation and agreement.

3. The court found defendant's expert witness (Mr. Moss) to have more experience with the logging industry than plaintiff's, and stated that its valuation of the logging company was "based upon the testimony of Steve Ernie Moss who is an expert in accounting and who is most familiar with the business of Crowder Logging Company[.]"

4. The court found that the value of the logging company on the date of separation was $227,500.

5. The court found that plaintiff was entitled to receive half (50%) of the appreciation in value of the logging company during the marriage, and that "an equal division of the increased value of [the logging company] . . . is an equitable distribution of said asset."

Plaintiff appeals from this order.

I.

We first summarize the law applicable to our review of an equitable distribution order. Equitable distribution is governed by N.C.G.S. § 50-20 (1999), which requires the trial court to "provide for an equitable distribution of the marital property and divisible property between the parties[.]" The court makes three determinations in connection with an equitable distribution judgment: classification, valuation, and distribution. *Khajanchi v. Khajanchi*, 140 N.C. App.

552, 537 S.E.2d 845 (2000). The court's first task is the classification of assets and debts as either marital property or separate property. Only marital property and debt is subject to equitable distribution. *Id.* Valuation of marital property is the next step; the net value for marital property is ascertained by calculating the fair market value of each asset, and subtracting the value of any debt or encumbrance on the property. *Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998). Under the law as written when this action was filed, marital assets are valued as of the date of separation, after which the marital estate is "frozen." *Becker v. Becker*, 88 N.C. App. 606, 364 S.E.2d 175 (1988).

The distribution of marital assets entails the court's determination of an "equitable" division of marital property. "The marital property is to be distributed equally, unless the court determines equal is not equitable." *Stanley v. Stanley*, 118 N.C. App. 311, 314, 454 S.E.2d 701, 703 (1995). As expressed by this Court in *Khajanchi v. Khajanchi*, 140 N.C. App. 552, 537 S.E.2d 845 (2000):

> The North Carolina Equitable Distribution Act is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* "unless the court determines that an equal division is not equitable." N.C.G.S. § 50-20(c). The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable.

Khajanchi at 557, 537 S.E.2d at 849. The trial court has wide discretion to determine what constitutes an equitable distribution of marital property:

> the exercise of that discretion will not be upset absent clear abuse. [Therefore, i]n order to reverse the trial court's decision for abuse of discretion, we must find that the decision was unsupported by reason and could not have been the result of a competent inquiry. Accordingly, the findings of fact are conclusive [on appeal] if they are supported by any competent evidence from the record.

Hamby v. Hamby, 143 N.C. App. 635, 637-38, 547 S.E.2d 110, 112, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 39 (2001). "A ruling com-

mitted to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). (citation omitted).

II.

[1] Plaintiff argues first that the earlier decision by this Court did not give the trial court the authority to reconsider the logging company's value. We disagree.

In its earlier ruling, this Court held that "judgment is reversed and remanded with instructions." The trial court was directed "to determine the net value of the marital estate with supporting findings of fact." The court ascertained the value of the logging company as part of its determination of the net value of the marital estate. The court's original equitable distribution order adopted the parties' agreement that the logging company's value was $102,000 on the date of their marriage, found the date of separation value to be $649,000, and awarded plaintiff ten percent of the resulting $547,000 appreciation ($54,700). The court's amended order also started with a marriage date value of $102,000, but recalculated the logging company's date of separation value to be $227,500, and awarded plaintiff fifty percent of the $125,500 appreciation ($62,750).

This Court's first decision reversed the trial court's equitable distribution order, and thus served to vacate the judgment below. *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966) (holding that reversal vacated lower court's order, and stating that "to reverse an injunction is to vacate it."). *See* Black's Law Dictionary 1319 (6th ed. 1990) (defining 'reverse' thusly: "to overthrow, vacate, set aside, make void, annul, repeal, or revoke"). Significantly, our earlier opinion did not explicitly affirm or uphold any part of the court's order, findings, or conclusions. As the original equitable distribution order received a blanket reversal, we conclude that the trial court was authorized to reconsider the logging company's value. *See Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393-94, 545 S.E.2d 788, 793 (2001) (where Court vacated previous judgment, trial court was "free to reconsider the evidence before it and to enter new and/or additional findings of fact based on the evidence"). Accordingly, we overrule this assignment of error.

III.

[2] Plaintiff argues next that the trial court erred in its determination of the value of the logging company on the date of separation. We find this contention to have merit.

The trial court, in its reevaluation of the date of separation value of the logging company, relied upon the testimony of defendant's accountant, Steven Moss (Moss), for its determination that the date of separation value of the logging company was approximately $227,500. This calculation was based on the following approximate values found by Moss:

1. Book Value Equity: $672,000.

2. $90,000 deducted for estimated sales commission if the logging company were sold in the future.

3. $13,200 deducted for estimated "wind up costs" if the logging company were sold in the future.

4. 25 % deduction in value to account for lack of marketability of the logging company.

5. $200,000 deducted for estimated income taxes if the logging company were sold in the future.

Plaintiff has argued that the trial court erred in deducting prospective sales commissions, wind up fees, and income taxes in its valuation of the logging company. We agree.

The general rule is that the trial court errs in considering hypothetical or speculative future expenses in an equitable distribution order. *Carlson v. Carlson*, 127 N.C. App. 87, 91, 487 S.E.2d 784, 786, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 407 (1997) ("expenses of a future sale of an asset are uncertain in both occurrence and amount"); *Wilkins v. Wilkins*, 111 N.C. App. 541, 553, 432 S.E.2d 891, 897 (1993) ["to predict variables (including *inter alia* the government's tax structure, plaintiff's financial condition, . . . and the date of plaintiff's eventual retirement) that far in the future requires the trial court to engage in impermissible speculation"]. Valuation of marital property may include tax consequences from the sale of an asset only when the sale is imminent and inevitable, rather than hypothetical or speculative. *See Smith v. Smith*, 111 N.C. App. 460, 503-04, 433 S.E.2d 196, 222 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994):

> [N]either party had offered evidence regarding specific tax consequences that might result from the equitable distribution. . . . As the party seeking an unequal division of marital property in his favor, defendant had the burden of producing evidence concerning the tax consequences of the anticipated distribution. . . . Furthermore, the tax consequences now claimed by defendant are of a purely speculative nature and are not inherent in the distribution actually ordered.

Further, in *Harvey v. Harvey*, 112 N.C. App. 788, 792-93, 437 S.E.2d 397, 400 (1993), this Court held that:

> [E]vidence of circumstances not in existence on the date of separation is not competent evidence for the purpose of valuing a marital asset. . . . [I]t is improper to consider possible tax consequences as a distributive factor under G.S. § 50-20(c)(11) in the absence of evidence that some taxable event has already occurred or that the distribution ordered by the court will itself create some immediate tax consequence to either of the parties. . . . [I]t was improper for the court to consider such hypothetical and speculative tax consequences in valuing defendant's partnership interest.

Harvey at 792-93, 437 S.E.2d at 400. Thus, estimated expenses connected with events that have neither occurred by the date of separation, nor are imminent, may not be incorporated into the trial court's valuation of marital property.

In the case *sub judice*, there is no evidence that liquidation is imminent, nor that it will be required by the court's equitable distribution order. The evidence at trial established that defendant was 55 years old, had operated the logging company for over twenty years, and planned to work at least another seven years. Defendant testified that he hoped to be able to retire after he was 62 years old, but could not afford to retire in the near future. He presented no evidence of plans to sell the logging company in the near future. Moreover, the evidence showed that defendant had taken his adult son into the business, suggesting that even defendant's retirement would not necessarily result in the sale of the logging company. We find that the sale of the logging company was a hypothetical future event "uncertain in both occurrence and amount." We conclude that the trial court erred in its consideration of estimated expenses associated with the possible future sale of the logging company.

We reverse the trial court's valuation of the logging company insofar as it included estimated expenses from the future sale of the logging company. Our review of the record shows that competent evidence supported the remainder of the court's findings and conclusions, including its reliance on Moss's calculations (other than those expressly disallowed by this opinion) and on the monetary values to which he testified; its determination that plaintiff is entitled to 50% of the logging company's appreciation; and the use of a 25% deduction rate for lack of marketability. Accordingly, we affirm the trial court's equitable distribution order in substantial part, and reverse and remand solely for entry of an adjusted date of separation value for the logging company, that does not include deductions for sales commissions, income taxes, or wind up expenses upon the future sale of the logging company.

Affirmed in part, reversed and remanded in part.

Judges MARTIN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. VAUGHN WOOLRIDGE, A/K/A PAUL REED

No. COA00-1472

(Filed 18 December 2001)

1. Search and Seizure— initial exclusion of heroin—subsequent admission by a different judge—inevitable discovery

There was no error in a heroin prosecution where the judge who heard defendant's motion to suppress the heroin ruled that there were no exigent circumstances for the warrantless search and granted defendant's motion; the State moved during pretrial motions before a different judge to admit the heroin under the inevitable discovery doctrine; and this judge granted the motion. A second judge is not precluded from hearing a new motion to suppress if new allegations are presented; in this case, the only question in the first hearing was whether the heroin was properly seized without a warrant.

2. Search and Seizure— inevitable discovery—bad faith by officer irrelevant

There was no error in admitting heroin under the inevitable discovery doctrine where there was sufficient evidence upon which the judge could conclude that the State fulfilled its burden of proving that the evidence would have been inevitably discovered in a search pursuant to a valid search warrant. Any bad faith on the part of the investigating officer in searching without a warrant is not relevant to the determination of inevitable discovery.

3. Evidence— other dismissed charges—intent, knowledge and plan

The trial court did not abuse its discretion in a heroin prosecution by admitting evidence of other dismissed heroin charges against defendant where the other charges involved the same controlled substance, the same codefendant, occurred less than one month prior to defendant's arrest on these charges, and the State argued that the charges showed intent, knowledge, and plan. Adjudication of guilt is not a prerequisite for admittance of other crimes under N.C.G.S. § 8C-1, Rule 404(b), the findings of the trial court show that it followed all of the appropriate steps in determining the admissibility of the evidence, there was competent evidence to support its findings, and the trial court gave the jury a limiting instruction.

Appeal by defendant from judgments entered 5 May 2000 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 18 October 2001.

Attorney General Roy Cooper, by Assistant Attorneys General Joyce S. Rutledge and William B. Crumpler, for the State.

The Law Offices of James D. Williams, Jr., P.A., by James D. Williams, Jr., for defendant-appellant.

WALKER, Judge.

On 18 December 1997, the Raleigh Police Department received information from a confidential informant that defendant was involved in heroin sales originating from his apartment. Sergeant M.E. Glendy of the Raleigh Police Department set up surveillance and observed the defendant walk out of his apartment, sit briefly in a

chair on the porch and then go back inside. He then saw the defendant leave with Darren Miller in a green Acura.

The police followed the Acura and initiated a stop, believing the defendant was wanted for a parole violation. Because an identification could not be done on site, the police transported both men to the Raleigh Police Department where it was determined that the defendant was in fact wanted for a parole violation. While at the station, Mr. Miller spoke with police officers and stated that he was staying at the defendant's apartment and that he sold heroin for the defendant. Based on this information, the police began the process of obtaining a search warrant for defendant's apartment.

Meanwhile, the surveillance of the apartment continued. Detective A.J. Wisniewski of the Raleigh Police Department testified that he was watching the apartment when he saw a man walk onto the defendant's porch and attempt to remove two chairs from it. Detective Wisniewski approached this person and determined he was a bondsman who had come to pick up the chairs. After some discussion, the bondsman left without the chairs.

Detective Wisniewski became suspicious and examined the chairs. After tipping one chair back, he noticed the lining had been cut away. When he turned the chair over, he could see a package in a cavity in the chair bottom. He retrieved the package, opened it, and recognized it to be heroin. He then placed the package in his car before continuing his surveillance of the apartment. He observed another person approach the chairs on the porch. Detective Wisniewski described the actions of this man as he "frantically starts to look around these chairs, starts to look around the balcony to where they [sic] were almost on their [sic] hands and knees. . . . [I]t was obvious he was searching for something." Thereafter, police officers arrived and executed a search warrant. Detective Wisniewski turned over the heroin which he found in the chair.

At trial, the defendant testified on his own behalf and denied knowledge of heroin anywhere in his home including under the chair on his porch. He also denied seeing Mr. Miller with any drugs in his home.

Before trial, the defendant filed a motion to suppress the heroin seized by Detective Wisniewski. The State argued that the search without a warrant was legal due to exigent circumstances. At a hearing on 28 September 1999, Judge Abraham P. Jones granted the

motion. Judge Jones followed up his oral findings and conclusions with a written order, which was filed on 28 April 2000 and concluded in pertinent part:

> 1. At the time Detective Wisniewski looked under the chair and retrieved the heroin, a search warrant had not been issued.
>
> 2. That there did not exist at the time any exigent circumstances so as to warrant a search by the Detective.

On 1 October 1999, the State filed notice of appeal but did not perfect the appeal.

Defendant's cases were then calendared for trial on 1 May 2000. During pre-trial motions, the State moved the trial court, Judge Orlando Hudson presiding, to admit the heroin into evidence. The State argued that even if an illegal search and seizure had occurred, the heroin would be admissible under the "inevitable discovery doctrine." After hearing the matter, Judge Hudson found that at the first hearing "Judge Jones did not consider, nor did the State argue, the applicability of the inevitable discovery exception." As such, in his discretion, Judge Hudson determined that inevitable discovery applied to the facts of this case. Specifically, he found that "although the heroin was illegally seized, it would have been inevitably legally discovered and seized pursuant to a legal search of the building."

At the trial, the heroin was admitted into evidence over the objection of the defendant. Defendant was convicted of trafficking in heroin by possession, trafficking in heroin by manufacture, conspiracy to traffic in heroin and maintaining a dwelling used for the keeping and selling of controlled substances.

[1] Defendant first assigns as error Judge Hudson's hearing the State's motion to admit the heroin after it had already been suppressed by Judge Jones. Defendant argues that Judge Hudson, in hearing arguments on inevitable discovery and ruling the heroin admissible, overruled Judge Jones. At the initial suppression hearing, Judge Jones concluded that the search by Detective Wisniewski was performed without a search warrant and at the time of the search, there were no exigent circumstances; thus, it was an illegal search. Based on these conclusions, Judge Jones suppressed the heroin seized from the defendant's apartment. However, he specifically limited his order by stating, "This ruling does not affect any subsequent search based upon the warrant issued and executed in this case."

After hearing evidence and arguments, Judge Hudson found in part the following:

> The Court does find at this time that Judge Jones did find, based on the motion to suppress, an illegal search. The Court, however, finds that Judge Jones never addressed whether the inevitable discovery exception applied to the facts as he found them to be. The Court finds that at this time the State can raise this issue for the first time. The Court finds that the State did not waive its right to argue this motion. The Court finds no prejudice to the defendant. The Court further allows the State's argument in the interest of justice.

Under the inevitable discovery doctrine, evidence which is illegally obtained can still be admitted into evidence as an exception to the exclusionary rule when "the information ultimately or inevitably would have been discovered by lawful means." *U.S. v. Nix*, 467 U.S. 431, 444, 81 L. Ed. 2d 377, 387-88 (1984). Thus, a determination of an illegal search does not preclude a separate determination that the exclusionary rule does not apply because of the inevitable discovery doctrine.

Our Court has held that even though a defendant's motion to suppress has been denied, if new allegations are presented that have not been previously addressed, a second trial court is not precluded from hearing the new motion to suppress. *State v. Langdon*, 94 N.C. App. 354, 380 S.E.2d 388 (1989). Here, in the suppression hearing before Judge Jones, the only question was whether the heroin was properly seized without a warrant. Judge Jones concluded a search warrant was necessary. A later determination by Judge Hudson that the inevitable discovery doctrine applies does not overrule the order of Judge Jones stating that the heroin was illegally seized.

Thus, there was no error in the re-hearing of the motion to suppress and admitting the heroin into evidence on the basis of the inevitable discovery doctrine.

[2] Defendant further contends the trial court erred in admitting the heroin since the inevitable discovery doctrine is not applicable. Under this doctrine, the prosecution has the burden of proving that the evidence, even though obtained through an illegal search, would have been discovered anyway by independent lawful means. *Nix*, 467 U.S. at 444, 81 L. Ed. 2d at 387-88; *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992). Our Supreme Court recognized that inevitable dis-

covery should be determined on a case-by-case basis. *Garner*, 331 N.C. at 503, 417 S.E.2d at 508. The Court also specifically rejected the requirement that the State prove an absence of bad faith by law enforcement. *Id.* at 507, 417 S.E.2d at 511. "[I]f the State carries its burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant." *Id.* at 508, 417 S.E.2d at 511.

At the second hearing, Officer Glendy testified that he was preparing the search warrant when he learned of the discovery of the heroin. He testified, "That information [regarding the discovery of the heroin beneath the chair] was not located in the search warrant. . . . And none of that information was used to base the search warrant on." He also testified that the chairs in front of the apartment would have been searched pursuant to the search warrant even if the heroin had not already been found. He stated, "That's normal practice. Anything that's in front of an apartment or building, house, residence, carport, it would have been searched. . . ." Detective Wisniewski testified that if he had not already searched the chairs, he would have "most definitely" checked them when executing the search warrant because of the interest shown in the chairs which he had observed.

Judge Hudson concluded "the State has carried its burden for proving that, although the heroin was illegally seized, it would have been inevitably legally discovered and seized pursuant to a legal search of the building." There was sufficient evidence upon which Judge Hudson could conclude that the State fulfilled its burden of proving that the evidence would have been inevitably discovered in a search pursuant to a valid search warrant. Any bad faith on the part of the investigating officer in searching without a warrant is not relevant to the determination of inevitable discovery. Thus, we conclude there was no error in admitting the heroin under the inevitable discovery doctrine.

[3] Defendant finally contends the trial court erred in admitting evidence of other dismissed heroin charges against him. Defendant contends he was unduly and unfairly prejudiced by admitting evidence of these dismissed charges.

At trial, the State presented evidence of criminal charges previously brought against the defendant but which had already been dismissed prior to this trial. The trial court held a Rule 404(b) hearing to determine whether this evidence was admissible. N.C. Gen.

Stat. § 8C-1, Rule 404(b) (1999). Corporal M.D. Berendsen of the Durham County Police Department testified about his investigation, search, and arrest of the defendant and Mr. Miller for possession of heroin in Durham County on 25 November 1997. These charges in Durham County involved the same controlled substance, the same co-defendant, and occurred less than one month prior to defendant's arrest on the Wake County criminal charges in the present action. The State argued that the evidence of the charges in Durham County, although ultimately dismissed, showed intent, knowledge, and a plan on the part of the defendant and thus was admissible pursuant to Rule 404(b).

At the Rule 404(b) hearing outside of the presence of the jury, defendant testified on the issue of the admissibility of the Durham County charges and denied any involvement in heroin charges in Durham County. After a hearing, the trial court made findings as follows in part:

> What I don't believe is the evidence that's been offered by the Defendant, totally untruthful summation of the facts that occurred on November 25, 1997. Court does accept the version of the facts as tendered by the State, through which evidence Court finds the fact that the arrest of the Defendant, Mr. Thomas/Miller, and the confiscation of the controlled substance from them, and their charges are relevant to the issues involved in this case; that is the intent of the Defendant, his knowledge of controlled substances, and common scheme or plan that he developed to traffic heroin and other controlled substances in this state. . . . Court finds that its relevance outweighs any prejudicial effect that this evidence may have.

The Court concluded that the testimony regarding the Durham County heroin charges from 25 November 1997 was admissible.

N.C. Gen. Stat. § 8C-1, Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Adjudication of guilt is not a prerequisite for admittance of other crimes under this rule. *State v. Weldon*, 314 N.C. 401, 333 S.E.2d 701

(1983). Our Supreme Court has held, "Any fact or facts tending to prove defendant's guilty knowledge may be offered against defendant when guilty knowledge is, as here, an issue in the case. Such facts may or may not show that defendant is guilty of another crime. Obviously such a showing is not prerequisite to admissibility. The only prerequisite to admissibility is that the evidence be probative on the question of defendant's guilty knowledge." *Id.* at 406, 333 S.E.2d at 704.

Our Court has held that "[e]ven though evidence presented may tend to show that the defendant may have committed other crimes or 'bad acts', or that the defendant had a propensity to commit those acts, it will be admissible if it is relevant for some other purpose." *State v. Bynum*, 111 N.C. App. 845, 848, 433 S.E.2d 778, 780, *disc. review denied*, 335 N.C. 239, 439 S.E.2d 153 (1993). To determine admissibility, the trial court must first determine whether the evidence is being offered for a proper purpose under Rule 404(b). *Id.* The trial court should then determine whether the evidence is relevant to the present charges. *Id.* Finally, it must apply a Rule 403 balancing test as to the probative value of the evidence against its prejudicial effect. *Id.*

Whether to exclude evidence of other crimes or bad acts is a matter within the sound discretion of the trial court. *Bynum*, 111 N.C. App. at 849, 433 S.E.2d at 781. Thus, the standard of review is whether the trial court abused its discretion in admitting the evidence. Here, the findings of the trial court show that it followed all of the appropriate steps in determining the admissibility of evidence of the dismissed Durham County charges. There was competent evidence to support its findings which in turn support its conclusion. Furthermore, the trial court gave a limiting instruction to the jury on consideration of this evidence. Jurors are presumed to follow instructions given by the trial court. *State v. Rouse*, 339 N.C. 59, 92, 451 S.E.2d 543, 561 (1994), *reconsideration* denied, 339 N.C. 619, 453 S.E.2d 188, *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). After a careful review, we find that the trial court did not abuse its discretion in admitting evidence of heroin charges in Durham County even though they had been dismissed.

In conclusion, we find there was no error in Judge Hudson's holding a hearing and admitting the seized heroin under the inevitable discovery doctrine. Further, the trial court did not err in admitting evidence of previously dismissed heroin charges against the defendant.

No error.

Judges MARTIN and TYSON concur.

STATE OF NORTH CAROLINA v. KEVIN LEE BURROUGHS

No. COA00-1035

(Filed 18 December 2001)

1. **Robbery— indictment—attempted robbery with a firearm—sufficiency of notice**

The trial court did not err by denying defendant's motion to dismiss the charge of attempted robbery with a firearm based on an allegedly defective indictment, because: (1) the indictment properly specified the name of the person from whose presence the property was attempted to be taken, whose life was endangered, and the place that the offense occurred; and (2) the indictment was sufficient to put defendant on notice that he was charged with attempted robbery with a firearm so as to prevent subsequent prosecution for that same offense.

2. **Robbery— attempted with a firearm—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of attempted robbery with a firearm based on an alleged insufficiency of the evidence, because: (1) the variance between the indictment's allegations and the evidence at trial were concerning superfluous matters; and (2) regardless of the exact property defendant intended to take upon his entry into the store and who owned that property, defendant entered the store with his face covered by a bandana, with his gun drawn and pointed at the store clerk, and with the stated intent to rob the store of its property.

3. **Criminal Law— deadlocked jury—trial court's reference to the potential for and expense of a new trial**

The trial court committed prejudicial error entitling defendant to a new trial in an attempted robbery with a firearm case by charging the jury in violation of N.C.G.S. § 15A-1235 about the

potential for and expense of a new trial when the trial court learned the jury was deadlocked.

Appeal by defendant from judgment entered 1 December 1999 by Judge J.B. Allen in Chatham County Superior Court. Heard in the Court of Appeals 16 August 2001.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Amber A. Corbin for defendant-appellant.

BIGGS, Judge.

Defendant Kevin Lee Burroughs was charged with attempted robbery with a firearm. The State's evidence tended to show the following: On 26 May 1999, Garrett Caviness was working in C's Convenience Store, a family owned and operated convenience store located in Bennett, North Carolina. At about 1:50 p.m., he was behind the cash register when he looked up and saw defendant and another man run past the window with guns drawn. The men were wearing bandanas over their faces. Suspecting that he was about to be robbed, Caviness immediately picked up his own gun. Defendant entered the store, with his co-defendant following. Defendant aimed his gun at Caviness, who in turn, aimed his gun at defendant. When he saw Caviness' gun pointed in his direction, defendant, who was about to say something, stopped and dove to the floor. Defendant begged Caviness not to shoot him. Upon seeing Caviness' gun, the co-defendant also dove to the floor, but subsequently fled the scene in his automobile when Caviness turned his attention to defendant. Caviness held defendant at gun point, and demanded that defendant relinquish his gun. When defendant did so, Caviness stepped around the counter to pick the gun up. He then locked the front door and called 911. While awaiting the arrival of law enforcement, Caviness made defendant lay face-down on the floor. At one point, defendant stated that "he had messed up" and that he "shouldn't have done it." Subsequently law enforcement arrived and took defendant into custody. While in custody, and after being apprised of his *Miranda* rights, defendant gave a written statement to Detective T.C. Yarborough, of the Chatham County Sheriff's Department, admitting to devising a plan with his cousin to rob C's Convenience Store. The plan required that defendant would hold the store clerk at gunpoint, while his cousin stole some beer. Defendant

admitted that he covered his face with a "do rag" and entered the store with a .22 Magnum pistol, and that he intended to steal beer.

At trial, defendant testified on his own behalf. Defendant testified that on the morning of 26 May 1999, he and his cousin had been target shooting. Defendant was using a gun that belonged to his grandmother. After target shooting, defendant placed the gun in his vehicle between the seats. When the two men got thirsty, they traveled to C's Convenience Store. The two then began to joke about robbing the store. Defendant testified that he was wearing a "do rag" on his head, and pulled it down over his nose to imitate Jesse James. Defendant also testified that he retrieved the gun from between the car seats. According to defendant, the next thing he knew, he was entering the store with his face covered by the "do rag" and carrying his loaded gun. Defendant insisted, "it was just a joke in the store," and that he had every intention of going in and paying for the goods. Defendant stated that "it just happened." Defendant maintained on cross-examination that he did not know how he ended up face down on the floor in the store. He stated, "I don't remember getting out and grabbing nothing between here and yonder. All I know is I was picking in the car. Next thing I know, I was in the door with a gun in my face so I hit the floor. I wasn't expecting none of this to be going on." As to the statement given to Detective Yarborough, defendant testified that he was scared at the time and did not pay attention to what he told the detective. A jury found defendant guilty as charged. The trial court entered judgment on that verdict, sentencing defendant to a presumptive term of sixty-eight to ninety-one months imprisonment. Defendant appeals.

We note at the outset that those assignments set forth in the record but not argued in defendant's brief are deemed abandoned. *See* N.C.R. App. P. 28(b)(5) (providing that "[a]ssignments 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[]").

[1] By his first assignment of error argued in his brief, defendant argues (1) that the trial court lacked jurisdiction to hear this case since the indictment was fatally flawed; and therefore (2) the trial court erred in denying his motion to dismiss. We disagree.

Jurisdiction to try a criminal defendant for a felony is premised upon a valid bill of indictment. *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). To sufficiently charge a criminal offense, an indictment must state the elements of the offense with sufficient

detail to put the defendant on notice as to the nature of the crime charged and to bar subsequent prosecution for the same offense in violation of the prohibitions against double jeopardy. *Id.* " 'In an indictment for robbery with firearms or other dangerous weapons (G.S. 14-87), the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapon.' " *State v. Mahaley*, 122 N.C. App. 490, 492, 470 S.E.2d 549, 551 (1996) (quoting *State v. Harris*, 8 N.C. App. 653, 656, 175 S.E.2d 334, 336 (1970)). While an indictment for robbery (or attempted robbery) with a dangerous weapon need not allege actual legal ownership of property, *see e.g.*, *State v. Rogers*, 273 N.C. 208, 159 S.E.2d 525 (1968); *State v. Fate*, 38 N.C. App. 68, 247 S.E.2d 310 (1978), the indictment must at least name a person who was in charge or in the presence of the property at the time of the robbery, if not the actual, legal owner. *State v. Moore*, 65 N.C. App. 56, 61, 308 S.E.2d 723, 727 (1983). If the defendant needs further information, he should move for a bill of particulars. *See* N.C.G.S. § 15A-925 (1999).

In the instant case, the indictment read as follows:

> The jurors . . . present that . . . the defendant named above unlawfully, willfully and feloniously did steal, take, and carry away and attempt to steal, take and carry away another's personal property, an unknown amount of U.S. Currency and the value of (unknown) dollars, from the presence, person, place of business, and residence of Garrett Caviness. The defendant committed this act having in possession and with the use and threatened use of firearms and other dangerous weapons, implements, and means, an assault consisting of having in possession and threatening the use of a firearm, a pistol, whereby the life of Gar[r]ett Caviness was endangered and threatened.

While defendant argues to the contrary, this indictment properly specified the name of the person from whose presence the property was attempted to be taken, whose life was endangered, and the place that the offense occurred. *See Moore*, 65 N.C. App. at 61, 308 S.E.2d at 727. Defendant's reliance on *State v. Thornton*, 251 N.C. 658, 111 S.E.2d 901 (1960), and *State v. Woody*, 132 N.C. App 788, 513 S.E.2d 801 (1999), is misplaced. Those cases are readily distinguishable from the present case, as they involve the offenses of larceny and/or conversion—offenses in which it is crucial that the identity of the owner of the property be properly alleged and proven at trial. As the present indictment was sufficient to put defendant on notice that he was

charged with attempted robbery with a firearm so as to prevent subsequent prosecution for that same offense, this argument fails.

In that same regard, defendant's argument that he was entitled to a dismissal of the attempted robbery charge, based upon the alleged defective indictment, also fails. This assignment of error is, therefore, overruled.

[2] Defendant next contends that the trial court erred in denying his motion to dismiss for insufficient evidence. This argument is also based upon an allegedly fatal variance between the indictment and the proof at trial.

The indictment alleged that defendant attempted to steal an unspecified amount of cash from the store clerk, Garrett Caviness. As previously discussed, the gravamen of the offense charged here is the taking by force or putting in fear, while the specific owner or the exact property taken or attempted to be taken is mere surplusage. *See Rogers*, 273 N.C. at 212, 159 S.E.2d at 528. Defendant cannot show prejudicial error where the alleged variance between the indictment's allegations and the evidence at trial were as to superfluous matters. Regardless of the exact property defendant intended to take upon his entry into the store and who owned that property, the evidence, in the light most favorable to the State, tends to show that defendant entered the store with his face covered by a bandana, with his gun drawn and pointed at the store clerk, Garrett Caviness, and with the stated intent to rob the store of its property. As this evidence is sufficient to prove the offense charged, the trial court's denial of defendant's motion to dismiss was proper. *See State v. McCoy*, 122 N.C. App. 482, 485, 470 S.E.2d 542, 544, *disc. review denied*, 343 N.C. 755, 473 S.E.2d 622 (1996) (stating that "[i]f there is substantial evidence of the essential elements of the offense charged, or of a lesser included offense, and of defendant being the perpetrator, 'the trial court must deny the motion to dismiss . . . and submit [the charge] to the jury. . . .' " *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992)). Accordingly, this assignment of error is also overruled.

[3] Defendant next argues that the trial court erred in charging the jury, upon learning that they were deadlocked, with an instruction that violated N.C.G.S. § 15A-1235 (1999). We agree.

N.C.G.S. § 15A-1235, which governs the charges that may be given to a jury that is apparently unable to agree upon a verdict, provides in pertinent part:

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C.G.S. § 15A-1235(c),(d) (1999). In *State v. Easterling*, our Supreme Court held that under N.C.G.S. § 15A-1235, "a North Carolina jury may no longer be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree." 300 N.C. 594, 608, 268 S.E.2d 800, 809 (1980). However, in *Easterling*, the Court found that defendant was not prejudiced since there was no evidence of deadlock when the court gave his instruction. *Id.* at 609, 268 S.E.2d at 809. In *State v. Mack*, this Court stated, "where the jury is deadlocked, and this fact is known to the trial judge, the mention of inconvenience and additional expense may well be prejudicial and harmful to the defendant, and must be scrutinized with extraordinary care." 53 N.C. App. 127, 129, 280 S.E.2d 40, 42 (1981); *see also State v. Lipfird*, 302 N.C. 391, 276 S.E.2d 161 (1981) (holding that the instruction given to a deadlocked jury, which referred to the possibility of a new trial and the selection of another jury, was prejudicial error); *State v. Buckom*, 111 N.C. App. 240, 431 S.E.2d 776 (1993) (holding that instructing the jury to attempt to reconcile its differences to avoid expense was prejudicial error), *aff'd per curiam*, 335 N.C. 765, 440 S.E.2d 274 (1994); *State v. Johnson*, 80 N.C. App. 311, 341 S.E.2d 770 (1986) (holding that the trial court's mention of the "potential inconvenience" of retrial during re-instruction to a jury, known to be deadlocked, was prejudicial error, even though the judge did not mention the expense of another trial); *State v. Lamb*, 44 N.C. App. 251, 261 S.E.2d 130 (1979) (finding reversible error where the trial judge stated, "[b]oth the state and the defendants have a tremendous amount of time and money invested in this case. If you don't reach a verdict, it means that it will have to be tried again by another jury in this county and that involves a duplication of all of the expense and all the time[]").

In the case *sub judice*, the jury first retired to deliberate at 3:16 p.m. At 4:00 p.m., the jury sent a note to the judge, requesting information on the "four rules for intent." Judge Allen brought the jury

back into the courtroom and instructed the jurors on the definition of intent and the four elements of robbery with a firearm. The jury returned to the jury room to resume deliberations at 4:05 p.m. At 4:45 p.m., the jury advised the bailiff that they were deadlocked at nine to three. The judge then properly instructed the jury pursuant to N.C.G.S. § 15A-1235. Subsequently, however, at about 10:10 a.m. on the next day, when the jury was still unable to reach a decision and sent the judge a note, asking what they were to make of defense counsel's closing remark about defendant facing 123 months imprisonment if convicted, the judge brought the jury back into the courtroom for additional instruction. First, the judge admonished the jury that the punishment of defendant was not their responsibility. He continued,

> Ladies and gentlemen, I want to advise you that if the jury in this trial cannot reach a unanimous verdict, in all probability the case will have to be tried before another jury of 12 citizens here in Chatham County. Superior court sessions and jury trials are very expensive to the taxpayers who pay for the court system. I do not tell you this in any way to pressure you into reaching a verdict because no juror should surrender his honest convictions. I repeat, an honest conviction, for the mere purpose of reaching a verdict.
>
> However, each and every one of you have a duty to deliberate with a view towards reaching an agreement. You have a duty, as a citizen and having been selected to set [sic] on this jury, to reach a verdict if it can be done[]. With this in mind, I again want to inform you that a jury verdict must be unanimous. That must be all 12 jurors must agree to your verdict as to guilt or no guilty [sic].
>
> But I say to you that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to an individual judgment. Each juror must decide this case for himself or herself but only after an impartial consideration of the evidence with his or her fellow jurors.

The judge went on, instructing the jury in accordance with N.C.G.S. § 15A-1235, and then sent the jury back to resume its deliberations at about 10:15 a.m. Defense counsel objected to the instructions and requested a mistrial, which was denied. The jury returned its guilty verdict within fifteen minutes of the trial judge's last instruction.

After reading the instructions of the trial judge, we are unable to perceive any distinguishable differences between the instructions given here and those found to be prejudicial error by our appellate courts in *Lamb*, and its progeny. We therefore conclude that the trial court's reference to the potential for and expense of a new trial was prejudicial error and that defendant is entitled to a new trial.

Having concluded that defendant is entitled to a new trial, we need not address his remaining assignments of error.

New Trial.

Judges MARTIN and McCULLOUGH concur.

STATE OF NORTH CAROLINA, BY AND THROUGH THE ALBEMARLE CHILD SUPPORT ENFORCEMENT AGENCY, EX REL., BRENDA MILLER, PLAINTIFF v. IVORY HINTON, DEFENDANT

No. COA00-1316

(Filed 18 December 2001)

Child Support, Custody, and Visitation— support—effective date of order

The trial court abused its discretion in a child support case by setting the effective date of its order as 1 May 2000 as opposed to January 1999, the first month after the filing of the complaint, and the case is remanded to the trial court for findings of fact concerning the propriety of an award of prospective child support from the date of the filing of the complaint.

Appeal by the State of North Carolina from order entered 5 June 2000 by Judge Edgar L. Barnes in Gates County Civil District IV-D Court. Heard in the Court of Appeals 6 November 2001.

Attorney General Michael F. Easley, by Associate Attorney General Sonya M. Allen, for the State.

No brief for defendant appellee.

McCULLOUGH, Judge.

On 11 April 2000, a hearing was held to establish paternity and child support for the minor child, Cordell Ballard Smith, Jr. Evidence

for the State showed that Brenda Miller and defendant, Ivory Hinton, went to junior high school together in Gates County, North Carolina. Ms. Miller saw defendant at a club in November 1985; around 21 November 1985, they engaged in sexual relations. Defendant and Ms. Miller had sexual relations at least two more times in November and December 1985.

On 8 September 1986, Ms. Miller gave birth to Cordell Ballard Smith, Jr. Ms. Miller wrote defendant a note approximately eight months after the child was born to inform defendant that he was the baby's father. Defendant and Ms. Miller later had a telephone conversation, during which defendant acknowledged that he was the father of Ms. Miller's son. However, the child's birth certificate, which was filed on 16 September 1986, listed Cordell Ballard Smith as the father. Ms. Miller initially believed Mr. Smith was the biological father of her child because she and Mr. Smith were engaged in a sexual relationship prior to and after Ms. Miller's relationship with defendant. Their relationship was suspended from January 1985 to January 1986 because Mr. Smith was in prison. During that time, Ms. Miller became involved with defendant.

The Gates County Child Support Enforcement Agency initiated an action for paternity and child support on behalf of Ms. Miller and her son. In March 1998, genetic testing confirmed that Mr. Smith was not the biological father of the child; as a result, no further action was taken against him. On 25 November 1998, Ms. Miller filed a complaint, alleging that defendant was the father of her child. Genetic tests performed in February 1999 showed a 99.62% probability that defendant was the biological father of Cordell Ballard Smith, Jr.

On 17 June 1999, a hearing was held to adjudicate paternity, establish child support, recover past public assistance, provide medical insurance for the child, initiate wage withholding and trade line reporting, and recover the costs of the action. When defendant failed to timely file an answer or other responsive pleading and did not appear to defend the action, the trial court entered a default order for paternity and child support against him. In the default order, defendant was adjudicated the natural biological father of the child and was ordered to pay child support in the amount of $324.00 per month, effective 1 July 1999. The default order was filed on 4 August 1999. However, the default order was set aside by stipulation of the parties on 13 January 2000 because there was legitimate confusion on the part of defendant regarding whether he was to appear in court on 17

June 1999. Evidence in the form of affidavits revealed that defendant received contradictory correspondence from the Gates County Child Support Office which reasonably led him to believe the 17 June 1999 hearing had been continued.

On 20 December 1999, defendant filed a "Notice to Deviate from Child Support Guidelines," requesting that the trial court deviate from the child support guidelines (Guidelines) and conduct an evidentiary hearing on the needs of the minor child and the ability of the parties to pay child support. At the hearing, Ms. Miller, defendant, and Gina Mizelle, an employee of the Albemarle Child Support Enforcement Agency, testified. Ms. Miller testified that defendant was the father of her child and had acknowledged him during his infancy, while defendant testified that he did not remember Ms. Miller and did not know the minor child. Defendant stated that he moved to New York in December 1986 and lived there for two years with his aunt. He also testified that he had never visited the minor child or given him gifts. Ms. Mizelle testified about the genetic test results and the calculation of child support.

After considering the evidence, the trial court found that defendant was the biological father of the minor child, Cordell Ballard Smith, Jr. The trial court also found that deviation from the Guidelines was warranted, and ordered defendant to pay $150.00 per month. The trial court further noted that defendant had paid $1,621.35 in child support before the 17 June 1999 order was set aside, and gave him a credit for that amount by ordering that the money be applied to the child support obligation established in its order. Defendant's child support obligation was ordered to commence effective 1 May 2000. The State appealed.

In its sole assignment of error, the State contends the trial court committed reversible error when it set the effective date of its order as 1 May 2000 as opposed to January 1999, the first month after the filing of the complaint. Specifically, the State argues the trial court failed to consider the weight of the evidence and failed to make adequate findings of fact to support its conclusions that a deviation from the Guidelines was proper and not award child support from the filing of the complaint. For the reasons set forth, we agree and reverse and remand the case for further findings of fact regarding the propriety of an award of prospective child support.

When considering the propriety of the trial court's deviation from the Guidelines, we employ an abuse of discretion standard. *Coble v.*

Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). The trial court's "determination as to the proper amount of child support will not be disturbed on appeal absent a clear abuse of discretion, *i.e.* only if 'manifestly unsupported by reason.' " *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998). "Thus, to determine whether the trial court abused its discretion in computation of a child support award deviating from the Guidelines, its findings of fact must show justification for the deviation and a basis for the amount ordered." *Fisher*, 131 N.C. App. at 644-45, 507 S.E.2d at 593; *see also Gowing v. Gowing*, 111 N.C. App. 613, 618-19, 432 S.E.2d 911, 914 (1993). Guidance is provided in *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999), where deviation is described as a four-step process:

> First, the trial court must determine the presumptive child support amount under the Guidelines. N.C.G.S. § 50-13.4(c). Second, the trial court must hear evidence as to "the reasonable needs of the child for support and the relative ability of each parent to provide support." Third, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount "would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate." ("The Court may deviate from the Guidelines in cases where application would be inequitable to one of the parties or to the child(ren).")[.] Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be "otherwise unjust or inappropriate."

Id. at 465-66, 517 S.E.2d at 926 (citations omitted).

In its order, the trial court made the following findings of fact:

9. Relator [Ms. Miller] is presently unemployed but has the capability of earning a monthly gross income of $893.00 per month.

10. The monthly financial needs for the maintenance and support of the minor child Cordell B. Smith Jr. are $250.00.

11. The total monthly needs of the relator and her other four children, excluding the monthly needs of relator's husband, are $637.68.

12. The relator receives $204.00 per month in food stamps.

13. The relator testified that her husband earned more than $1000.00 per month but that she did not know her husband's gross monthly income.

14. Defendant is employed at MCI World Com in Virginia and earns a gross monthly income of $1906.30.

15. The total monthly needs of the defendant, defendant's wife and infant child are $2000.00 per month.

16. Defendant is obligated by a Virginia Child Support Order to pay child support for another child not living in his home in the amount of $363.00.

17. After statutory and voluntary deductions are withheld from defendant's paycheck he has a total monthly net income of $894.00.

18. Defendant's rent for his family residence is $700.00 per month.

19. Defendant has a one year old infant child in his home. Defendant's wife is not currently employed as she stays at home to care for defendant's infant child.

20. Defendant incurs $73.00 per month in health insurance expense each month for the minor child Cordell B. Smith Jr.

21. Under the current applicable child support guidelines in effect in the State of North Carolina the recommended amount of support that defendant should pay as his share of support for Cordell B. Smith Jr. is $221.00 as shown by Worksheet A which was admitted into evidence as plaintiff's Exhibit 3.

22. Neither defendant nor relator have the means or ability to pay their share of the recommended child support as determined, under the child support guidelines, for the minor child Cordell B. Smith Jr.

23. On June 17, 1999 an Order adjudicating paternity and establishing child support was entered by the Honorable C.

Christopher Bean District Court Judge. Said Order required defendant via immediate income withholding to pay child support in the sum of $324.00 per month. On August 11, 1999 defendant filed a Motion under Rule 60 of the North Carolina Rules of Civil Procedure to set aside the June 17, 1999 Order. On January 8, 2000 Judge Bean entered an Order setting aside his June 17, 1999 Order adjudicating paternity and establishing child support. That during the time that Judge Bean's June 17, 1999 Child Support Order was in effect defendant paid, by income withholding, the sum of $1621.35 as child support for Cordell B. Smith Jr. Defendant requested a refund or credit of child support paid prior to the entry of this Order.

24. Plaintiff requested that the Court award child support effective January 1, 1999, the first month after the filing of the Complaint.

The trial court then concluded, as a matter of law:

3. That based on the gross income of the defendant and relator, the reasonable needs of the minor child, the reasonable needs of the relator and her four other minor children, the reasonable needs of the defendant, and upon consideration of the current financial circumstances of the defendant and relator, deviation from the recommended child support amount under the current child support guidelines is warranted and reasonable and the Court should deviate from the child support guidelines and establish child support in the sum of $150.00 per month.

4. That the defendant has available to him, through his employment medical insurance for the minor child Cordell B. Smith Jr.; it is reasonable for the defendant to maintain medical insurance on said child and therefore defendant should be required to maintain health insurance on the minor child as long as the same is available to him through his employment.

5. That the defendant should be entitled to a credit of $1621.35 for support payments made until Judge Bean's June 17, 1999 child support Order was set aside. That said credit should be applied to the child support obligation established in this Order.

6. That the defendant's child support obligation should commence effective May 1, 2000.

The findings of fact made by the trial court in the present case are similar in scope and vein to the findings of fact made by the trial court in *Fisher*. In *Fisher*, the trial court made several findings of fact which discussed the parties' income and debts, as well as the presumptive Guideline amount. *Fisher*, 131 N.C. App. at 643-44, 507 S.E.2d at 593. The trial court deviated from $505.00 per month, the Guideline amount, to $50.00, and declined to award child support from the time the complaint was filed to the date of the trial. *Id.* In reversing the trial court, the *Fisher* Court stated:

> [T]he court's findings lack the specificity necessary to justify its deviation from the presumptive Guidelines. While the trial court made findings relating to child care contributions, health insurance costs, and the relative ability of each party to pay, it failed to include any findings regarding [the child's] reasonable needs, including his education, maintenance, or accustomed standard of living . . . .

Id. at 646, 507 S.E.2d at 594. Although the parties in the present case do not dispute the amount of child support awarded, we nonetheless find *Fisher* instructive regarding the implied presumption that child support payments should begin at the time the complaint was filed. After careful examination of the record, we conclude that the trial court in the present case made the same error as the trial court in *Fisher*, in that the trial court provided no rationale as to why the child support award did not begin at the filing of the complaint. Unless the trial court finds that beginning the prospective child support payments on the date the complaint was filed would be "unjust or inappropriate" and there is evidence in the record to support this finding, it is error to order prospective support to begin at any other time. *See Sain*, 134 N.C. App. 460, 517 S.E.2d 921; and *Fisher*, 131 N.C. App. 642, 507 S.E.2d 591.

We thus agree with the State's argument that the trial court erred in failing to explain why it did not award child support from the filing of the complaint. Prospective child support includes the portion of the child support award representing "that period from the time a complaint seeking child support is filed to the date of trial." *Taylor v. Taylor*, 118 N.C. App. 356, 361, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996). N.C. Gen. Stat. § 50-13.4(c) applies to prospective child support and requires application of the Guidelines to arrive at an appropriate award. *Taylor*, 118 N.C. App. at 362, 455 S.E.2d at 446; *see also Shaw v. Cameron*, 125 N.C. App. 522, 527, 481 S.E.2d 365, 368 (1997).

We therefore remand to the trial court for findings of fact concerning the propriety of an award of prospective child support from the date of the filing of the complaint. *See* N.C. Gen. Stat. § 50-13.4(c); *Taylor*, 118 N.C. App. at 362-63, 455 S.E.2d at 446-47.

Reversed and remanded.

Judges GREENE and CAMPBELL concur.

STATE OF NORTH CAROLINA v. SANDY McMILLIAN

No. COA01-135

(Filed 18 December 2001)

1. Identification of Defendants— in-court—improper pretrial identification—independent origin

The trial court did not err in a robbery with a dangerous weapon case by finding the victim's in-court identification to be of independent origin and by allowing the identification of defendant before the jury even though defendant contends the in-court identification was tainted by an improper pretrial identification, because: (1) even though a pretrial procedure is found to be unreliable, an in-court identification of independent origin is admissible; (2) the victim stated that his identification of defendant was based on seeing defendant the night of the incident and not the show-up at the sheriff's department; and (3) there was not a substantial likelihood of misidentification when the witness had ample opportunity to view defendant, the witness gave an accurate description of defendant and his clothing, and the witness was certain in his identification of defendant as the person who robbed him.

2. Search and Seizure— warrantless search—presence in motel room of another

The trial court did not err in a robbery with a dangerous weapon case by admitting evidence obtained from a warrantless search of the motel room where defendant was found, because: (1) the room was rented to a person other than defendant; (2) there was no evidence that defendant had any luggage in the room, and there was no evidence that defendant had spent the

night or planned on staying overnight; and (3) while defendant may have had a subjective expectation of privacy in the room, it was not a reasonable expectation of privacy.

3. Robbery— dangerous weapon—sufficiency of evidence— use or threatened use of a firearm or other dangerous weapon

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon based on the State's alleged failure to produce evidence that defendant robbed the victim by use or threatened use of a firearm or other dangerous weapon, because: (1) the victim testified on cross-examination that the man who robbed the victim walked up to him from around the corner of the store and pointed a shotgun at the victim; (2) the victim testified that the assailant kept the shotgun pointed at the victim while driving off in his stolen car; and (3) the victim later identified the sawed-off single barrel shotgun recovered from defendant as looking just like the gun which was pointed at him the night of the robbery.

4. Sentencing— aggravating factor—firearm of mass destruction—robbery with a dangerous weapon

The trial court did not err in a robbery with a dangerous weapon case by finding as an aggravating factor the use of a firearm of mass destruction, because: (1) N.C.G.S. § 14-288.8(c)(3) defines a weapon of mass destruction as any shotgun with a barrel or barrels of less than eighteen inches in length or an overall length of less than twenty-six inches; (2) a witness testified that the barrel of the shotgun found in defendant's possession had been sawed off and the barrel was less than eighteen inches in length; and (3) this element was not required to prove the offense of robbery with a dangerous weapon.

5. Constitutional Law— effective assistance of counsel— defense counsel's cross-examination possibly bolstering the State's case

A defendant in a robbery with a dangerous weapon case was not deprived of effective assistance of counsel based on an allegation that defense counsel's extensive cross-examination regarding the shotgun possibly bolstered the State's case, because: (1) the State presented sufficient evidence on direct examination of the use of a dangerous weapon; and (2) defendant failed to meet his burden of proving that his attorney's perform-

ance fell below an objective standard of reasonableness and that defendant was prejudiced by his attorney's alleged deficient performance.

Appeal by defendant from judgment entered 25 July 2000 by Judge Dennis Jay Winner in Bladen County Superior Court. Heard in the Court of Appeals 28 November 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General George W. Boylan, for the State.

A. Michelle FormyDuval, for defendant-appellant.

TYSON, Judge.

I. Facts

Evidence presented at trial tended to establish that on 26 December 1999, Sandy McMillian ("defendant") robbed David Lloyd outside a convenience store in Tar Heel, North Carolina.

Mr. Lloyd testified that on the night of the incident he gave a statement describing the assailant as a tall black male, approximately 175 to 180 pounds, light brown skin, wearing a three-quarter length black coat. Mr. Lloyd also testified that the assailant pointed a double-barrel shotgun at him and demanded his car keys.

After *voir dire*, Mr. Lloyd was permitted to identify defendant, before the jury, as the person who robbed him. Mr. Lloyd testified that some of the items in his car that night were later returned to him by Investigator Marshall Allen ("Allen").

Allen testified that he investigated the robbery on 26 December 1999. On 28 December 1999, Allen received a phone call that Michael Green ("Green") had attempted to cash one of Mr. Lloyd's checks and had been detained by the Lumberton police after he was found in possession of Mr. Lloyd's stolen car. Green directed the police to a motel room key in Mr. Lloyd's car and to room 134 at the Red Roof Motel which was registered by Green under another name.

Allen testified that after knocking, Aletha Rose Jones opened the door. Allen and other officers entered the motel room. They found defendant lying on the bed and a sawed-off twenty-gauge shotgun leaning against the wall, approximately eight feet from defendant. Allen also found a black leather coat which defendant identified as his and various personal items belonging to Mr. Lloyd.

Defendant presented no evidence at trial. The jury found defendant guilty of robbery with a dangerous weapon. The trial court found as an aggravating factor the use of a weapon of mass destruction and sentenced defendant within the aggravated range. Defendant appeals. We hold there was no error.

II. Issues

The issues presented are: (1) whether the trial court erred in finding the victim's in-court identification to be of independent origin and allowing the identification of defendant before the jury, (2) whether the trial court erred in admitting evidence obtained from a warrantless search, (3) whether the trial court erred in denying defendant's motion to dismiss, (4) whether the trial court erred in finding as an aggravating factor the use of a firearm of mass destruction, and (5) whether defendant was deprived of effective assistance of counsel.

We note that defendant raised an additional assignment of error in the record, pertaining to the failure of the trial court to find mitigating factors. This assignment of error was not argued in defendant's brief and is deemed abandoned. N.C.R. App. P. 28(b)(5) (1999).

III. In-court Identification

[1] Defendant contends that the in-court identification of him was tainted by an improper pretrial identification and lacked sufficient independent origin to be admissible. We disagree.

Both the United States Supreme Court and our Supreme Court have criticized the practice of a "show-up": showing suspects to victims and witnesses singularly rather than as part of a lineup. *See State v. Oliver*, 302 N.C. 28, 44-45, 274 S.E.2d 183, 194 (1981) (citing *Stovall v. Denno*, 388 U.S. 293, 302, 18 L. Ed. 2d 1199, 1206 (1967)). At bar, the trial court properly found that the pretrial show-up was suggestive and not admissible.

Even though a pretrial procedure is found to be unreliable, an in-court identification of independent origin is admissible. *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978). If shown that the pretrial identification procedures were so suggestive as to create a very substantial likelihood of irreparable misidentification, the in-court identification evidence must be suppressed. *State v. Wilson*, 313 N.C. 516, 528-29, 330 S.E.2d 450, 459 (1985). The likelihood of irreparable misidentification depends on the totality of the circumstances. *State v. Fisher*, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987).

Our Supreme Court identified several factors to determine the existence of irreparable misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *State v. Powell*, 321 N.C. 364, 368-69, 364 S.E.2d 332, 335 (1988).

Defendant objected prior to the in-court identification. During *voir dire*, Mr. Lloyd testified that: (1) he was fifteen feet from the assailant during the robbery, (2) he saw his assailant's face for approximately one to two minutes, (3) the parking lot outside of the convenience store had newer canopy lights and track lights, (4) the parking lot was well lit, (5) he was not tired at the time, and (6) he does not wear glasses or have any eyesight problems. Mr. Lloyd then identified defendant as the person who robbed him and stated that his identification of defendant was based on seeing defendant the night of the incident and not the show-up at the sheriff's department. The trial court found by clear and convincing evidence that the in-court identification of defendant by Mr. Lloyd was independent of and not tainted by the show-up but was solely from his memory of the incident.

Considering the totality of the circumstances, we conclude that there was not a substantial likelihood of misidentification. The witness had ample opportunity to view defendant; the witness gave an accurate description of defendant and his clothing, other than a minor discrepancy as to whether defendant had a toboggan rolled up around his head or whether it was defendant's own hair; and the witness was certain in his identification of defendant as the person who robbed him. We hold that the trial court did not err by admitting the in-court identification. This assignment of error is overruled.

IV. Warrantless Search

[2] Defendant argues that evidence obtained from the warrantless search of the motel room violated his constitutional rights under the Fourth and Fourteenth Amendments. Defendant contends that he had a legitimate expectation of privacy in the motel room, and that the trial court's denial of his motion to suppress was error.

The Fourth Amendment protects people from unreasonable searches and seizures. To challenge a search as unreasonable under

the Fourth Amendment, an individual must be able to show that he has a legitimate expectation of privacy in the area searched. *Rakas v. Illinois*, 439 U.S. 128, 143, 58 L. Ed. 2d 387, 401 (1978). Justice Harlan, concurring in *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576 (1976), outlined a two-prong test for determining whether an individual has a legitimate expectation of privacy: (1) the individual must have a subjective expectation of privacy, and (2) that subjective expectation must be reasonable. *Id.* at 361, 19 L. Ed. 2d at 588.

The United States Supreme Court has held that a guest in a hotel room has a reasonable expectation of privacy. *Stoner v. California*, 376 U.S. 483, 490, 11 L. Ed. 2d 856, 861 (1964) (holding that an overnight guest "living" in a hotel room, like "a tenant of a house, or the occupant of a room in a boarding house," has a legitimate expectation of privacy in the hotel room) (citations omitted). The facts in *Stoner* are not present here. The evidence showed that the room was rented to Green and not to defendant, there was no evidence that defendant had any luggage in the room, and there was no evidence that defendant had spent the night or planned on staying overnight.

While defendant may have had a subjective expectation of privacy in the room, it was not a reasonable expectation of privacy "rooted in 'understandings that are recognized and permitted by society.' " *Minnesota v. Olson*, 495 U.S. 91, 100, 109 L. Ed. 2d 85, (1990) (determining that an "overnight guest" has a legitimate expectation of privacy, in part, because he is engaging in a "longstanding social custom that serves functions recognized as valuable by society") (quoting *Rakas*, 439 U.S. at 144, n. 12, 58 L. Ed. 2d 387 (1978)). We conclude that defendant did not have a reasonable expectation of privacy and cannot invoke the protections of the Fourth Amendment. *See United States v. Grandstaff*, 813 F.2d 1353, 1357 (9th Cir. 1987) (holding that "mere presence in the hotel room of another is not enough" to establish a legitimate expectation of privacy in one's surroundings); *United States v. Maddox*, 944 F.2d 1223, 1234 (6th Cir. 1991) (holding that a "purely transient party guest" had no reasonable expectation of privacy in his host's home). This assignment of error is overruled.

V. Motion to Dismiss

[3] Defendant next assigns error to the trial court's denial of his motion to dismiss at the close of the State's evidence. Defendant contends that the State failed to produce evidence that defendant robbed the victim by use, or threatened use, of a firearm or other dangerous weapon. This contention is without merit.

The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). In determining the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *Id.* at 450, 439 S.E.2d at 585.

The offense of robbery with a dangerous weapon has the following three elements: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, and (3) whereby the life of a person is endangered or threatened. *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998).

Mr. Lloyd, the victim, testified on cross-examination that the man who robbed him walked up to him from around the corner of the store and pointed a double-barrel shotgun or a single-barrel with a pump, which appeared to be two barrels, at him. Mr. Lloyd also testified that the assailant kept the shotgun pointed at him while driving off in his stolen car. Mr. Lloyd later identified the sawed-off single barrel shotgun recovered from defendant as looking just like the gun which was pointed at him the night of the robbery.

This evidence is sufficient to withstand defendant's motion to dismiss. This assignment of error is overruled.

VI. Aggravating Factor

[4] Defendant argues that he was not charged with or indicted for the offense of possession of a weapon of mass destruction; therefore, it was error for the trial court to find him guilty of such offense and use it as an aggravating factor in sentencing him. Defendant cites no authority for this contention. We conclude this assertion is without merit.

Defendant further contends that the aggravating factor was based on circumstances which were part of the essence of the crime. "Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation. . . ." N.C. Gen. Stat. § 15A-1340.16(d) (1999); *see also State v. Hughes*, 136 N.C. App.

92, 99, 524 S.E.2d 63, 67 (1999) ("[i]t is error for an aggravating factor to be based on circumstances which are part of the essence of a crime"), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000).

An essential element of the offense of robbery with a dangerous weapon is the use or threatened use of a firearm or other dangerous weapon. *Call*, 349 N.C. at 417, 508 S.E.2d at 518. We have already concluded that sufficient evidence was presented that defendant pointed a shotgun at the victim. Elements not essential to the crime charged may be used to prove any factor in aggravation. *State v. Thompson*, 309 N.C. 421, 422, 307 S.E.2d 156, 158 (1983). "The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists . . . ." N.C. Gen. Stat. § 15A-1340.16(a) (1999).

A weapon of mass destruction includes "any shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches . . . ." N.C. Gen. Stat. § 14-288.8(c)(3) (1999). Allen testified that the barrel of the shotgun found in defendant's possession had been sawed off and that the barrel was less than 18 inches in length. This element was not required to prove the offense of robbery with a dangerous weapon and therefore was properly found as an aggravating factor by the trial court. This assignment of error is overruled.

VII. Effective Assistance of Counsel

[5] Defendant's final assignment of error is that he was deprived of his Sixth Amendment right to effective assistance of counsel. Defendant contends that the State failed to show the element of robbery with a dangerous weapon and that he would not have been convicted absent his counsel eliciting this information on cross-examination. We disagree.

The test for ineffective assistance of counsel is the same under the federal and state constitutions. A defendant is entitled to relief if he can show: (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that his counsel's deficient representation was so serious as to deprive him of a fair trial. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985); *see also Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

Here, the State presented testimony by the victim that defendant was the man who robbed him on 26 December 1999 and that Green was not the man who pointed the gun at him. While defense counsel's extensive cross-examination regarding the shotgun may have bol-

stered the State's case, we conclude that the State presented sufficient evidence on direct examination of the use of a dangerous weapon. Defendant has failed to meet his burden of proving that his attorney's performance fell below an objective standard of reasonableness and that he was prejudiced by his attorney's alleged deficient performance.

No error.

Judges TIMMONS-GOODSON and HUDSON concur.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, PLAINTIFF v. JOHN V. HOGAN AND SYLVIA A. HOGAN, DEFENDANTS AND JOHN V. HOGAN AND SYLVIA A. HOGAN, THIRD PARTY PLAINTIFFS v. BEAM, COOPER, GAINEY & ASSOCIATES T/A NXS, CORPORATION, NXS, CORPORATION; AND BEAM COOPER, GAINEY & ASSOCIATES, THIRD PARTY DEFENDANTS

No. COA00-1319

(Filed 18 December 2001)

Insurance— condominium—loss of rents—sufficiency of documentation

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of plaintiff on the issue of whether defendants have presented sufficient documentation under the terms of their insurance policy with plaintiff to entitle defendants to recover for the loss of rents resulting from their condominium being damaged and unfit to live in, because the policy was not ambiguous and its loss of rents provision requires defendants to submit a written rental contract with a third-party tenant who actually occupies or personally intends to occupy defendant's condominium.

Appeal by defendants from judgment entered 2 October 2000 by Judge Anthony M. Brannon in New Hanover County Superior Court. Heard in the Court of Appeals 18 September 2001.

Johnson & Lambeth, by Robert White Johnson, for plaintiff-appellee.

Jennifer L. Umbaugh, for defendant-appellants.

CAMPBELL, Judge.

John and Sylvia Hogan ("defendants" or "the Hogans") appeal from an award of summary judgment for Certain Underwriters at Lloyd's London ("Lloyd's") on the question of whether defendants have presented sufficient documentation under the terms of their insurance policy with Lloyd's to entitle defendants to recover for the loss of rents resulting from their condominium being damaged and unfit to live in. Having found no error of law, we affirm the ruling of the trial court.

Defendants are the owners of Condominium Unit 803 at Shell Island Resort Hotel in Wrightsville Beach, North Carolina. Defendants purchased Lloyd's insurance policy number 20982 ("the policy") to insure their condominium. Coverage B of the policy provides up to $4,000.00 of loss of use coverage, which includes coverage for loss of rents. It is undisputed that the Hogans' policy was in effect from 30 December 1995 to 30 December 1996, during which time their claim arose.

On 6 September 1996, Hurricane Fran struck the coast of North Carolina, inflicting extensive damage on Shell Island Resort Hotel. As a result of this damage, defendants' condominium was condemned for repairs from 6 September 1996 to 7 August 1997. Consequently, the Hogans filed a claim under the policy seeking recovery for loss of rents during the time their condominium was being repaired.

In support of their loss of rents claim, defendants submitted a copy of the property management agreement between defendants and MHI Recovery Management, Inc. ("MHI"), setting forth the manner in which defendants' condominium was rented prior to being damaged. Similar to the manner in which hotel rooms are rented, MHI maintained a reservations desk at Shell Island Resort which took advance and walk-in reservations, and at the time the guests arrived they were assigned (i.e., "rented") a condominium unit. MHI rented the condominium units at Shell Island Resort on a rotating basis, whereby the units with the lowest year-to-date gross rental revenue would be rented first. This rental scheme was designed to ensure that all units were rented on an equal basis.

In support of their claim, defendants also submitted a statement from MHI detailing the manner in which the condominiums at Shell Island Resort were rented, a lost business report from Shell Island Resort detailing the reservations that were canceled as a result of the

damage to the condominium units and the actual monetary losses associated with the cancellations, and a rental history of defendants' condominium showing the yearly rental revenues received by defendants from 1994-1996.

On 28 January 1997, Lloyd's denied defendants' loss of rents claim on the ground that defendants had failed to provide a written rental contract with a bona fide third-party tenant who intended personally to occupy defendants' condominium for a specific term.

Following further demands by defendants for payment, Lloyd's filed the instant declaratory judgment action seeking a declaration that defendants have not provided sufficient documentation under the loss of rents provision to warrant recovery on their claim. Defendants answered and filed a counterclaim against plaintiff for breach of contract, contending that the property management agreement with MHI was sufficient documentation to support defendants' loss of rents claim. Defendants' counterclaim further contended that plaintiff was vicariously liable for the actions of the insurance broker who procured defendants' policy. In addition, defendants filed a third-party complaint against the insurance broker, alleging breach of contract, breach of fiduciary duty, negligent misrepresentation, and unfair and deceptive trade practices.

Defendants filed a motion for summary judgment on Lloyd's declaratory judgment action. Lloyd's responded by filing a summary judgment motion of its own. Following a hearing on the motions, the trial court granted summary judgment in favor of Lloyd's. The trial court's summary judgment order was specifically limited to the issue of whether defendants had presented the documents required for recovery under the policy's loss of rents provision. The trial court's order did not in any way affect defendants' counterclaims or third-party complaint.[1] The trial court's order was properly certified for immediate appellate review pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, thereby making our review of this interlocutory order appropriate.

By their sole assignment of error, the Hogans contend that in awarding summary judgment for Lloyd's, the trial court erroneously construed the provisions of the policy. The Hogans argue that the policy's loss of rents provision is ambiguous as to whether an actual rental contract with a third-party tenant who intends to personally

1. Therefore, defendants' counterclaims and third party claims are not before us on this appeal.

occupy the condominium is a requirement for coverage under the provision. The Hogans contend that this ambiguity should be resolved in favor of coverage and that the provision should be interpreted in a manner that allows defendants' property management agreement with MHI to suffice as proof of loss of rents under the provision. We disagree.

"A party seeking a declaratory judgment may properly be granted summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Nationwide Mut. Fire Ins. Co. v. Grady*, 130 N.C. App. 292, 294, 502 S.E.2d 648, 650 (1998) (quoting N.C. R. Civ. P. 56(c). "The party moving for summary judgment bears the burden of establishing the lack of any triable issue, and may meet this burden by (1) proving that an essential element of the opposing party's claim is nonexistent; (2) showing through discovery that the opposing party cannot produce evidence to support an essential element; or (3) showing that the opposing party cannot surmount an affirmative defense." *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 94-95, *disc. review denied*, 352 N.C. 590, 544 S.E.2d 783 (2000). The construction and application of insurance policy provisions to undisputed facts is a question of law, properly committed to the province of the trial judge for a summary judgment determination. *Nationwide*, 130 N.C. App. at 294, 502 S.E.2d at 650; *Walsh v. National Indemnity Co.*, 80 N.C. App. 643, 647, 343 S.E.2d 430, 432 (1986). Therefore, in the instant case, if the policy's loss of rents provision requires defendants to submit a written rental contract with a third-party tenant who personally intends to occupy defendants' condominium, summary judgment in favor of Lloyd's was proper.

We begin by noting several well-settled principles governing the construction of insurance policies. "[A]n insurance policy is a contract and its provisions govern the rights and duties of the parties thereto," *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986), and "[a]s with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued." *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). "The parties' intent may be derived from the language employed in the policy." *Rouse v. Williams Realty Bldg. Co.*, 143 N.C. App. 67, 69, 544 S.E.2d 609, 612 (2001). In determining the meaning of

the language used in an insurance policy, the following general rules of construction apply:

> Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Woods, 295 N.C. at 505-06, 246 S.E.2d at 777; *see also Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000). We apply these principles to the insurance policy in the instant case.

The Lloyd's policy issued to defendants contains the following relevant coverage provision:

> **COVERAGE B—LOSS OF USE**
>
> . . . .
>
> 2. LOSS OF RENTS. If a loss caused by a PERIL INSURED AGAINST makes that part of the insured premises rented to others (under a "rental contract") NOT FIT TO LIVE IN, we cover your actual loss of rents, less any expenses that do NOT continue while that part of the insured premises is not fit to live in. Loss payment will be limited to the lesser of:
>
> A. the SHORTEST TIME required to repair or replace the part of the premises rented or held for rental;
>
> B. NET RENTAL PROCEEDS that would be payable to you had the premises been occupied in accordance with "rental contract."
>
> The "rental contract" for the insured premises must be:
>
> A. WRITTEN;

B. made with a BONA FIDE THIRD PARTY TENANT (Tenant must intend to personally occupy insured premises);

C. for a SPECIFIC TERM (Specific term does not include any renewal term contained in any "rental contract" unless tenant has given actual written notice of intent to exercise its rights under the renewal term prior to occurrence of loss.).

We DO NOT cover any loss or expense due to cancellation of a "rental contract".

. . . .

Defendants contend that the language used in the loss of rents provision is ambiguous and should be construed in their favor. While they concede that the provision purports to require that the condominium actually be rented under a written rental contract with a third-party tenant who intends to personally occupy it for a specific term, defendants argue that the language in the loss payment clause clearly contemplates that defendants are entitled to payment when the property is "held for rental," even in the absence of an actual written rental contract. Defining "held for rental" to mean maintaining possession of something which is available for use in return for payment, defendants contend that the property management agreement with MHI indicates the condominium was available for use in return for payment, and is therefore sufficient documentation of loss of rents under the provision.

Lloyd's contends that the loss of rents provision is not ambiguous because the coverage section clearly requires that the condominium be rented to others under a "rental contract," which is expressly defined as a written contract with a third-party tenant who intends to occupy the condominium for a specific term. According to Lloyd's, absent a "rental contract" as defined in the provision, defendants are not entitled to coverage, and any alleged ambiguity created by the provision limiting the amount of loss payment is irrelevant because defendants have not met the coverage requirements.

Having considered the arguments of both sides, the trial court concluded that any ambiguity in the phrase "held for rental" did not affect the meaning of "rental contract," which was clearly defined and set forth four times in the provision. Finding that the documents defendants had presented Lloyd's did not constitute a contract with a third-party tenant who intended to personally occupy the condominium, the trial court granted summary judgment for Lloyds. We

agree with the trial court's decision, but differ slightly with the trial court's reasoning in reaching our decision.

The coverage clause of the loss of rents provision at issue clearly and unambiguously rests coverage on whether the condominium is "rented to others (under a 'rental contract')," and expressly defines "rental contract" as a written contract with a tenant who personally intends to occupy the condominium. The alleged ambiguity arises by operation of the loss payment clause which limits payment to "the SHORTEST TIME required to repair or replace the part of the condominium rented or 'held for rental.' " However, following well-settled principles of construction of insurance policies, and in light of the express definition of "rental contract," the phrase "held for rental" in the loss payment clause is to be interpreted in context and construed in a manner that gives proper meaning and effect to the provision as a whole. The phrase "held for rental" cannot be given a meaning that conflicts with the express definition of "rental contract." Therefore, we conclude that the provision requires the condominium be rented, or "held for rental," pursuant to a written rental contract with a tenant who actually occupies or intends to personally occupy the condominium. The phrase "held for rental" merely indicates that the condominium need not actually be occupied by a tenant at the time it is rendered unfit to live in, but that coverage will be provided if the damage to the condominium prevents future tenants under a "rental contract" from occupying the condominium. Any other interpretation of the phrase "held for rental" would contradict the express definition of "rental contract" contained in the policy. We refuse to interpret the policy in that manner.

In sum, we conclude that the loss of rents provision is not ambiguous and the trial court did not err in awarding summary judgment for Lloyd's. The trial court is affirmed.

Affirmed.

Judges GREENE and THOMAS concur.

CORBIN RUSSWIN, INC., PLAINTIFF v. ALEXANDER'S HARDWARE, INC., DEFENDANT

No. COA00-1097

(Filed 18 December 2001)

1. **Jurisdiction— long-arm statute—promissory note for valuable consideration**

   A promissory note for valuable consideration was sufficient to bring a Connecticut corporation under the North Carolina long-arm statute. N.C.G.S. § 1-75.4(5)c.

2. **Jurisdiction— minimum contacts—four payments on note mailed to North Carolina**

   The minimum contacts requirement for personal jurisdiction in North Carolina was not satisfied where defendant's only contact with North Carolina was the mailing of approximately four payments on a promissory note from Connecticut to North Carolina.

3. **Jurisdiction— choice of law clause—distinguished from forum selection and consent to jurisdiction clauses**

   A clause in a promissory note that it would be "governed and construed in accordance with the laws of North Carolina" was a choice of law clause rather than a forum selection clause or a consent to jurisdiction. A choice of law clause is a factor in determining minimum contacts and due process, but is not determinative.

Appeal by defendant from judgment entered 11 July 2000 and filed 12 July 2000 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 August 2001.

Moore & Van Allen, P.L.L.C., by Andrew S. O'Hara and Carlos L. Pauling, for Plaintiff-Appellee.

Johnston, Allison & Hord, P.A., by Gary J. Welch and Kenneth Lautenschlager, for Defendant-Appellant.

BRYANT, Judge.

Defendant-appellant Alexander's Hardware, Inc., is a Connecticut corporation with its principal place of business in Connecticut. Plaintiff-appellee Corbin Russwin, Inc., is a Delaware corporation with its principal place of business in North Carolina. In its com-

plaint, Corbin alleges that between 1993 and 1997, Alexander's ordered and received locks, keys, and other hardware from Corbin. No products were shipped to or from North Carolina. Alexander's accepted the goods, but failed to pay the entire balance.[1] In 1996, Alexander's executed a promissory note [Note] in favor of Corbin in the original principal amount. The Note contained the provision, "This Note is to be governed and construed in accordance with the laws of the State of North Carolina . . . ." Alexander's mailed approximately four payments to Corbin in North Carolina, then defaulted on the Note.

Corbin brought this action on 28 January 2000 in Superior Court in Mecklenburg County to recover for breach of contract, default and unjust enrichment. Alexander's filed a Motion to Dismiss on 3 April 2000, alleging that North Carolina courts do not have in personam jurisdiction over it.[2] On 7 July 2000, Corbin filed its Memorandum of Law in Opposition to Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. The trial court, without stating findings of fact, denied the defendant's motion to dismiss for lack of in personam jurisdiction.

The sole issue before us is whether the trial court erred in denying the defendant's motion to dismiss for lack of in personam jurisdiction. We hold that the trial court erred in denying the defendant's motion. Accordingly, we reverse.

North Carolina General Statute section 1-277(b) provides that the right of immediate appeal lies from an order denying a motion to dismiss for lack of in personam jurisdiction. N.C. Gen. Stat. § 1-277(b) (1999); *Duke Univ. v. Bryant-Durham Elec. Co., Inc.*, 66 N.C. App. 726, 311 S.E.2d 638 (1984). The plaintiff has the burden of establishing by a preponderance of the evidence that the trial court has jurisdiction over the defendant. *Church v. Carter*, 94 N.C. App. 286, 289, 380 S.E.2d 167, 169 (1989). The judge is not required to make findings of fact to support a ruling on a motion to dismiss, unless requested by the parties. *Id.* When the trial court does not make findings of fact, this Court, on appeal, presumes that there were sufficient facts to support the judgment. *Id.* This Court then determines whether there is competent evidence to support the presumed findings of fact. *Id.* at 289-90, 380 S.E.2d at 169.

1. This fact is in dispute.

2. Alexander's filed a complaint on 10 May 2000 in Connecticut Superior Court, alleging violations of the Connecticut Franchise Act and Unfair Trade Practices Act, breach of contract and unjust enrichment.

A two-step analysis applies when determining whether a court may exercise in personam jurisdiction over a non-resident defendant. First, is there statutory authority that confers jurisdiction on the court? *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977). This is determined by looking at North Carolina's "long arm" statute. *Id.* (referring to N.C. Gen. Stat. § 1-75.4 (1999)). Second, if statutory authority confers in personam jurisdiction over the defendant, does the exercise of in personam jurisdiction violate the defendant's due process rights? *Id.*

[1] We first address the issue of statutory authority. North Carolina General Statute section 1-75.4(5)c provides in pertinent part that a North Carolina court has in personam jurisdiction over a defendant in an action that "[a]rises out of a promise, made anywhere to the plaintiff . . . 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 . . . ." N.C. Gen. Stat. § 1-75.4(5)c (1999). North Carolina courts have construed "other things of value" to include money. *Pope v. Pope*, 38 N.C. App. 328, 330, 248 S.E.2d 260, 261 (1978). In this case, Alexander's signed a promissory note for valuable consideration. A promissory note for valuable consideration is sufficient to bring the defendant under the jurisdiction of the court pursuant to North Carolina's long arm statute.

[2] We next address the issue of due process. The exercise of in personam jurisdiction must comport with due process. To comport with due process, the defendant must have minimum contacts in the forum state. *Godwin v. Walls*, 118 N.C. App. 341, 353, 455 S.E.2d 473, 482 (1995), *rev. allowed*, 341 N.C. 419, 461 S.E.2d 757 (1996). Minimum contacts must be such that the exercise of in personam jurisdiction "does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 343, 85 L. Ed. 278, 283 (1940)). The defendant must have invoked the benefits and protections of the laws of the forum state by purposely availing himself of the privilege of doing business in that state. *Godwin*, 118 N.C. at 353, 455 S.E.2d at 482. "This relationship between the defendant and the forum must be 'such that he should reasonably anticipate being haled into court there.' " *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)).

In determining minimum contacts, the court looks at several factors, including: 1) the quantity of the contacts; 2) the nature and quality of the contacts; 3) the source and connection of the cause of action with those contacts; 4) the interest of the forum state; and 5) the convenience to the parties. *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 530-31, 265 S.E.2d 476, 479 (1980). These factors are not to be applied mechanically; rather, the court must weigh the factors and determine what is fair and reasonable to both parties. *Id.* at 531, 265 S.E.2d at 479 (citing *Farmer v. Ferris*, 260 N.C. 619, 625, 133 S.E.2d 492, 497 (1963)). No single factor controls; rather, all factors "must be weighed in light of fundamental fairness and the circumstances of the case." *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986).

In the case before us, Alexander's sole retail store was in Ansonia, Connecticut. Alexander's never solicited business in North Carolina. It never advertised in North Carolina. It never shipped products to North Carolina, nor did it purchase materials or products from North Carolina. Finally, Alexander's never conducted any business in North Carolina. The parties executed the Note in Connecticut. Alexander's sole contact with this State was the mailing to North Carolina of approximately four payments on the Note.

Corbin argues that a single contract is sufficient to establish in personam jurisdiction. We disagree. While it is true that a single contract may sometimes be sufficient to establish in personam jurisdiction, *Tom Togs, Inc.*, 318 N.C. at 367, 348 S.E.2d at 786, this is not always the case. As our Supreme Court stated in *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979), "[T]he circumstances surrounding the signing of such obligation must be closely examined in each case to determine whether the quality and nature of defendant's contacts with North Carolina justify the assertion of personal jurisdiction over him in an action on the obligation." *Id.* at 518, 251 S.E.2d at 616.

[3] Corbin also argues that the Note expressly provided that it would be "governed and construed in accordance with the laws of the State of North Carolina" and thus, Alexander's purposely availed itself of the laws of this State. We disagree. The provision in the Note is a choice of law clause, which our Supreme Court explains "names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named

state and the state in which the case is litigated." *Johnston County v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 92, 414 S.E.2d 30, 33 (1992). There are three types of provisions frequently used by contracting parties to avoid potential litigation concerning jurisdiction and governing law: 1) forum selection; 2) consent to jurisdiction; and 3) choice of law. *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 92, 414 S.E.2d 30, 33 (1992). One commentator who recognized the difficulty in distinguishing between the clauses offered this guidance:

> [1] A typical forum-selection clause might read: '[B]oth parties agree that only the New York Courts shall have jurisdiction over this contract and any controversies arising out of this contract.' . . .
>
> [2] A . . . 'consent to jurisdiction' clause[ ] merely specifies a court empowered to hear the litigation, in effect waiving any objection to personal jurisdiction or venue. Such a clause might provide: '[T]he parties submit to the jurisdiction of the courts of New York.' Such a clause is 'permissive' since it allows the parties to air any dispute in that court, without requiring them to do so.
>
> [3] . . . A typical choice-of-law provision provides: 'This agreement shall be governed by, and construed in accordance with, the law of the State of New York.'

Johnston County v. R.N. Rouse & Co., 331 N.C. 88, 93, 414 S.E.2d 30, 33 (1992) (non-numbered alterations in original) (quoting Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases,* 66 N.Y.U. L. Rev. 422, 423 n.10 (1991)).

Black's Law Dictionary also provides guidance. A forum selection clause is "[a] contractual provision in which the parties establish the place (such as the country, state, or type of court) for specified litigation between them." Black's Law Dictionary 665 (7th ed. 1999). Choice of jurisdiction (a.k.a., consent to jurisdiction), on the other hand, is "[t]he choice of the state (or country) that should exercise jurisdiction over a case." *Id.* at 234. A choice-of-law clause is "[a] contractual provision by which the parties designate the jurisdiction whose law will govern any disputes that may arise between the parties." *Id.* To summarize, a forum selection clause designates the venue, a consent to jurisdiction clause waives personal jurisdiction

and venue, and a choice-of-law clause designates the law to be applied.

In the case at bar, the provision in the Note stated, "This Note is to be governed and construed in accordance with the laws of the State of North Carolina . . . ." This provision is very similar to the choice-of-law example stated in *R.N. Rouse*. Corbin argues that the choice-of-law clause is a pivotal factor in determining whether the trial court had in personam jurisdiction. In support of this argument, Corbin cites a section of *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 241, 506 S.E.2d 754, 761-62 (1998), which states that "[a] factor in determining fairness concerning a breach of contract . . . is whether the contract expressly provides that the law of the forum state would apply to actions arising out of the contract." (alterations in original) (citing *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 635, 394 S.E.2d 651, 657 (1990)).

Corbin's reliance on *Inspirational Network* is misguided. In that case, Inspirational Network, Inc. [INSP], a cable network, provided advertising and television programs. Merchant Square Network, Inc. [MSN] entered into a contract with INSP to air "infomercials." When MSN defaulted on payments to INSP in North Carolina, it executed a promissory note providing that, inter alia, the note was "to be governed and construed in accordance with the laws of the State of North Carolina." *Inspirational Network*, 131 N.C. App. at 233, 506 S.E.2d at 757. After making several payments on the note, MSN defaulted. INSP sued MSN's president and chief executive officer, as well as its chief financial officer [the defendants]. The defendants moved to dismiss for lack of in personam jurisdiction. The trial court denied the motion, and the defendants appealed. In affirming the trial court's decision, this Court found jurisdiction under this State's long arm statute and minimum contacts to satisfy due process requirements. The minimum contacts requirement was satisfied because the CFO made numerous phone calls to North Carolina, MSN's programs were aired in North Carolina and MSN voluntarily entered into a contractual arrangement with INSP, a North Carolina corporation.

The *Inspirational Network* Court noted that the provision that the promissory note would be "governed and construed in accordance with the laws of the State of North Carolina" was a factor in determining the fairness of the breach of contract. *Id.* at 241-42, 506 S.E.2d at 761-62. Thus, reading *Inspirational Network* and *R.N. Rouse* together, it becomes clear that: 1) the clause in the contract in

Inspirational Network was a choice-of-law clause; and 2) a choice-of-law clause is a *factor* in determining the issue of minimum contacts and due process, but not determinative of the issue of in personam jurisdiction.

Like the promissory note in *Inspirational Network*, the Note in the case sub judice contains a choice-of-law provision but no choice of, or consent to jurisdiction provision. However, unlike *Inspirational Network*, the only contact Alexander's had with North Carolina was the mailing to this State of approximately four payments on the Note. Therefore, we must rely solely on these payments to determine whether due process requirements have been met. We find that they have not. Other than the payments, we find nothing else to indicate that Alexander's purposely availed itself of the benefits and protections of the laws of North Carolina. This contact is too tenuous to avoid offending "traditional notions of fair play and substantial justice." Accordingly, we reverse.

Reversed.

Judges GREENE and CAMPBELL concur.

STATE OF NORTH CAROLINA v. EDUARDO HERNANDEZ LORENZO

No. COA00-1349

(Filed 18 December 2001)

1. Criminal Law— judge questioning witness during trial— clarification

The trial court did not err in a trafficking in marijuana case by interrupting the direct examination of a prosecution witness to ask the witness a few questions as the witness was testifying that he could identify defendant's voice, because: (1) the trial court's questioning was simply an effort to clarify the witness's testimony; and (2) the clarification was helpful since it could have been unclear to the jury exactly what the witness meant, and the questions helped clarify that the detective was speaking of a person and not the subject matter of a telephone call.

2. Drugs— trafficking in marijuana by transportation—trafficking in marijuana by delivery—constructive delivery—acting in concert

The trial court did not err by permitting the jury to consider charges against defendant for trafficking in marijuana by transportation and trafficking in marijuana by delivery even though defendant contends he never actually possessed or delivered the pertinent marijuana, because: (1) the doctrine of constructive delivery is recognized under our state laws; and (2) defendant was guilty of acting in concert when he was present at the scene of the crime and acted with another who transported the marijuana.

3. Evidence— trafficking in marijuana—laboratory report—chain of custody

The trial court did not err in a trafficking in marijuana case by finding the chain of custody for a laboratory report was properly established even though the statement of the chain of custody did not comply with N.C.G.S. § 90-95(g1)(1) based on an inaccuracy concerning the last person to handle the evidence, because: (1) a statement pursuant to N.C.G.S. § 90-95(g1)(1) is not the exclusive method for authenticating a laboratory report; (2) the chain of custody may also be established by the testimony of the individuals in the chain of custody; and (3) a detective's testimony establishing that he was the last person to handle the evidence, in addition to the statement admitted by the State, was sufficient to establish the chain of custody.

4. Drugs— conspiracy to traffic in marijuana—failure to name person to whom defendant conspired to sell or deliver

The indictment used to charge defendant with conspiracy to traffic in marijuana was not defective even though it failed to name the person to whom defendant conspired to sell or deliver, because: (1) an indictment for conspiracy to sell or deliver a controlled substance does not need to name the person to whom defendant conspired to sell or deliver; (2) the indictment for conspiracy, considered along with the accompanying indictment charging defendant with the offense of delivery of marijuana and the magistrate's order both identifying the person to whom defendant delivered marijuana, gave defendant sufficient notice of the charge against him; and (3) even if the indictment had been

defective in charging defendant with conspiracy to traffic in marijuana by delivery, the indictment would have still been sufficient to support a conviction of a single act of conspiracy to traffic in marijuana by possession and transportation.

5. Criminal Law— trafficking in marijuana—errors in forms to record judgment and commitment

Although there was no error in the determination that defendant was guilty of trafficking in marijuana by possession, trafficking in marijuana by delivery, trafficking in marijuana by transportation, and conspiracy to traffic in marijuana, the case is remanded to correct the errors in the forms used to record the judgment and commitment.

Appeal by defendant from judgments entered 5 June 2000 by Judge A. Moses Massey in Rockingham County Superior Court. Heard in the Court of Appeals 16 October 2001.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Douglas R. Hux for defendant-appellant.

HUNTER, Judge.

Eduardo Hernandez Lorenzo ("defendant") was convicted in the Superior Court of Rockingham County for trafficking in marijuana by possession, trafficking in marijuana by delivery, trafficking in marijuana by transportation, and conspiracy to traffic in marijuana by possession, transportation, and delivery. Defendant appeals. We find no error, but we remand for correction of judgment and commitment forms.

On 14 September 1999, police executed a search warrant at the home of Chad Smith, where they found and seized approximately two pounds of marijuana and $11,000.00 in cash. Smith told police his supplier was a hispanic male named Edward, and he agreed to help the police arrest Edward. Over the course of the day, Smith arranged to buy fifteen pounds of marijuana from his supplier. The transaction was to take place at 9:00 p.m. outside a Mexican restaurant. Smith informed police that defendant usually arrived in a white vehicle to "check out" the scene, but that he used another hispanic male to make the actual delivery. The police officers positioned at the restaurant saw a white car, matching the description Smith had given, circle

around the parking lot. A few minutes later, a red car pulled into the parking lot. The driver of the red car, Alejandro Cruz Gonzalez, got out, removed a garbage bag, and placed it in Smith's car. Gonzalez and defendant were subsequently arrested. Tests conducted by the State Bureau of Investigation ("SBI") revealed that the garbage bag contained 18.4 pounds of marijuana.

A grand jury indicted defendant for trafficking in marijuana by possession, trafficking in marijuana by delivery, trafficking in marijuana by transportation, and conspiracy to traffic in marijuana by possession, transportation, and delivery. On 2 June 2000, a jury found defendant guilty on all charges. During sentencing, the judgments for trafficking in marijuana by possession and trafficking in marijuana by delivery were consolidated. For this consolidated offense, defendant was sentenced to a prison term of twenty-five to thirty months and a fine of $5,000.00. The trial court also consolidated the offenses of trafficking in marijuana by transportation and conspiracy to traffic in marijuana by possession, delivery, and transportation. For this consolidated offense, defendant also received a prison term of twenty-five to thirty months and a fine of $5,000.00. Defendant appeals.

[1] By his first argument, defendant contends that the trial court committed reversible error by questioning a trial witness and therefore depriving defendant of a fair and impartial tribunal. The trial court interrupted the direct examination of prosecution witness Detective Billy Parker, as Parker was testifying that he could identify defendant's voice, to ask the witness a few questions. The following exchange occurred:

Q: Did you recognize the voice on that occasion?

A: It was the same subject as earlier.

Q: And what did you do after that call?

THE COURT: Excuse me. Do you have an opinion as to who it was? The same voice? Was it the person you had talked to earlier, approximately a month before?

THE WITNESS: Yes, sir.

THE COURT: What is your opinion when the second phone call was made? Was it the same person you talked to about a month before?

THE WITNESS: I feel it was the same subject.

Q: And that person you spoke to a month before, was that person Mr. Lorenzo?

A: Yes.

A judge may speak to witnesses during the trial but "[t]he 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). This statute does not preclude a judge from questioning a witness to clarify his or her testimony, *State v. Whittington*, 318 N.C. 114, 125, 347 S.E.2d 403, 409 (1986), as long as the questioning is "conducted in such a manner as to avoid prejudice to either party," *id.* We have reviewed the questioning during Detective Parker's testimony and we believe the questioning was not prejudicial to defendant. Rather, the trial court's questioning was simply an effort to clarify the detective's testimony. Such clarification was helpful because it could have been unclear to the jury exactly what Detective Parker meant when he spoke of "the same subject." The trial court's questions helped to clarify that the detective was speaking of a person and not the subject matter of the telephone call. Therefore, we conclude that this line of questioning was not prejudicial to defendant.

[2] Defendant's second argument is that the trial court committed reversible error by charging defendant with trafficking in marijuana by transportation and trafficking in marijuana by delivery because defendant himself never actually possessed or delivered the marijuana in question and because North Carolina does not recognize the doctrines of constructive delivery or constructive transportation. We disagree. The doctrine of constructive delivery is recognized under our state laws. For example, the offense of delivery of a controlled substance is defined as "the actual constructive, or attempted transfer from one person to another." N.C. Gen. Stat. § 90-87(7) (1999). Our courts have also recognized the concept of constructive delivery. *See State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985); *State v. Thrift*, 78 N.C. App. 199, 201, 336 S.E.2d 861, 862 (1985), *disc. review denied*, 316 N.C. 557, 344 S.E.2d 15 (1986). Thus, defendant's argument that there is no doctrine of constructive delivery under North Carolina law is incorrect.

While we have found no case in North Carolina that recognizes the doctrine of constructive transportation, we nonetheless conclude there was no error in the jury instruction given by the trial court. The

trial court did not instruct the jury on constructive transportation, but instructed the jury on acting in concert. It is well-settled in North Carolina that a person may be guilty of a crime by "acting in concert" if he is found at the scene of a crime, acting with another person who plans to commit a crime. *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993). A person is considered acting in concert even if the other person "does all the acts necessary to commit the crime." *Id.* Here, we believe defendant was guilty of acting in concert. Defendant had previously spoken with Smith to arrange where the transaction would take place. He was at the scene of the crime when the marijuana was delivered to Smith. Defendant was therefore present at the scene of the crime, acting with another who transported the marijuana. Thus, the jury instruction on the charge of trafficking in marijuana by transportation was proper based on the doctrine of acting in concert.

[3] Defendant's third argument relates to the evidence presented by the State regarding the chain of custody of the laboratory report. Defendant argues that the chain of custody was not properly established. Under North Carolina law, a chain of custody does not have to be established by calling witnesses if there is "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." N.C. Gen. Stat. § 90-95(g1)(1) (1999). Defendant claims that the State's statement was inaccurate because it provided that Alice Green-Guy was the last person in the chain of custody, whereas the evidence at trial showed that Detective Parker was the last person to handle the evidence.

Although defendant is correct that the statement of the chain of custody did not comply with the statute, we find that the evidence presented by the State was sufficient to establish the chain of custody. A statement pursuant to N.C. Gen. Stat. § 90-95(g1) is not the exclusive method for authenticating a laboratory report. *State v. Greenlee*, 146 N.C. App. 729, 731, 553 S.E.2d 916, 918 (2001). The chain of custody may also be established by the testimony of the individuals in the chain of custody. Here, once the error in the statement was discovered, the trial court recalled Detective Parker who testified that he had retrieved the lab report from Green-Guy and that it had remained under his control until he testified. This testimony, in addition to the statement submitted by the State, was sufficient to establish the chain of custody.

[4] Defendant's fourth argument is that the indictment charging defendant with conspiracy to traffic in marijuana was defective. The indictment alleges that defendant "did conspire with Alejandro Cruz Gonzalez to commit the felony of trafficking to possess, transport and deliver more than ten but less than fifty pounds of marijuana." Defendant argues that conspiracy to traffic in marijuana by delivery requires the involvement of at least three people, since delivery alone requires at least two people, and that the indictment was defective for failing to name the person to whom defendant allegedly conspired to deliver the marijuana.

"The purpose of an indictment is to give defendant sufficient notice of the charge against him, to enable him to prepare his defense, and to raise the bar of double jeopardy in the event he is again brought to trial for the same offenses," and "[a]n indictment not meeting these standards will not support a conviction." *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E.2d 532, 534 (1974). Furthermore, " '[w]here a sale is prohibited, it is necessary, for a conviction, to allege in the bill of indictment the name of the person to whom the sale was made or that his name is unknown . . . .' " *State v. Bennett*, 280 N.C. 167, 168, 185 S.E.2d 147, 148 (1971) (quoting *State v. Bissette*, 250 N.C. 514, 517, 108 S.E.2d 858, 861 (1959)). However, this Court has previously held that an indictment for *conspiracy* to sell or deliver a controlled substance need not name the person to whom the defendant conspired to sell or deliver. *State v. McLamb*, 71 N.C. App. 220, 222, 321 S.E.2d 465, 466 (1984) ("[w]e reject defendant's argument and refuse to extend the *Bennett* rule as to . . . indictments for conspiracy to sell and deliver controlled substances"), *reversed on other grounds*, 313 N.C. 572, 330 S.E.2d 476 (1985). Therefore, the indictment was sufficient despite the fact that it does not identify the person to whom defendant conspired to sell or deliver marijuana. Further, in this case, the accompanying indictment charging defendant with the offense of delivery of marijuana (on the same date as the alleged conspiracy) identifies Eugene Riddick as the person to whom defendant delivered marijuana, and the "Magistrate's Order" for the conspiracy charge identifies Eugene Riddick as the person to whom defendant conspired to deliver marijuana. We hold that the indictment for conspiracy, especially when considered along with the other documents in the record, was sufficient to give defendant notice of the charge against him, to enable him to prepare his defense, and to raise the bar of double jeopardy in the event he is again brought to trial for the same offense.

We also note that even if the indictment had been defective in charging defendant with conspiracy to traffic in marijuana by delivery, the indictment would still have been sufficient to support defendant's conviction for conspiracy to traffic in marijuana. Defendant was convicted of a single act of conspiring with Gonzalez to traffic in marijuana by any one or more of the following: possession, transportation, or delivery. *See, e.g., State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 ("[i]t is well established that the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime"), *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). The jury returned a verdict finding defendant guilty of "Conspiracy to Traffic In Marijuana by Possession, Delivery, and Transportation." Thus, even if the indictment were insufficient to support a conviction of conspiracy to traffic in marijuana by delivery, it would still be sufficient to support a conviction of a single act of conspiracy to traffic in marijuana by possession and transportation.

[5] Finally, defendant asserts that there are errors in the forms used to record the judgment and commitment. The State concedes that errors exist in these forms. The errors that exist on the two judgment and commitment forms are as follows: (1) defendant's pleas are recorded as "guilty" when they should be recorded as "not guilty"; (2) the felony trafficking offenses are listed as misdemeanors, when they should be listed as felonies; and (3) the forms refer to N.C. Gen. Stat. § 14-322 (1999) when referring to the trafficking offenses, but the forms should refer to N.C. Gen. Stat. § 90-95(h). Although the sentencing was proper, it was improperly recorded. Thus, we remand to the trial court to correct both judgment and commitment forms in the manner stated above.

We believe there was no error in the determination that defendant was guilty of trafficking in marijuana by possession, trafficking in marijuana by delivery, trafficking in marijuana by transportation, and conspiracy to traffic in marijuana. The case is remanded, however, to correct the errors in the forms used to record the judgment and commitment.

No error. Remanded.

Judges GREENE and THOMAS concur.

GARY F. SINGLETON, PLAINTIFF v. SUNSET BEACH & TWIN LAKES, INC., EDWARD M. GORE, DINAH E. GORE, AND TOWN OF SUNSET BEACH, DEFENDANTS

No. COA00-1135

(Filed 18 December 2001)

1. Highways and Streets— entitlement to strip of land—public dedication—summary judgment

The trial court erred in a declaratory judgment action by granting summary judgment in favor of defendants on the issue of whether plaintiff is legally entitled to the use of a certain strip of land based on the determination of the proper width of the pertinent street, because: (1) the record discloses the existence of genuine issues of material fact regarding whether defendant town has taken action that constitutes an acceptance of defendant individuals' offer of public dedication of the pertinent strip of land on the 1965 map; (2) plaintiff's deed has not been included in the record, making it impossible to determine whether plaintiff purchased his lot pursuant to a deed that referenced a particular map or plat, and if so, which map or plat; (3) there is an absence of information in the record regarding the location of the street as depicted on the 1965 map as compared to the location of the street as it currently exists; and (4) the record is unclear as to whether some or all of the street has ever been submerged by water.

2. Declaratory Judgments— proper party—controversy between every party not required

The trial court erred in a declaratory judgment action by granting a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) in favor of defendant town on the issue of whether plaintiff is legally entitled to the use of a certain strip of land based on the determination of the proper width of the pertinent street, because: (1) it is not necessary under the Declaratory Judgment Act that there be a controversy between every party in the action, and plaintiff has set forth a real and justiciable controversy between himself and defendant individuals; and (2) any declaration as to whether defendant town accepted defendant individuals' offer of dedication of the pertinent street as depicted in the 1965 map will affect defendant town's interest, making the town a proper party to the declaratory judgment action.

Appeal by plaintiff from orders entered 8 May 2000 and 16 May 2000 by Judge D. Jack Hooks, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 22 August 2001.

Rudolf, Maher, Widenhouse & Fialko, by M. Gordon Widenhouse, Jr.; and Laura S. Jenkins, for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr. and Robert R. Marcus; Baxley & Trest, by Roy D. Trest, for defendant-appellees Sunset Beach & Twin Lakes, Inc., Edward M. Gore and Dinah E. Gore.

Fairley, Jess, Isenberg & Green, by Michael R. Isenberg and Laura E. Thompson, for defendant-appellee Town of Sunset Beach.

HUNTER, Judge.

North Shore Drive is a street located on the island of Sunset Beach in Brunswick County, North Carolina. On 14 February 2000, Gary F. Singleton ("plaintiff"), owner of a lot abutting on North Shore Drive, filed a complaint seeking a declaratory judgment as to the proper width of the street. On 8 May 2000, the trial court entered an order granting a motion to dismiss in favor of defendant Town of Sunset Beach ("the Town") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1999). On 16 May 2000, the trial court entered a second order denying plaintiff's motion for summary judgment and granting summary judgment in favor of defendants Sunset Beach & Twin Lakes, Inc., Edward M. Gore (president of the corporation), and Mr. Gore's wife Dinah E. Gore (collectively "the Gores"). Plaintiff appeals from these orders. We affirm in part, reverse in part and remand.

The parties on appeal have generally construed this case as a dispute over the proper width of North Shore Drive. However, this case is actually a dispute over whether plaintiff is legally entitled to the use of a certain strip of land designated as North Shore Drive on a map of the eastern end of Sunset Beach filed in 1965. True, the map filed in 1965 depicts North Shore Drive as a street with a width of sixty feet; and, apparently, North Shore Drive as it is currently constructed (or at least as it has been depicted in subsequent maps) is only thirty feet in width. However, in fact, there is no single "North Shore Drive," the width of which is to be declared by the court. Rather, there are at least two mapped versions of North Shore Drive (if not more), and the question is whether plaintiff is entitled by law

to the use of the sixty-foot strip of land, or a portion thereof, designated as North Shore Drive on the 1965 map.

The record tends to establish the following pertinent facts. In the 1950's, the Gores began to develop the island of Sunset Beach. On 21 July 1965, a map ("the 1965 map") was recorded at Book 8, Page 7, in the Brunswick County Registry, showing a survey of the eastern end of the island. The 1965 map depicts North Shore Drive as running generally east-west, with a width of sixty feet.

On 6 August 1965, the Gores conveyed to James Bowen ("Bowen") a large parcel of land adjacent to North Shore Drive ("the Bowen property"). This conveyance was made pursuant to a deed dated 22 July 1965 ("the Bowen deed") which was recorded at Book 184, Page 452, and which expressly references the 1965 map.

According to an affidavit from Mr. Gore, submitted in support of the Gores' motion for summary judgment, the 1965 map shows only the "proposed development" of the island. At that time, according to Mr. Gore, "the area known as North Shore Drive had not [yet] been established and opened on the ground." Subsequently, according to Mr. Gore's affidavit, a body of water known as Tubbs Inlet gradually migrated westward over a number of years until, by 1969, it covered a portion of the eastern end of the island. In May of 1969, the Gores allegedly began to reclaim, by dredge and fill, portions of the island that had been submerged by water. According to Mr. Gore's affidavit, this "reclamation project" was completed in February of 1970, and the reclaimed portion of the island was then re-subdivided and re-platted.

On 12 June 1975, the Town Council adopted a resolution expressing its intent to permanently close and relocate the portion of North Shore Drive (as depicted on the 1965 map) between Cobia Street and Sixteenth Street. This portion does not include the portion of North Shore Drive between Sixteenth Street and the water on which plaintiff's lot currently abuts. The stated purpose for relocating this portion of North Shore Drive was to allow for the "proper use of the abutting property and for the safe location of the street with reference to the waterline just North of this portion of the street." This resolution was unanimously adopted by the town at a public hearing on 11 July 1975, held pursuant to N.C. Gen. Stat. § 160A-299 (1999). The relocation was apparently not undertaken until sometime later.

On 13 September 1976, a map ("the 1976 Bowen Map") was recorded at Book H, Page 356, which illustrates the division of the

Bowen Property into lots, and which (like the 1965 map) shows North Shore Drive to be sixty feet in width. Later on the same day, another map ("the 1976 Gore Map") was recorded at Book H, Page 358, which illustrates the division of a large tract of property owned by the Gores into lots, and which (contrary to the 1965 map) depicts the entire length of North Shore Drive to be thirty feet in width. On 7 December 1977, a map ("the 1977 Bowen Map") was recorded at Book I, Page 379, which shows the addition of cul-de-sacs to the ends of Sixteenth, Seventeenth, Eighteenth, and Nineteenth Streets, and which, again, depicts North Shore Drive as sixty feet in width.

Either in 1986, or at some point in time thereafter, plaintiff purchased lot twenty-five from Bowen ("plaintiff's lot"). However, the deed for this conveyance has not been included in the record. Finally, on 22 December 1999, the Gores recorded a "Withdrawal of Street from Dedication" at Book 1349, Page 1112. This document purports to withdraw the offer of dedication of North Shore Drive as depicted in the 1965 map, pursuant to N.C. Gen. Stat. § 136-96 (1999).

It is not clear from the record whether the 1976 Gore Map is consistent with the way in which the eastern end of the island is currently constructed. According to this map, North Shore Drive, running generally east-west, begins at Cobia Street at its western end, and runs east to the water at its eastern end. Sixteenth Street, which runs north-south, crosses North Shore Drive at a point approximately halfway between Cobia Street and the water. Plaintiff's lot abuts on North Shore Drive at a point between Sixteenth Street and the water. In addition, it is undisputed that Sunset Beach & Twin Lakes, Inc., Edward M. Gore and Dinah E. Gore currently own all lots abutting on the north and south sides of North Shore Drive between Cobia and Sixteenth Streets.

The parties dispute whether the portion of North Shore Drive between Sixteenth Street and the water (on which plaintiff's lot abuts) has ever been moved or relocated from where it is depicted on the 1965 map. In fact, the parties dispute whether North Shore Drive, as it appears on the 1965 map, has ever been opened or used at all. In his affidavit, Mr. Gore contends that the actual physical location on the face of the earth of North Shore Drive as it currently exists is different than the strip of land designated as North Shore Drive on the 1965 map. However, according to plaintiff's affidavit, submitted in support of his motion for summary judgment, the location of the por-

tion of North Shore Drive between Sixteenth Street and the water was not affected by the dredge and fill in 1969, and that portion has "been opened and used continuously since . . . 1974."

"Appellate review of a grant of summary judgment is limited to two questions: (1) Whether there is a genuine question of material fact; and (2) whether the moving party is entitled to judgment as a matter of law." *Gregorino v. Charlotte-Mecklenburg Hospital Authority*, 121 N.C. App. 593, 595, 468 S.E.2d 432, 433 (1996). "A motion for summary judgment should be granted if, and only if, 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . .' " *Wooten v. Town of Topsail Beach*, 127 N.C. App. 739, 740, 493 S.E.2d 285, 286-87 (1997) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990)), *disc. review denied*, 348 N.C. 78, 505 S.E.2d 888 (1998).

[1] Plaintiff has articulated two theories in support of his claim that he is entitled to the use and enjoyment of the sixty-foot-wide strip of land designated as North Shore Drive on the 1965 map. First, plaintiff contends that he is entitled to an individual easement by estoppel over this strip of land. Second, plaintiff contends that the Gores made an offer of public dedication of this strip of land, and that this offer of dedication has been accepted by the Town. Based upon the incomplete record before us, which contains numerous genuine issues of material fact, we are unable to conclude that either plaintiff or the Gores are entitled to judgment as a matter of law.

First, the record discloses the existence of genuine issues of material fact regarding whether the Town has taken action that constitutes an acceptance of the Gores' offer of public dedication of the strip of land depicted as North Shore Drive on the 1965 map. For example, the evidence as to whether the Town has used and maintained North Shore Drive as it appears on the 1965 map, as noted above, is conflicting. Whether there has been an acceptance of the offer of dedication is significant because the purported withdrawal by the Gores in 1999 of the strip of land designated as North Shore Drive on the 1965 map would be ineffective as a matter of law if, prior to that time, the Town had accepted the offer of public dedication. *See* N.C. Gen. Stat. § 136-96.

We also note that plaintiff's deed has not been included in the record. As a result, we are unable to determine whether plaintiff purchased his lot from Bowen pursuant to a deed that referenced a par-

ticular map or plat, and if so, which map or plat.[1] There is also a striking absence of information in the record regarding the location on the face of the earth of North Shore Drive as depicted in the 1965 map as compared to the location on the face of the earth of North Shore Drive as it currently exists (or as depicted in the 1976 Gore map). This is significant because it may bear upon whether North Shore Drive as depicted in the 1965 map is necessary for convenient ingress to and egress from plaintiff's lot; which, in turn, may have an impact upon the Gores' right to withdraw North Shore Drive as depicted on the 1965 map pursuant to N.C. Gen. Stat. § 136-96. Finally, the record is also unclear as to whether some or all of North Shore Drive has ever been submerged by water, and, as a result, we are unable to determine what effect, if any, this might have on the rights of the parties. *See, e.g., Ward v. Sunset Beach & Twin Lakes, Inc.*, 53 N.C. App. 59, 279 S.E.2d 889 (1981).

[2] However, we are able to address plaintiff's argument that the trial court erred in granting the Town's motion to dismiss. The Town moved to dismiss pursuant to Rule 12(b)(6). In general, a Rule 12(b)(6) motion to dismiss "challenges whether a complaint states a legally sufficient cause of action." *Perry v. Carolina Builders Corp.*, 128 N.C. App. 143, 146, 493 S.E.2d 814, 816 (1997). For a court to have jurisdiction under the Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 to -267 (1999), the plaintiff must allege in his complaint that a real and justiciable controversy, arising out of opposing contentions as to respective legal rights and liabilities, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. *See Town of Spencer v. Town of East Spencer*, 351 N.C. 124, 127, 522 S.E.2d 297, 300 (1999). Further, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." N.C. Gen. Stat. § 1-260.

The Town argues that its motion to dismiss was properly granted because plaintiff has not alleged a controversy between himself and the Town. However, it is not necessary under the Declaratory Judgment Act that there exist a controversy between each and every party to the action. Here, plaintiff has set forth a real and justiciable

1. Plaintiff's complaint alleges that he purchased his lot pursuant to a deed that references the 1976 Bowen Map, but the complaint is not verified; further, plaintiff's affidavit does not state that he purchased pursuant to a deed that references the 1976 Bowen Map.

controversy between himself and the Gores, thereby establishing jurisdiction under the Declaratory Judgment Act over the issues raised in the complaint. The complaint seeks, in part, a declaration as to whether the Town accepted the Gores' offer of dedication of North Shore Drive as depicted in the 1965 map. Any declaration regarding whether the Town has accepted the offer of dedication of North Shore Drive as depicted on the 1965 map will affect the Town's interest. Therefore, although the Town does not dispute plaintiff's allegations, and may in fact benefit from a declaration in plaintiff's favor, the Town is still a proper party to this declaratory action because its interests will be affected by the outcome. Thus, the Town's Rule 12(b)(6) motion to dismiss should have been denied.

In summary, we reverse the grant of the Town's motion to dismiss and hold that the Town is a proper party in this declaratory action. Further, we affirm the denial of plaintiff's motion for summary judgment but we reverse the grant of the Gores' motion for summary judgment because of the existence of genuine issues of material fact, and we remand for further proceedings.

Affirmed in part, reversed in part and remanded.

Judges WYNN and TYSON concur.

DIANA J. LEWIS, EMPLOYEE PLAINTIFF v. ORKAND CORPORATION, EMPLOYER; ZURICH-AMERICAN INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA00-1265

(Filed 18 December 2001)

1. Workers' Compensation— findings of fact—supported by plaintiff's testimony

The Industrial Commission's findings of fact in a workers' compensation action were supported by the evidence where plaintiff's testimony directly supported the factual description of the circumstances as found by the Commission.

2. Workers' Compensation— injury arising from employment—attempting to catch falling table

The Industrial Commission in a workers' compensation action properly concluded that plaintiff's injury arose out of her employment where plaintiff was injured when she instinctively attempted to catch a falling table in a security area as she returned from a break in a cafeteria on a different floor of her building. Plaintiff was obtaining refreshment during a scheduled break in a manner approved by the employer and her actions were to the benefit of her employer.

Appeal by Defendants from Opinion and Award entered 6 July 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 September 2001.

Prince, Youngblood & Massagee, by Sharon B. Alexander, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Dale A. Curriden, for defendants-appellants.

HUDSON, Judge.

Defendants Orkand Corporation and Zurich-American Insurance Company appeal from an Opinion and Award of the North Carolina Industrial Commission (the "Commission") awarding total disability compensation and medical expenses to Plaintiff. The only issue raised on appeal is whether the Commission erred in its determination that Plaintiff's injury arose out of her employment. We affirm.

Relevant to this appeal are the following undisputed facts, as found by the Commission. Plaintiff was injured on 2 October 1996, while employed by Orkand Corporation, a federal government subcontractor for whom she had worked for three years. Up until the day of her injury, Plaintiff worked from 6:00 a.m. until 2:30 p.m., five days per week. During each work day, Plaintiff was allowed two fifteen-minute breaks and a thirty-minute lunch break.

Orkand leased space in the Federal Building in Asheville, and Plaintiff worked on the fourth floor. The Federal Building is open to the public. Members of the general public could enter the building through an entrance on the second floor, where security guards, a metal detector, an x-ray/conveyor machine for checking personal belongings, and a metal table were located. The security guard and

equipment at this entrance were provided by a company under contract with the federal government.

On the day of the injury, Plaintiff went to a cafeteria located in the Federal Building during one of her fifteen-minute breaks. This cafeteria is located on the second floor, and Plaintiff had to pass by the security area to reach the elevator to return to her work area on the fourth floor. As Plaintiff was passing the security area, the metal table there began to fall. Plaintiff saw the table falling and reacted instinctively, going two or three steps out of her way to attempt to catch the table with her left hand. She caught the table with her left hand as it fell, but it slipped from her hand and landed on her right foot. Plaintiff sustained injuries to her left hand, wrist, and forearm, her right foot, and her lumbar spine.

The Commission determined that all of these injuries were the result of the incident on 2 October 1996, and that Defendants should pay for her medical treatment and temporary total disability benefits for loss of wage earning capacity "from October 3, 1996 to October 10, 1996 and from September 9, 1998 to the date of the hearing before the Deputy Commissioner and continuing." *See* N.C. Gen. Stat. §§ 97-25, 97-29 (1999).

Ordinarily, the questions to be considered by this Court on appeal are: (1) whether the findings are supported by the evidence; (2) whether the findings support the conclusions of law; and (3) whether the conclusions are consistent with the applicable legal principles. "[A]ppellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). On appeal from an opinion and award of the 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). "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.*

Defendants have challenged a number of findings of fact and conclusions of law in their assignments of error, and have combined

them all into one argument in their brief. In the assignments of error, however, Defendants have referred to findings and conclusions of the Deputy Commissioner, not to those of the Full Commission. Under N.C. Rule of Appellate Procedure 10, these assignments of error do not serve to bring forward challenges to the findings and conclusions of the Full Commission. *See* N.C. R. App. Proc. 10(c)(1) (1999). In *Adams*, our Supreme Court held that the Commission in a workers' compensation case may not simply affirm and adopt the findings of a deputy commissioner, but is required to conduct its own review of the evidence; "the ultimate fact-finding function [lies] with the [Full] Commission—not the hearing officer." *Adams*, 349 N.C. at 681, 509 S.E.2d at 413; *see Deese*, 352 N.C. at 115, 530 S.E.2d at 552-53. Thus, it is the Opinion and Award of the Commission, not that of the Deputy Commissioner, that comes before this Court for review. However, because the findings and conclusions of the Commission are nearly identical to those of the Deputy Commissioner, and we presume that this error was in the nature of a clerical oversight, we exercise our discretion under N.C. Rule of Appellate Procedure 2 to review the issue further.

In the Record on Appeal, Defendants have assigned as error the following:

1. Finding of Fact No. 14, wherein the Commission found that "Since the Plaintiff had only short breaks, she was required to go to this cafeteria in order to obtain refreshment during her work day. The conditions of employment placed the employee near this table every time she went to the cafeteria and as she entered, left and, at times, moved about the Federal Building," on the ground that there is insufficient evidence in the record to support it.

   Record, p. 26-27

2. Finding of Fact No. 15, wherein the Commission found that "The incident with the falling table was an injury by accident. Plaintiff was in the course and scope of her employment when she suffered the injury by accident," on the ground that it is not supported by sufficient competent evidence and is contrary to law.

   Record, p. 27

Defendants make no argument in support of the contention that there is no evidence to support Finding of Fact No. 14; thus under N.C. Rule

of Appellate Procedure 28, the first assignment of error is deemed abandoned. *See* N.C. R. App. Proc. 28(a) (1999).

[1] The remaining assignments of error (numbers 2-14) include challenges to Finding of Fact No. 15, and to the conclusions of law and the award. In their one argument, Defendants assert, in essence, that the evidence and the law do not support the factual inference or legal conclusion that Plaintiff's actions benefitted her employer or arose from a risk which was incidental to her employment. Therefore, Defendants submit, Plaintiff's injuries could not have resulted from an "injury by accident arising out of and in the scope of" her employment.

Finding No. 15 is a mixed finding of fact and conclusion of law. To the extent that it is a factual finding, we hold that it is supported by the evidence. Plaintiff's testimony directly supports the factual description of the circumstances, as found by the Commission.

[2] Having determined that the findings of fact are supported by the evidence, we turn to the Commission's conclusions of law, which we review *de novo*, and which we also affirm. *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). Defendants argue that Plaintiff's injury did not "aris[e] out of" the employment as that phrase has been defined by the courts, since it was not the result of an activity incidental to her job. *See Roberts v. Burlington Industries*, 321 N.C. 350, 364 S.E.2d 417 (1988); *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 377 S.E.2d 777, *aff'd per curiam*, 325 N.C. 702, 386 S.E.2d 174 (1989). In both of these cases, the plaintiffs were injured assisting motorists on the roadside, while on the way home from a business trip or work. Defendant maintains that the facts here are sufficiently analogous that these cases are controlling. We disagree. In both cases, the plaintiffs had left work and were driving home, when they stopped on their own volition to render assistance. Although the plaintiffs' actions were admirable, any benefit to the employer was too remote for our courts to hold that the incidents arose out of the employment.

We agree with Plaintiff that the circumstances here are more similar to the facts in *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E.2d 97 (1946), and *Shaw v. Smith & Jennings, Inc.*, 130 N.C. App. 442, 503 S.E.2d 113, *disc. rev. denied*, 349 N.C. 363, 525 S.E.2d 175 (1998). In *Rewis*, the plaintiff's deceased husband (the employee) was killed while, during a personal visit to the washroom, he became faint and

fell through an open window. The Supreme Court clearly indicated that personal breaks are included within the scope of the employment. "An employee, while about his employer's business, may do those things which are necessary to his own health and comfort, even though personal to himself, and such acts are regarded as incidental to the employment." *Rewis*, 226 N.C. at 328, 38 S.E.2d at 99.

More recently, this Court issued its decision in the *Shaw* case, which we do not find distinguishable in any significant respect. There, the employee was killed in a motor vehicle crash that occurred while he was going to get coffee during a scheduled ten-minute "on the clock" break. This Court upheld the Commission's determination that the incident arose out of the employment. We summarized earlier decisions in which injuries sustained during personal breaks were held covered by workers' compensation:

> This Court has held that if the employee's injury is "fairly traceable to the employment" or "any reasonable relationship to employment exists," then it is compensable under the Act. *White v. Battleground Veterinary Hosp.*, 62 N.C. App. 720, 723, 303 S.E.2d 547, 549, *disc. review denied*, 309 N.C. 325, 307 S.E.2d 170 (1983) (citation omitted). An employee is injured in the course of his employment when the injury occurs "under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." *Powers v. Lady's Funeral Home*, 306 N.C. 728, 730, 295 S.E.2d 473, 475 (1982) (citations omitted).

Shaw, 130 N.C. App. at 445-46, 503 S.E.2d at 116. Quoting *Harless v. Flynn*, 1 N.C. App. 448, 456-57, 162 S.E.2d 47, 53 (1968), we observed in *Shaw* that

> "[T]he fact that the employee is not engaged in the actual performance of the duties of his job does not preclude an accident from being one within the course of employment. . . .
>
> In tending to his personal physical needs, an employee is indirectly [benefitting] his employer. Therefore, the course of employment continues when the employee goes to the washroom, takes a smoke break, [or] *takes a break to partake of refreshment* . . . ."

Shaw, 130 N.C. App. at 446, 503 S.E.2d at 117 (alterations and emphasis in original). The Court in *Shaw* went on to hold that the

Commission properly concluded that the death arose out of and in the course of the decedent's employment, on the basis of the facts that the employee was on a paid break a short distance from the work-site, he had left the premises because of the absence of closer facilities for food and drink, and the employer acquiesced in the employees going off the work-site for refreshments. *See id.* at 447, 503 S.E.2d at 117.

Here, as in *Rewis* and *Shaw*, Plaintiff was obtaining refreshment during a scheduled break, in a manner approved by the employer. Further, her actions in attempting to break the fall of the table, which was part of the security system for the entire building, was to the benefit of her employer as well as others in the building.

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, e.g., Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 578, 336 S.E.2d 47, 54 (1985). Based upon this fundamental principle, we hold that the Commission properly concluded that Plaintiff's injury was one "arising out of" her employment, and therefore constituted an injury by accident.

Affirmed.

Judges WALKER and McGEE concur.

WILDA KAY ZIMMERMAN, EMPLOYEE, PLAINTIFF v. EAGLE ELECTRIC MANUFACTURING CO., EMPLOYER; ZURICH-AMERICAN INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA00-1287

(Filed 18 December 2001)

1. Workers' Compensation— back injury—greater risk than general public—supporting testimony

There was evidence in the record in a workers' compensation action supporting the Industrial Commission's findings that the demands of plaintiff's job increased her risk of injury above that of the general public and that her job caused, exacerbated, or

accelerated her injury. While defendants argued that medical testimony supporting these findings should have been given lesser weight than other testimony because the testimony was based on speculation, the doctor was received as an expert witness, he stated clear and definite opinions to a reasonable degree of medical certainty, and he based his opinions on his experience and available information.

2. Workers' Compensation— disability—not purely a medical question

The findings of the Industrial Commission that a workers' compensation plaintiff had met her burden of proving total and permanent disability were supported by the evidence where defendants argued that the doctors did not testify that plaintiff had no physical capacity to work, but disability is not purely a medical question. The evidence here included medical testimony regarding the extent of plaintiff's physical limitations and other evidence that plaintiff had unsuccessfully sought numerous jobs with defendant-employer, through State Vocational Rehabilitation, and through private companies.

3. Workers' Compensation— back injury—specific traumatic event—judicially cognizable time

In a workers' compensation action arising from a back injury, the Industrial Commission's findings of fact that plaintiff sustained two specific traumatic incidents supported the conclusion that plaintiff sustained compensable injuries as defined by N.C.G.S. § 97-2(6) where the Commission found that plaintiff had an onset of specific symptoms on two specific days. Although defendants contended that there should be an "inciting event," a worker must only show that the injury occurred at a judicially cognizable time in order to prove a "specific traumatic event."

Appeal by defendants from Opinion and Award entered 3 August 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 September 2001.

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

Young, Moore and Henderson, P.A., by Dawn M. Dillon and Tina Lloyd Hlabse, for defendants-appellants.

HUDSON, Judge.

Defendants appeal an Opinion and Award of the North Carolina Industrial Commission (the "Commission") awarding plaintiff permanent total disability compensation as a result of two separate compensable accidents and an occupational disease. We affirm.

The following is a summary of pertinent findings of the Commission: Plaintiff began working for defendant-employer in January of 1989, and continued for approximately eight and one-half years with only a one-month interruption in that employment. During her entire employment relationship with defendant-employer, plaintiff worked as an assembler of electrical replacement plugs for extension cords. To do her job, she sat in one position, bending forward, pushing together the various parts to assemble the plugs. As part of her job, plaintiff also lifted baskets of parts and moved barrels.

On 19 June 1996, plaintiff was working on the very fast "Number 3" job in which she was required to produce 480 parts per hour. She experienced "a stiff neck, as well as right arm and shoulder pain." Plaintiff reported this pain to the nurse, and followed the nurse's directives; when plaintiff's pain failed to subside, the nurse recommended her work station be modified. As a result, plaintiff worked in a light duty or "Number 1" station for two months. While working on 16 September 1996, plaintiff experienced "a tingling sensation radiating from her right shoulder into the thumb and first finger of her right hand." Plaintiff reported this incident, and then was seen by the company doctor, Dr. Vandermeer. Dr. Vandermeer performed limited testing on plaintiff, and treated her for four months, producing no improvement in her condition. Plaintiff's primary doctor, Dr. Cook, examined her in January of 1998, discovered that she had a herniated disc, and referred her to a surgeon.

The surgeon, Dr. Robin Koeleveld, performed surgery, "a C6-C7 anterior discectomy and fusion utilizing an iliac crest bone graft," on 16 March 1998. Plaintiff's condition improved somewhat after the surgery, but her primary care doctor, Dr. Cook, placed very limiting and permanent restrictions on plaintiff's work activities. Plaintiff has not been able to find work within her restrictions.

In accordance with the testimony of Dr. Koeleveld, the Commission found as fact that "plaintiff's cervical symptoms resulted from her work and working position" and that nothing outside of work had caused her condition. Dr. Cook testified and the

Commission found as fact that "plaintiff has reached maximum medical improvement and that her injury was permanent." Dr. Cook also testified in agreement with Dr. Koeleveld that plaintiff's "symptoms were due to causes and conditions characteristic and peculiar to her employment and were not an ordinary disease of life to which the public was equally exposed." The Commission concluded that the plaintiff has met her burden of proving total disability, and awarded the plaintiff continuing (permanent) total disability compensation until she returns to work at her pre-injury wages or until the Industrial Commission orders otherwise. Defendants appeal the Commission's decision to this court.

Before addressing the defendants' arguments, we summarize the appropriate standard of review. "[A]ppellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). *Accord Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 535 S.E.2d 602 (2000); *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977). " 'The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Gallimore*, 292 N.C. at 402, 233 S.E.2d at 531). We treat the findings of fact as conclusive " 'even when there is evidence to support contrary findings.' " *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001) (quoting *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *disc. rev. denied*, 350 N.C. 310, 534 S.E.2d 596, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999)). The Supreme Court in *Deese* found that the reviewing Court is bound by the findings of fact "[e]ven though there is conflicting testimony, [where] there is competent evidence in the record to support the Commission's findings of fact." 352 N.C. at 117, 530 S.E.2d at 553. In following *Adams*, *Deese*, and other similar decisions, we limit our review in this case to (1) whether any competent evidence supports the Commission's findings of fact and (2) whether the findings of fact support the Commission's conclusions of law. *See id.* at 116-17, 530 S.E.2d at 553.

In their first argument, defendants contend that the findings of the Commission do not support the conclusions that she suffered two specific traumatic incidents (compensable accidents to the back).

N.C. Gen. Stat. § 97-2(6) (1999). In their second and third arguments, defendants maintain that there is "no competent evidence to support" most of the findings of fact of the Commission. We first address and overrule all assignments of error raised in Arguments II and III.

[1] In Argument II, defendants contend that the evidence in the record does not support the Commission's findings to the effect that the demands of plaintiff's job increased her risk of injury above that of the general public, or its findings that her job "caused, exacerbated, or accelerated" her injury. The plaintiff points out in her brief, and defendants do not disagree, that the testimony of Dr. Cook supported these findings. Defendants argue that the testimony of other witnesses should have been given greater weight because Dr. Cook's testimony was based on "speculation." Review of Dr. Cook's testimony reveals otherwise; he was received as an expert witness, and he stated clear and definite opinions to a reasonable degree of medical certainty, based on his experience and available information. As it is not our task to re-weigh the evidence, we decline to do so. This argument has no merit.

[2] In Argument III, defendants contend that the findings of the Commission, to the effect that the plaintiff has met her burden of proving total and permanent disability, are not supported by the evidence. Defendants maintain that since the doctors did not testify that the plaintiff had no physical capacity to work at all, but only that she had significant permanent restrictions, she could not be totally disabled. We disagree.

As the plaintiff points out, this Court has clearly outlined different methods that a plaintiff may employ to prove total loss of wage-earning capacity, and thus, entitlement to total disability benefits under N.C. Gen. Stat. § 97-29 (1999). *See Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). One such method is by "the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment." *Id.* at 765, 425 S.E.2d at 457. Here, the plaintiff's evidence was found as fact. This evidence included medical testimony regarding the extent of her physical limitations, and other evidence that plaintiff sought numerous jobs with defendant-employer, through State Vocational Rehabilitation and through private companies, but she was unsuccessful. Defendants appear to be assuming that the only way to prove total disability is by medical evidence. They argue that "there is no competent evidence in the record to support the Full Commission's

finding that plaintiff was permanently and totally disabled," based on the assertion that no doctor testified unequivocally that plaintiff is capable of no work whatsoever. It is clear that disability (loss of wage earning capacity) is not purely a medical question. *See Russos v. Wheaton Industries*, 145 N.C. App. 164, 168, 551 S.E.2d 456, 459 (2001) (noting that "the term 'disability' is not simply a medical question, but includes an assessment of other vocational factors, including age, education, and training."); *Little v. Food Service*, 295 N.C. 527, 246 S.E.2d 743 (1978). Defendants encourage an incorrect application of the law in this arena, and we reject this argument.

[3] Finally, we address defendants' Argument I, that the findings of fact do not support the Commission's conclusions that the plaintiff sustained two specific traumatic incidents. The essence of the defendants' argument is the contention that the only evidence to support these findings and conclusions is evidence that the plaintiff complained of pain on two occasions, while performing her job. This argument does not accurately reflect the legal requirement for proof of "specific traumatic incident," nor does it accurately state the findings of the Commission. The Commission found that the plaintiff "experienced two separate specific and documented traumatic incidents of pain in her neck, shoulders, and right arm," on 19 June 1996, and 16 September 1996. The Commission found that while working 19 June 1996, plaintiff "suddenly experienced a stiff neck, as well as right arm and shoulder pain;" it also found that on 16 September 1996, plaintiff "experienced a tingling sensation radiating from her right shoulder into the thumb and first finger of her right hand." She immediately reported both of these occurrences.

In 1983, the General Assembly amended N.C.G.S. § 97-2(6), to provide that the term "injury," as applied to back injuries, means an injury resulting from a "specific traumatic incident of the work assigned." For back injuries, this change eliminated the requirement that an injury be the result of an "accident," which has been defined by the Courts over the years to mean an unusual or untoward event, or unexpected occurrence; this requirement still applies to injuries to parts of the body other than the back. *See Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118-19 (1988) (noting the change in the treatment of back injuries by the law for worker's compensation purposes), *disc. rev. denied*, 324 N.C. 337, 378 S.E.2d 799 (1989); *see also Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 119, 476 S.E.2d 410, 414 (1996), *disc. rev. denied*, 345 N.C. 753, 485 S.E.2d 53 (1997); *Gabriel v. Newton*, 227

N.C. 314, 316, 42 S.E.2d 96, 97 (1947) (explaining "an unlooked for and untoward event"); *Edwards v. Publishing Co.*, 227 N.C. 184, 186, 41 S.E.2d 592, 593 (1947) (explaining "an unexpected, unusual, or undesigned occurrence"). Defendants acknowledge this change in the law, but ask this Court to require that there be an "inciting event." This Court and the Supreme Court have made it clear in recent years that to prove a "specific traumatic incident," a worker must only show that the injury occurred at a "judicially cognizable" point in time. *See Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 449 S.E.2d 233 (1994), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995); *Richards*, 92 N.C. App. 222, 374 S.E.2d 116. This Court defined "judicially cognizable" in *Fish*, as follows:

> *Judicially cognizable* does not mean "ascertainable on an exact date." Instead, the term should be read to describe a showing by plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration. If the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied.

116 N.C. App. at 709, 449 S.E.2d at 238 (emphasis in original). As properly applied by the Commission here, the relevant inquiry was whether the plaintiff's symptoms of pain began at a "judicially cognizable" period. The Commission found, and the evidence fully supports, that on the two occasions identified, the plaintiff had an onset of specific symptoms on two specific days, 19 June 1996 and 16 September 1996. We hold that the Commission properly applied the law in concluding that these findings support the conclusions that on both days plaintiff sustained compensable injuries, as defined by N.C.G.S. § 97-2(6), and that the defendants' argument on this point fails.

In sum, we hold that the findings of the Commission are supported by competent evidence in the record, that the findings support the conclusions of law, and that the award of benefits for total and permanent disability benefits is appropriate under applicable law. Accordingly, we affirm the Award of the Commission in all respects.

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. JEFFREY ALAN BRADY

No. COA01-104

(Filed 18 December 2001)

1. Indictment and Information— amendment—attempting to obtain a controlled substance by forgery—name of controlled substance

The trial court did not err in an attempting to obtain a controlled substance by forgery case by allowing an amendment to change the name of the controlled substance from "Zanax" to "Percocet" in the indictment, because: (1) an inadvertent variance neither misleads nor surprises the defendant as to the nature of the charges; and (2) the name of the controlled substance was not necessary to charge defendant with a crime under N.C.G.S. § 90-108(a)(10) since the charge remained the same whether the controlled substance was a Schedule II or a Schedule IV drug.

2. Drugs— attempting to obtain a controlled substance by forgery—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of attempting to obtain a controlled substance by forgery under N.C.G.S. § 90-108(a)(10), because: (1) a pharmacist testified that defendant presented a Percocet prescription with the purported signature of a doctor, and the pharmacist verified that the doctor did not write such a prescription; (2) the doctor testified that although his name may have been on the Percocet prescription presented to the pharmacist, the doctor had not signed such a prescription or authorized anyone else to do so; and (3) evidence that defendant presented the Percocet prescription and had it in his possession leads to the presumption that he either forged the document or had knowledge it was a forgery.

Appeal by defendant from judgments dated 31 August 2000 by Judge Russell G. Walker, Jr.[1] in Randolph County Superior Court. Heard in the Court of Appeals 4 December 2001.

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1. Although Judge C. Preston Cornelius presided over Defendant's trial, Judge Russell G. Walker, Jr. imposed Defendant's sentences.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.

Moser, Schmidly, Mason & Roose, by Richard G. Roose, for defendant-appellant.

GREENE, Judge.

Jeffrey Alan Brady (Defendant) appeals judgments dated 31 August 2000 entered consistent with a jury verdict finding him guilty of obtaining a controlled substance by fraud and of attempting to obtain a controlled substance by fraud or forgery in violation of N.C. Gen. Stat. § 90-108(a)(10).[2]

On 27 January 1997, a Randolph County Magistrate issued a warrant for Defendant's arrest finding probable cause Defendant attempted

> to intentionally acquire and obtain possession of [P]ercocet[], a quantity of 40 tablets, a controlled substance included in Schedule II of the North Carolina Controlled Substance[s] Act, from Pharmacist[] Rosemar[y] Lawrence [(Lawrence)] at Eckerd Drug, by forgery in that [Defendant] forged the signature of Dr. Newton on a [prescription] dated 1/23/97.

On 25 August 1997, the Randolph County Grand Jury issued an indictment (the Indictment) charging Defendant with attempting to obtain a controlled substance by forgery. The Indictment specifically alleged Defendant:

> did intentionally attempt to acquire and obtain possession of Xanax (alprazolam), a controlled substance included in Schedule IV of the North Carolina Controlled Substances Act, from [Lawrence] of Eckerd Drug Store . . . by forgery in that [Defendant] presented a prescription for that substance on which [Defendant] forged the signature of Doctor Newton, M.D., on the prescription.

On 5 May 1999, after a jury was impaneled, the State made a motion to amend the Indictment to change the drug from "Xanax" to "Percocet[]." The State argued the substitution of a different controlled substance did not alter the charge as the elements and the penalty level for the crime remained the same. Over Defendant's

2. Defendant presents no argument in his brief to this Court relating to the conviction for obtaining a controlled substance (Xanax) by fraud.

objection, the trial court granted the State's motion allowing the State to amend the Indictment.

At trial, Lawrence testified that on 20 January 1997, a man, whom she later identified as Defendant, entered the Eckerd Drug Store (Eckerd) where she worked and presented a prescription for Xanax, with the name "Jeffrey Brady," to be filled. The prescription had no address or telephone number on it, and was written from UNC-Memorial Hospital at Chapel Hill. After Defendant had given Lawrence his address and telephone number, Lawrence filled the Xanax prescription. Six days later, on 26 January 1997, Defendant returned to Eckerd, where he presented a prescription for "Percocet" (the Percocet prescription). Lawrence became suspicious because Defendant had been there "a few days earlier and [had] gotten another controlled substance." Lawrence felt "uncomfortable" filling the Percocet prescription and could not reach the physician to verify whether the prescription was legitimate, so she returned it to Defendant.

On 27 January 1997, Lawrence telephoned Dr. Warren Newton (Dr. Newton) to verify whether the Xanax prescription and the Percocet prescription were legitimate. Lawrence was told by Dr. Newton that he had not written either prescription.

Dr. Newton testified he practiced medicine at the University of North Carolina, and Defendant was one of Dr. Newton's patients. Dr. Newton recognized the Xanax prescription as it was written on a form used in his office. The Xanax prescription was signed in Dr. Newton's name; Dr. Newton, however, testified it was not his signature and he had not authorized anyone to sign the Xanax prescription for him. Although Dr. Newton had written Defendant a prescription for Percocet in the past, he had not written such a prescription in January 1997 and had not authorized anyone to write such a prescription during that time frame.

Defendant testified that he was taking medications prescribed by several doctors and had received a prescription for Xanax from the Randolph County Mental Health Center. Defendant testified the prescription he received from the Randolph County Mental Health Center was sufficient to meet his needs. Sometime in January or February 1997, Defendant noticed a prescription missing from his refrigerator. Approximately two years prior to this date, Defendant's first cousin, Donna Lynn Cox, had a prescription pad from North Carolina Memorial Hospital in her possession. Defendant denied writ-

ing the Xanax prescription or presenting any prescriptions to Eckerd on 20 or 26 January 1997.

Defendant made motions to dismiss the charges against him for insufficiency of the evidence at the close of the State's evidence and at the close of all the evidence. Both motions were denied. The jury returned verdicts finding Defendant guilty of obtaining a controlled substance by forgery and for attempting to obtain a controlled substance by forgery.

The issues are whether: (I) an amendment to change the name of a controlled substance in an indictment for attempting to obtain a controlled substance by forgery substantially alters the charge set forth; and (II) the State presented sufficient evidence Defendant attempted to obtain a controlled substance by forgery.

I

[1] Defendant argues the trial court erred in allowing the State to amend the Indictment because "the amendment changed the substance which [Defendant] was charged with attempting to obtain from a Schedule [IV] controlled substance to a [S]chedule [II] controlled substance," thus, substantially altering the charge as set forth in the Indictment. We disagree.

"A bill of indictment may not be amended," N.C.G.S. § 15A-923(e) (1999), if the "change in the indictment . . . would substantially alter the charge set forth in the indictment," *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, *appeal dismissed and disc. review denied*, 294 N.C. 737, 244 S.E.2d 155 (1978). Thus, a "non-essential variance is not fatal to the charged offense," and any "averment unnecessary to charge the offense . . . may be disregarded as inconsequential surplusage." *State v. Grady*, 136 N.C. App. 394, 396-97, 524 S.E.2d 75, 77 (change in address on indictment for maintaining a dwelling for the use of a controlled substance was not a substantial alteration), *appeal dismissed and disc. review denied*, 352 N.C. 152, 544 S.E.2d 232 (2000); *see State v. Joyce*, 104 N.C. App. 558, 573, 410 S.E.2d 516, 525 (1991) (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). This is so because an inadvertent variance neither misleads nor surprises the defendant 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).

Section 90-108 provides it shall be unlawful for any person "[t]o acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge[.]" N.C.G.S. § 90-108(a)(10) (1999). A "controlled substance" is "a drug, substance, or immediate precursor included in Schedules I through VI" of the Controlled Substances Act. N.C.G.S. § 90-87(5) (1999). Under section 90-108(a)(10), it is not necessary to specifically designate the controlled substance at issue to set out the charge of "acquir[ing] or obtain[ing] possession of a controlled substance by . . . fraud [or] forgery." *See* N.C.G.S. § 90-108(a)(10).

In this case, the amendment to the Indictment to change the controlled substance named therein from "Xanax" to "Percocet" did not substantially alter the charge against Defendant. The name of the controlled substance was not necessary to charge Defendant with a crime under section 90-108(a)(10), as the charge remained the same whether the controlled substance was a Schedule II or a Schedule IV drug. Moreover, Defendant was neither misled nor surprised by the subsequent change in the Indictment as the State was required to prove the same elements. Accordingly, the trial court did not err in permitting the State to change the name of the controlled substance listed in the Indictment.

II

[2] Defendant next argues the trial court erred in failing to dismiss the charge as listed in the Indictment because "the State presented insufficient evidence to show . . . Defendant fraudulently attempted to acquire the substance, Percocet." We disagree.

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

A person attempts to violate section 90-108(a)(10) "by attempting to acquire a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge." *State v. Booze*, 29 N.C. App. 397, 399, 224 S.E.2d 298, 300 (1976). "Knowledge that the prescription is false or forged is an essential element of the offense under G.S. 90-108(a)(10)." *State v. Baynard*, 79 N.C. App. 559, 562, 339 S.E.2d 810, 812 (1986). Knowledge is presumed "[w]hen a defendant is found with a forged paper and is endeavoring to obtain property with it." *State v. Fleming*, 52 N.C. App. 563, 568, 279 S.E.2d 29, 32 (1981).

In this case, viewing the evidence in the light most favorable to the State, there was substantial evidence Defendant attempted to acquire Percocet by forgery. Lawrence testified Defendant presented the Percocet prescription with the purported signature of Dr. Newton and she later verified Dr. Newton did not write such a prescription. Moreover, Dr. Newton testified that although his name may have been on the Percocet prescription presented to Lawrence, he had not signed such a prescription nor authorized anyone else to do so, and had not written a prescription for Percocet in January 1997. Since there is evidence Defendant presented the Percocet prescription and had it in his possession, it is presumed he either forged the document or had knowledge it was a forgery. Accordingly, the trial court did not err in denying Defendant's motion to dismiss the charge of attempting to obtain a controlled substance by forgery.

No error.[3]

Judges McCULLOUGH and CAMPBELL concur.

3. We do not address Defendant's remaining assignments of error as he has failed to present any arguments in his brief to this Court relating to those assignments of error. *See* N.C.R. App. P. 28(b)(5).

CHIQUITA B. MOORE, AS ADMINISTRATRIX OF THE ESTATE OF JEFFREY MOORE, DECEASED, AND OTIS EUGENE CHAPMAN, PLAINTIFFS v. THE CINCINNATI INSURANCE COMPANY, DEFENDANT

No. COA00-1427

(Filed 18 December 2001)

Insurance— garage owner's policy—coverage by driver's policy

The trial court erred in a declaratory judgment action by declaring defendant responsible for primary coverage in an action arising from an automobile collision involving a loaner vehicle where the garage owner's policy issued by defendant provided coverage if the customer had "no other available insurance" and the person to whom the vehicle was loaned and the driver at the time of the accident both had liability coverage.

Appeals by defendant/third-party plaintiff, The Cincinnati Insurance Company, and plaintiffs from judgment filed 24 April 2000 by Judge James U. Downs in Craven County Superior Court. Heard in the Court of Appeals 6 November 2001.

Jones, Garland & Peterman, PLLC, by T. Russell Peterman, Jr. for plaintiff-appellants.

Barber & Wilson, P.A., by Andrew H.D. Wilson, for defendant/third-party plaintiff-appellant.

Wallace, Morris & Barwick, P.A., by P.C. Barwick, Jr., for defendant-appellee Atlantic Casualty Insurance Company.

Ennis, Newton & Baynard, P.A., by Stephen C. Baynard, for defendant-appellee Universal Insurance Company.

GREENE, Judge.

The Cincinnati Insurance Company (Defendant) appeals an order (the Order) filed 24 April 2000 declaring Defendant to be responsible for providing primary liability coverage up to its policy limits and underinsured motorist coverage in the amount of $25,000.00 per person and $50,000.00 per accident to Chiquita B. Moore, as Administratrix of the Estate of Jeffrey Moore (Moore), deceased, and Otis Eugene Chapman (Chapman) (collectively, Plaintiffs); Plaintiffs also appeal the Order based on the amount of underinsured motorist coverage.

On 21 June 1995, Moore purchased a 1991 Subaru Loyale station wagon (the Subaru) from Alcoke Auto Center, LLC d/b/a New Bern Pontiac Mazda (Alcoke) in New Bern, North Carolina. Shortly after purchasing the Subaru, Moore began experiencing mechanical problems with the vehicle. These problems were caused by the vehicle having been previously wrecked, a fact unknown by Moore. On or about 6 September 1995, Alcoke agreed to repair the Subaru, with Alcoke and Moore equally bearing the costs of the repairs. While the Subaru was being repaired, Alcoke provided Moore with a loaner vehicle to drive (the loaner vehicle) that was covered under a garage liability insurance policy provided to Alcoke by Defendant.

On 11 September 1995, after several return visits to Alcoke, Moore returned to the dealership to see if the Subaru had been repaired. According to Chapman, after Moore informed Alcoke he would be making a trip to New York, an Alcoke representative "said it was all right . . . since they had [Moore's] car." On 11 September 1995, Moore, as the driver, along with Chapman and David Earl Sanders (Sanders), as passengers, drove the loaner vehicle to New York City. The three men left New York to return to New Bern on 12 September 1995 at approximately 4:30 p.m. At the time the men left New York, Moore was driving the loaner vehicle; sometime during the return trip to New Bern, however, Sanders began driving while Moore rested in the back seat of the loaner vehicle. At approximately 3:45 a.m. on 13 September 1995, the loaner vehicle collided with an "eighteen-wheeler tractor-trailer" at the intersection of US 70 Business and US 70 By-Pass in Johnston County, North Carolina. Moore and Sanders died as a result of the incident, and Chapman was seriously injured. The N.C. Highway Patrol investigated the incident scene and determined Sanders was solely at fault for causing the incident.

In a letter dated 19 December 1995, in response to a demand package sent by Plaintiffs, Defendant denied liability coverage for the collision stating the loaner vehicle "was to be driven in the New Bern area with [Moore] being the only driver. . . . The driver of the [loaner] vehicle at the time of the accident was [Sanders], an unauthorized driver."

On 26 January 1996, Plaintiffs filed a complaint against Defendant seeking a judgment declaring: the rights of the parties with respect to Defendant's policy of insurance covering the loaner vehicle; that Defendant provide Plaintiffs with compensation for the wrongful death and personal injuries arising out of the 13 September 1995 incident; the limits of automobile liability coverage provided by

Defendant; Defendant responsible for any judgment entered in civil actions arising out of the 13 September 1995 incident; and Defendant has a duty to defend the estate of Sanders and Alcoke as a result of the 13 September 1995 collision. Defendant answered and denied the allegations in Plaintiffs' complaint.

On 12 September 1997, with the leave of the trial court, Defendant filed a third-party complaint against Atlantic Casualty Insurance Company (Atlantic), Universal Insurance Company (Universal), Integon Indemnity Corporation, and Salem Underwriters, Inc.[1] Atlantic had issued an insurance policy to Sanders (Sanders' liability policy) with limits of liability in the amount of $25,000.00 per person and $50,000.00 per accident. Sanders' liability policy provided:

> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.

Universal had issued an insurance policy to Moore (Moore's liability policy) with limits of liability in the amount of $25,000.00 per person and $50,000.00 per accident. Moore's liability policy covered "[a]ny auto . . . not owned by [him] while used as a temporary substitute" for his vehicle if it was out of normal use due to: breakdown; repair; servicing; loss; or destruction. An "insured" under Moore's policy was anyone using his "covered auto." With respect to coverage for vehicles not owned by Moore, Moore's liability policy stated "any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance."

At a bench trial held on 9 August 1999, Morris Randolph Hinton (Hinton), a field claims manager with Defendant, testified Alcoke was the named insured in a garage owner's liability policy provided by Defendant (Alcoke's policy). Under Alcoke's policy, an insured for a covered auto included:

> (2) Anyone . . . while using with your permission a covered "auto" you own, hire or borrow except:
>
> . . . .

1. On 7 May 1999, Defendant dismissed the claims against Integon Indemnity Corporation and Salem Underwriters, Inc. without prejudice.

(d) Your customers, if your business is shown in the Declarations as an "auto" dealership. However, if a customer of yours:

(i) Has no other available insurance (whether primary, excess or contingent), they are an "insured" but only up to the compulsory or financial responsibility law limits where the covered "auto" is principally garaged.

(ii) Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered "auto" is principally garaged, they are an "insured" only for the amount by which the compulsory or financial responsibility law limits exceed the limits of their other insurance.

In Hinton's opinion, Sanders was not an "insured" under Alcoke's policy because (1) Sanders was driving the loaner vehicle without the permission of Alcoke, and (2) Sanders was not a customer of Alcoke.

In an order filed 24 April 2000, the trial court declared, in pertinent part, that:

(4) [Moore's liability policy] would . . . provide the primary excess coverage . . . upon exhaustion of the liability limits of the policy issued by [Defendant] . . . .[2]

(5) [Sanders' liability policy] . . . will provide secondary excess liability coverage[.]

The dispositive issue is whether a garage owner's liability policy excluding coverage for customers having "other available insurance (whether primary, excess or contingent)" excludes a customer when his policy provides it "shall be excess over any other collectible insurance."

Where a garage owner's policy contains a provision that liability coverage for the garage owner's customer[3] is provided only if the customer "[h]as no other available insurance (whether primary, excess

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2. The trial court thus implicitly declared Defendant provided primary liability coverage to Plaintiffs.

3. If the garage policy states that it provides coverage to a customer only if that customer is "using" the vehicle with the dealership/garage owner's "permission," no liability exists unless these tests are also satisfied.

or contingent),"[4] and the customer's liability policy provides it "shall be excess over any other collectible insurance," and it provides the minimum amount of liability insurance required by statute,[5] the garage owner's policy provides no liability coverage for the customer.[6] *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 351-52, 152 S.E.2d 436, 443-44 (1967); *United Services Auto. Ass'n v. Universal Underwriters Ins. Co*, 332 N.C. 333, 335-37, 420 S.E.2d 155, 156-58 (1992); *Eaves v. Universal Underwriters Group*, 107 N.C. App. 595, 600, 421 S.E.2d 191, 193, *disc. review denied*, 333 N.C. 167, 424 S.E.2d 908 (1992). If the customer's liability insurance is for an amount less than what is required by the Financial Responsibility Act, the garage policy containing an escape clause nonetheless provides coverage to the extent the statutory amount exceeds the customer's liability policy limits. *See Allstate*, 269 N.C. at 352, 152 S.E.2d at 444.

In this case, Alcoke's policy provided liability coverage only to those customers "using" the loaner vehicle with its "permission." Assuming without deciding that Sanders and/or Moore were Alcoke's customers and were "using" the loaner vehicle with Alcoke's permission, Defendant's garage policy provides no liability coverage for injuries sustained during Sanders' and/or Moore's use of the loaner vehicle. This is so because Alcoke's policy provided coverage if the customer had "no other available insurance." Sanders' and Moore's liability policies, however, provided the minimum amount of liability coverage as required by the Financial Responsibility Act and stated it would "be excess over any other collectible insurance." Accordingly, Alcoke's policy provided no liability coverage for the injuries sustained in the use of its loaner vehicle by either Moore or Sanders. The trial court must, therefore, be reversed.[7]

4. This type of insurance provision is commonly known as an escape clause. *Horace Mann Ins. Co. v. Continental Cas. Co.*, 54 N.C. App. 551, 555, 284 S.E.2d 211, 213 (1981).

5. The Financial Responsibility Act provides that for incidents occurring before 1 July 2000, the minimum amount of liability coverage required is $25,000.00 per person and $50,000.00 per incident. N.C.G.S. §§ 20-279.1(11); 20-279.21(b)(2) (2000) (for incidents occurring after 1 July 2000, the minimum amount of coverage is $30,000.00 per person and $60,000.00 per incident).

6. Plaintiffs contend this principle applies only to situations where the customer is test-driving a vehicle owned by a vehicle dealership/garage. We disagree and see no reason to limit the application of this principle to test-driven vehicles.

7. As we hold Defendant has no obligation to provide any liability coverage for injuries arising out of the 13 September 1995 incident, any error the trial court may have made in determining the amount of Defendant's liability under its underinsured motorist provisions is now moot. Accordingly, we do not address Plaintiffs' cross-appeal.

Reversed.

Judges McCULLOUGH and CAMPBELL concur.

STATE OF NORTH CAROLINA v. BROOKE KRAUS

No. COA01-116

(Filed 18 December 2001)

1. **Drugs— maintaining motel room to keep or sell controlled substances—sufficiency of evidence**

The trial court erred by denying defendant's motion to dismiss a charge of maintaining a motel room to keep or sell controlled substances where the State presented evidence of defendant's occupancy of the room, but did not present evidence that she bore the expense of the room or otherwise maintained it in any way, and defendant had occupied the room for less than twenty-four hours.

2. **Drugs— constructive possession—motel room**

There was sufficient evidence for a reasonable juror to conclude that defendant had the power and intent to exercise control over the marijuana and drug paraphernalia in a motel room where law enforcement officers found defendant and one other person in a room filled with marijuana smoke, defendant was stoned, a quantity of marijuana and drug paraphernalia were in plain view, defendant had spent the previous night in the motel room, and she had equal access to the room key.

Appeal by defendant from judgments entered 28 July and 1 August 2000 by Judge Zoro J. Guice, Jr., in Henderson County Superior Court. Heard in the Court of Appeals 28 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Teresa L. White, for the State.

David W. Rogers for defendant appellant.

TIMMONS-GOODSON, Judge.

Brooke Kraus ("defendant") appeals from judgments sentencing her for felonious possession of marijuana, possession of drug para-

phernalia, and felonious maintenance of a place for controlled substances. Although the judgments indicate that defendant pled guilty to these offenses, it is evident from the record that defendant in fact entered a plea of not guilty and was tried before a jury. At trial, the State presented the following evidence: Richard Sandborn, the general manager of a motel located in Flat Rock, North Carolina, requested assistance on 9 March 2000 from the Henderson County Sheriff's Department after detecting a strong and distinctive odor of marijuana emanating from Room 229 at the motel. When responding law enforcement officers arrived, they met with Chris Fain ("Fain"), who had rented Room 229, and obtained written consent for a search of the room. As the officers approached Room 229, they encountered a dense cloud of white marijuana smoke. The officers knocked on the door of Room 229 several times before defendant's friend and co-defendant, Leon Henderson ("Henderson"), opened the door. Upon entering the room, officers found defendant sitting in a chair next to the window. No other person was present in the smoky room. Like Henderson, defendant was "glassy-eyed[,]" "lethargic[,]" and appeared to be "stoned." Marijuana, marijuana seeds and stems, a box cutter, cigar wrappers, small plastic bags, and pill bottles littered a nearby table. The officers discovered a small bag containing eighty-five (85) grams of marijuana in a trash can and a quantity of crack cocaine and a room key in the drawer of a night stand. Officers also found a red duffle bag in the closet, the door to which was partially open. An identification tag on the bag listed Henderson's name as the owner. The duffle bag contained a set of digital scales, a small plastic bag containing 312 grams of marijuana, and a large "block" of marijuana weighing four pounds, eleven ounces.

Henderson testified that, on the evening of 8 March 2000, he and defendant were invited by Fain to a party in Room 229. Eight to ten people, many of whom were smoking marijuana, were in the room when Henderson and defendant arrived. Henderson admitted that he and defendant smoked marijuana, then spent the night in the room. Henderson denied any knowledge of the duffle bag's contents, stating that he had lent the bag to Fain. Henderson further denied knowledge of the cocaine, and testified that defendant was similarly ignorant of the drugs and drug paraphernalia found in the room. Defendant did not testify.

The jury found defendant guilty of felonious possession of marijuana, possession of drug paraphernalia, and felonious maintenance of a motel room used to keep controlled substances. The trial court

consolidated the offenses and sentenced defendant to a suspended term of six to eight months of imprisonment, with thirty-six (36) months of supervised probation. Defendant now appeals.

The issues are whether the State presented substantial evidence that defendant (1) maintained the motel room where the contraband was seized; (2) constructively possessed marijuana; and (3) constructively possessed drug paraphernalia. For the reasons set forth herein, we hold there was insufficient evidence that defendant maintained the motel room, and we therefore reverse the trial court in part. We further hold that there was sufficient evidence to support defendant's convictions concerning her constructive possession of the marijuana and the drug paraphernalia.

[1] Defendant argues there was insufficient evidence that she maintained the motel room where the contraband was found, and that the trial court thus erred in denying her motion to dismiss this charge. Defendant submits that the room was rented to Fain, and that the State presented no evidence that defendant kept or otherwise maintained the room. We agree with defendant and reverse the trial court on this charge.

Defendant was charged with knowingly and intentionally maintaining a motel room used for keeping or selling controlled substances under North Carolina General Statutes section 90-108(a)(7). This statute, in pertinent part, makes it unlawful for any person "[t]o knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, . . . which is used for the keeping or selling of [a controlled substance]." N.C. Gen. Stat. § 90-108(a)(7) (1999). "Maintain means to 'bear the expense of; carry on . . . hold or keep in an existing state or condition.' " *State v. Allen*, 102 N.C. App. 598, 608, 403 S.E.2d 907, 913 (1991) (quoting Black's Law Dictionary 859 (5th ed. 1979)), *reversed on other grounds*, 332 N.C. 123, 418 S.E.2d 225 (1992). In determining whether or not a person "keep[s] or maintain[s]" a place within the meaning of section 90-108(a)(7), this Court considers several factors, including "ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of repair expenses; and payment of rent." *State v. Bowens*, 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001).

In the instant case, the State presented evidence supporting only one of the above-stated factors, namely, defendant's occupancy of the

motel room. The evidence tended to show that defendant had access to a key, spent the previous night in the motel room, and was present when law enforcement officials discovered the contraband. The State presented no evidence, however, that defendant "b[ore] the expense of" or otherwise maintained the motel room in any way. Defendant did not rent the room or otherwise finance its upkeep. Moreover, defendant had occupied the room for less than twenty-four hours when law enforcement arrived. Under these facts, the State failed to present sufficient evidence from which a reasonable jury could conclude that defendant maintained the motel room. *See State v. Hamilton*, 145 N.C. App. 152, 157-58, 549 S.E.2d 233, 234-35 (2001); *Bowens*, 140 N.C. App. at 222, 535 S.E.2d at 873 (both holding that the charge of maintaining a dwelling to keep or sell controlled substances should have been dismissed where there was no evidence that the defendant owned or leased the dwelling, or otherwise had any responsibility for the payment of utilities or general upkeep of the residence, although there was evidence in each case that the defendant resided at the dwelling). The trial court erred by denying defendant's motion to dismiss the charge of maintaining a motel room to keep or sell controlled substances.

[2] Defendant next argues that there was insufficient evidence that she constructively possessed the marijuana or the drug paraphernalia seized in Room 229. Defendant notes that no drugs or contraband were found on her person, and asserts that numerous persons spent time in Room 229 during the previous evening. Defendant further notes that the room was rented to Fain, and that the duffle bag belonged to Henderson. As such, defendant argues that there was no evidence that she possessed marijuana or drug paraphernalia. We disagree.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged. *See State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984). "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). When reviewing the evidence, the trial court must consider even incompetent evidence in the light most favorable to the prosecution, granting the State the benefit of every reasonable inference. *See State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). Any contradictions or discrepancies in the evidence should be resolved by the jury. *See id.*

"Constructive possession of contraband material exists when there is no actual personal dominion over the material, but there is an intent and capability to maintain control and dominion over it." *Id.* at 568, 313 S.E.2d at 588. Where sufficient incriminating circumstances exist, constructive possession of the contraband materials may be inferred even where possession of the premises is nonexclusive. *See id.* at 569, 313 S.E.2d at 588-89. Evidence placing the accused within close proximity to the contraband may support a jury's conclusion that the contraband was in the accused's possession, thereby justifying the denial of a motion to dismiss. *See State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972).

In the instant case, defendant did not maintain exclusive possession of the premises. We must therefore determine whether sufficient incriminating circumstances exist to infer that defendant had the intent and capability to maintain control and dominion over the contraband. *See State v. Givens*, 95 N.C. App. 72, 78, 381 S.E.2d 869, 872 (1989).

The State's evidence indicated that law enforcement officers found defendant with one other person in a small motel room filled with marijuana smoke. Defendant was "stoned," and a quantity of marijuana and drug paraphernalia were in plain view. "A defendant's presence on the premises and close proximity to a controlled substance is a circumstance which may support an inference of constructive possession." *Id.* at 78, 381 S.E.2d at 872. Further, defendant had spent the previous night in the motel room and had equal access to the room key. *See Brown*, 310 N.C. at 569, 313 S.E.2d at 589 (holding that defendant's possession of a key to the apartment where contraband was found showed sufficient control over the premises for constructive possession).

Giving the State the benefit of all reasonable inferences that may be drawn from the circumstances, the evidence is sufficient for a reasonable juror to conclude that defendant had the power and intent to exercise control over the marijuana and drug paraphernalia. *See State v. Autry*, 101 N.C. App. 245, 252-53, 399 S.E.2d 357, 361-62 (1991) (upholding defendant's conviction for constructive possession of cocaine although defendant had no control of the premises and was found with two other persons standing near the cocaine); *Givens*, 95 N.C. App. at 78, 381 S.E.2d at 872-73 (holding that constructive possession was proper where defendant was arrested in the same room where police found cocaine in plain sight). We therefore overrule defendant's second and third assignments of error.

In conclusion, we hold that defendant's conviction for maintaining a motel room used to keep or sell a controlled substance must be reversed. We otherwise find no error by the trial court.

Reversed and remanded in part.

Judges HUDSON and TYSON concur.

ROBERT COLEMAN PRATT, JR., AND WIFE, JUDITH ELLIS PRATT, PLAINTIFFS V. JACK S. STATON, DEFENDANT

No. COA00-1415

No. COA01-128

(Filed 18 December 2001)

Appeal and Error— preservation of issues—interlocutory appeal—Rule 60 motion to add certification

An appeal was dismissed as interlocutory where the trial court's original order was not certified for appellate review pursuant to N.C.G.S. § 1A-1, Rule 54(b) and plaintiffs failed to argue in their brief that delay would deprive them of a substantial right. Although plaintiffs subsequently filed a motion to amend the order pursuant to N.C.G.S. § 1A-1, Rule 60 to add the certification, Rule 60(a) provides a limited mechanism to amend erroneous judgments and is not an appropriate means for seeking an amendment to add a Rule 54(b) certification, and Rule 60(b)(6) applies only to final judgments, orders, or proceedings and has no application to interlocutory orders.

Appeal by plaintiffs from order entered 11 August 2000 (COA00-1415) and appeal by plaintiffs from amended order entered 10 October 2000 (COA01-128) by Judge Loto G. Caviness in Jackson County Superior Court. Heard in the Court of Appeals 8 October 2001.

McGuire, Wood & Bissette, P.A., by Grant B. Osborne, for plaintiff-appellants.

Coward, Hicks & Siler, P.A., by William H. Coward, for defendant-appellee.

CAMPBELL, Judge.

Plaintiffs filed two interrelated appeals from orders granting defendant's motion to dismiss plaintiffs' claims for violation of restrictive covenants and unfair and deceptive trade practices. Upon plaintiffs' motion, the appeals were consolidated for argument pursuant to N.C. R. App. P. 40. The appeals remain consolidated for decision in this opinion. For the reasons stated herein, we dismiss both of plaintiffs' appeals.

On 3 March 2000, plaintiffs filed the instant action alleging defendant had cut and removed trees from plaintiffs' property in order to create a scenic view from defendant's adjacent tract of property over plaintiffs' property, thereby enhancing the market value of defendant's property and causing substantial damage to plaintiffs' property. Based on defendant's alleged misconduct, plaintiffs asserted claims against defendant for trespass to real property, violation of N.C. Gen. Stat. § 1-539.1, conversion, trespass to chattels, negligence and unfair and deceptive trade practices. Plaintiffs further alleged that defendant had cut down and removed several trees from his own property in violation of the restrictive covenants governing the parties' subdivision.

On 7 July 2000, defendant filed a motion to dismiss plaintiffs' claims for violation of restrictive covenants and unfair and deceptive trade practices. Defendant's motion was granted and the respective claims were dismissed by order filed 11 August 2000. Plaintiffs filed timely notice of appeal from the trial court's order of dismissal. On 22 September 2000, subsequent to filing notice of appeal in COA00-1415, plaintiffs filed a "Motion To Correct Order Dismissing Claims For Relief." Specifically, plaintiffs moved the trial court to amend its 11 August 2000 order by certifying it for immediate appellate review pursuant to N.C. R. Civ. P. 54(b) (Rule 54(b)). On 10 October 2000, the trial court entered an amended order of dismissal which contained the trial court's Rule 54(b) certification. Plaintiffs subsequently filed timely notice of appeal from the trial court's amended order (COA01-128).

The dispositive issue on appeal is whether the respective orders are properly before this Court for review. Although neither party has raised and addressed the interlocutory nature of plaintiffs' appeals, we raise the issue of appealability on our own motion. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). "Where a trial court's order . . . fails to resolve all issues between all parties in an

action, the order is not a final judgment, but rather is interlocutory." *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999). An order, such as the orders *sub judice*, granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order. *See Thompson v. Newman*, 74 N.C. App. 597, 328 S.E.2d 597 (1985).

As a general rule, an interlocutory order is not immediately appealable. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999). However, an interlocutory order may be immediately appealed where it is certified for appellate review pursuant to Rule 54(b), or "where delaying the appeal will irreparably impair a substantial right of the party." *Id.* Here, the trial court's 11 August 2000 order granting defendant's motion to dismiss was not certified by the trial court pursuant to Rule 54(b). Thus, it is immediately appealable only if delay would irreparably impair a substantial right of plaintiffs.

However, plaintiffs failed to present argument in their brief to this Court to support our acceptance of this interlocutory appeal.

> It is not the duty of this Court to construct arguments for or find support for appellant[s'] right to appeal from an interlocutory order; instead, the appellant[s have] the burden of showing this Court that the order deprives the appellant[s] of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Since plaintiffs have failed to argue how delaying appeal of the trial court's 11 August 2000 order would deprive them of a substantial right, we dismiss plaintiffs' appeal of the 11 August 2000 order as interlocutory.

Apparently realizing that the trial court's 11 August 2000 order was interlocutory, and hoping to secure its immediate appellate review, plaintiffs filed a motion to correct the order pursuant to N.C. R. Civ. P. 60 (Rule 60), seeking amendment of the order to reflect the trial court's Rule 54(b) certification. Plaintiffs relied on both Rule 60(a) and Rule 60(b)(6) as grounds for their motion to correct the order. However, for the following reasons, we hold that neither Rule 60(a) nor Rule 60(b)(6) is the appropriate tool for seeking to amend an order to add the trial court's Rule 54(b) certification. Therefore,

the trial court's 10 October 2000 amended order is vacated and plaintiffs' appeal in COA01-128 is likewise dismissed.

Rule 60(a) provides a limited mechanism for trial courts to amend erroneous judgments. Specifically, Rule 60(a) provides, in pertinent part:

> (a) Clerical mistakes.—Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. . . .

N.C. R. Civ. P. 60(a) (1999).

"While Rule 60[a] allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment." *Food Service Specialists v. Atlas Restaurant Management*, 111 N.C. App. 257, 259, 431 S.E.2d 878, 879 (1993). "A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order." *Buncombe County ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993). We conclude that the 10 October 2000 amended order impermissibly altered the effect of the 11 August 2000 order.

We find this Court's prior decision in *Food Service* to be closely analogous to the present situation. In that case, the trial court, on its own initiative and purportedly pursuant to Rule 60(a), amended a previous order by changing the date of entry of judgment from 2 October 1991 to 21 January 1992. However, the actual date judgment was entered was 13 December 1991. In holding that this was an improper exercise of Rule 60(a), we stated, "[b]y changing the incorrect date of entry of judgment (2 October 1991) to a date other than 13 December 1991, the actual date judgment was entered, the trial court improperly altered the substantive rights of the parties by extending the period in which the parties could file a timely notice of appeal." *Food Service*, 111 N.C. App. at 259-60, 431 S.E.2d at 879.

We conclude that by adding the trial court's Rule 54(b) certification and establishing grounds for immediate appellate review of an otherwise interlocutory order, the trial court's 10 October 2000 amended order likewise "altered the substantive rights of the parties." *Id.* As in *Food Service*, the amended order in the instant case allowed plaintiffs to circumvent the established procedural rules

governing the bringing of an appeal and secure appellate review of an otherwise unappealable order. Accordingly, we hold that Rule 60(a) is not an appropriate means for seeking an amendment to an order or judgment to add the trial court's Rule 54(b) certification.

Plaintiffs also cited Rule 60(b)(6) as grounds for their motion to correct the 11 August 2000 order. Rule 60(b) reads, in pertinent part:

> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a *final* judgment, order, or proceeding for the following reasons:
>
> . . . .

N.C. R. Civ. P. 60(b) (emphasis added). By its express terms, Rule 60(b) only applies to final judgments, orders, or proceedings; it has no application to interlocutory orders. *Sink v. Easter*, 288 N.C. 183, 193, 217 S.E.2d 532, 540 (1975); *O'Neill v. Bank*, 40 N.C. App. 227, 230, 252 S.E.2d 231, 234 (1979). Since the trial court's 11 August 2000 order only granted defendant's motion to dismiss two, but not all, of plaintiffs' claims, it is not a final judgment or order. Thus, plaintiffs' motion to correct the order could not, as a matter of law, have been proper under Rule 60(b), and the trial court should not have considered the motion. *See Hooper v. Pizzagalli Construction Co.*, 112 N.C. App. 400, 408, 436 S.E.2d 145, 150-51 (1993) (holding that a Rule 60 motion was appropriately denied where it sought relief from an order dismissing less than all of the claims in an action). Therefore, we vacate the trial court's 10 October 2000 amended order and dismiss plaintiffs' appeal in COA01-128.

In summary, we dismiss plaintiffs' appeal in COA00-1415, and we vacate the trial court's 10 October 2000 amended order and dismiss plaintiffs' appeal from said vacated order in COA01-128.

Appeals dismissed and order vacated.

Chief Judge EAGLES and Judge HUDSON concur.

TANESHA HARDESTY v. OSCAR ALDRIDGE

No. COA01-153

(Filed 18 December 2001)

Costs— attorney fees—personal injury—judgment finally obtained greater than offer of judgment

The trial court did not abuse its discretion in a personal injury action by awarding attorney fees of $2,625.00 under N.C.G.S. § 6-21.1 to plaintiff even though defendant made a settlement offer of $1,997.50 and plaintiff only received a jury verdict of $350.00, because: (1) there is no allegation that the hours claimed or the amount per hour used in the calculation was unreasonable; and (2) the judgment finally obtained was more favorable to plaintiff than defendant's offer of judgment since the final amount is not merely the jury's verdict, but includes the award of attorney fees making the total $2,975.00.

Appeal by defendant from judgment entered 25 September 2000 by Judge Cheryl Spencer in Craven County District Court. Heard in the Court of Appeals 28 November 2001.

Chesnutt, Clemmons, Thomas & Peacock, by Gary H. Clemmons, for plaintiff-appellee.

Walker, Clark, Allen, Herrin & Morano, by Jeffrey T. Ammons and Gay P. Stanley, for defendant-appellant.

THOMAS, Judge.

Defendant, Oscar Aldridge, appeals from a judgment awarding attorney fees to plaintiff, Tanesha Hardesty, in a personal injury action resulting from an automobile accident. For the reasons discussed herein, we affirm the trial court and remand the issue of attorney fees pending appeal.

The facts are as follows: On 28 January 1997, a vehicle owned and operated by defendant struck the vehicle plaintiff was operating. Plaintiff sustained injuries and was first treated at the Craven Regional Medical Center emergency room and then at a chiropractic center.

Subsequently, defendant's insurance carrier, Allstate Insurance Company (Allstate), engaged in negotiations with plaintiff's counsel.

Allstate offered to settle for a total of $1,997.50, which equaled the amount of medical bills, but the offer was refused and suit was filed on 28 October 1997.

There was no answer to the complaint and plaintiff obtained a default judgment of $5,000 plus $2,134 for costs, interest, and attorney fees against defendant. Allstate, however, filed a motion to vacate the judgment because plaintiff had never forwarded a copy of the complaint to the company. Plaintiff signed a consent order to both vacate the entry of default and set aside the judgment. Defendant then filed an answer, which included a Rule 68 offer of judgment for $1,997.50.

In May 2000, a jury returned a verdict for plaintiff in the amount of $350. On 25 September 2000, the trial court granted plaintiff's motion for attorney fees and awarded $2,625.00. Defendant appeals the order.

By defendant's sole assignment of error, he argues the trial court abused its discretion in granting plaintiff's motion for attorney fees pursuant to N.C. Gen. Stat. § 6-21.1. We disagree.

The North Carolina General Statutes provide:

> In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C. Gen. Stat. § 6-21.1 (1999). Under this statute, the trial court is given the discretion to award attorney fees to the prevailing party. *See Porterfield v. Goldkuhle*, 137 N.C. App. 376, 528 S.E.2d 71 (2000). The trial court's ruling will not be disturbed on appeal absent a showing of abuse of discretion. *West v. Tilley*, 120 N.C. App. 145, 461 S.E.2d 1 (1995). An abuse of discretion occurs when the trial court's ruling "is so arbitrary that it could not have been the result of a reasoned decision." *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App.

101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998) (citations omitted).

When determining whether to award attorney fees, the trial court must consider the entire record, including the following factors: (1) settlement offers made prior to institution of the action; (2) offers of judgment made pursuant to Rule 68 and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in a case of unwarranted refusal by an insurance company to pay the claim, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of settlement offers as compared to the jury verdict. *Washington v. Horton*, 132 N.C. App. 347, 351-52, 513 S.E.2d 331, 334-35 (1999).

The trial court made findings as to those factors as follows: (1) Allstate engaged in settlement negotiations with plaintiff before the institution of suit and offered $1,997.50. Plaintiff, in turn, rejected it. (2) After suit had been filed, defendant served an offer of judgment for the same amount. It was also rejected by plaintiff. Plaintiff had incurred costs of $67, her counsel had expended a total of 17.50 hours, $150 per hour was reasonable as attorney fees, and plaintiff was in sum entitled to $2,625 in attorney fees. Attorney fees plus the jury verdict of $350 totals $2,975, which is the judgment finally obtained. The judgment finally obtained is more favorable to plaintiff than the offer of $1,997.50. (3) The trial court's findings of fact did not mention whether defendant may have unjustly exercised superior bargaining power. However, " 'the absence of such a finding does not require reversal when the trial court made adequate findings on the whole record to support an award of attorney's fees.' " *Davis v. Kelly*, 147 N.C. App. 102, 554 S.E.2d 402 (2001) (quoting *Olson v. McMillan*, 144 N.C. App. 615, 619, 548 S.E.2d 571, 573-74 (2001). (4) There was no unwarranted refusal by Allstate to pay the claim. This finding is not necessary since the suit was not on an insurance policy. *See Crisp v. Cobb*, 75 N.C. App. 652, 331 S.E.2d 255 (1985). (5) One of the settlement offers was made before suit, and one after, both in the amount of $1,997.50. (6) The jury verdict was $350.

Detailed findings are not required for each factor. *Tew v. West*, 143 N.C. App. 534, 546 S.E.2d 183 (2001). These excerpts are adequate findings of fact based on the whole record. Additionally, we note an award of attorney fees must be reasonable. The trial court found here that the award was reasonable and, further, there is no allegation

that the hours claimed or the amount per hour used in the calculation was unreasonable.

Lastly, defendant argues the judgment finally obtained was not more favorable to plaintiff than defendant's offer of judgment. We disagree. In *Tew*, where the offer amount was $5,000, the jury's verdict was $5,000, and the trial court had awarded the plaintiff $555 in costs and $3,937.50 in attorney fees, this Court held that the judgment finally obtained "is not merely the jury's verdict" but the final amount awarded to the plaintiff, $9,492.50. *Id.* Our Supreme Court has defined "judgment" as " '[t]he final decision of the *court* resolving the dispute and determining the rights and obligations of the parties,' and '[t]he law's last word in a judicial controversy.' " *Poole v. Miller*, 342 N.C. 349, 352, 464 S.E.2d 409, 411 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 722 (1996) (quoting Black's Law Dictionary 841-42 (6th ed. 1990)). Because the order contains the $350 jury verdict and attorney fees of $2,625, we hold the trial court did not abuse its discretion in awarding attorney fees to plaintiff.

Furthermore, plaintiff has moved, in this Court, for attorney's fees for work performed during the appellate process. This Court has held that the trial court has authority, pursuant to section 6-21.1 to award such fees. *See Hill v. Jones*, 26 N.C. App. 168, 215 S.E.2d 168, *cert. denied*, 288 N.C. 240, 217 S.E.2d 664 (1975). Accordingly, we remand this case for the limited purpose of allowing the trial court, in its discretion and upon plaintiff's motion, to make findings of fact relevant to a determination of reasonable attorney's fees for services rendered on appeal and to enter an award consistent with those findings. *See Davis v. Kelly*, 147 N.C. App. 102, 554 S.E.2d 402 (2001).

AFFIRMED AND REMANDED.

Judges WYNN and WALKER concur.

MELISSA RENEE JENKINS, PLAINTIFF v. HAN PYO CHOONG, M.D. AND ALEXANDER COMMUNITY HOSPITAL, INC., DEFENDANTS

No. COA01-175

(Filed 18 December 2001)

Appeal and Error— appealability—denial of motion for Rule 11 sanctions

An appeal was dismissed as interlocutory, despite certification pursuant to N.C.G.S. § 1A-1, Rule 54(b), where plaintiff sought to appeal from the denial of Rule 11 sanctions. The denial of the motion for sanctions does not implicate a substantial right which will be lost if this particular case moves forward to a final judgment.

Appeal by plaintiff from order entered 2 November 2000, and amended 22 November 2000, by Judge William Erwin Spainhour in Alexander County Superior Court. Heard in the Court of Appeals 5 November 2001.

Twiggs, Abrams, Strickland & Rabenau, P.A., by Howard F. Twiggs, Donald R. Strickland, and Jeff E. Essen; and Richard S. Hunter, Jr., for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James P. Cooney III; and Northup & McConnell, P.L.L.C., by Isaac N. Northup, Jr., and Elizabeth E. McConnell, for defendant-appellee Choong.

Roberts & Stevens, by Jacqueline Grant and Jim Williams, for defendant-appellee Alexander Community Hospital, Inc.

Kuniholm Law Firm, by Elizabeth F. Kuniholm, for North Carolina Academy of Trial Lawyers, amicus curiae.

Carruthers & Roth, P.A., by Richard L. Vanore and Norman F. Klick, Jr., for North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

Plaintiff appeals from the trial court's order denying plaintiff's motion for sanctions against counsel for Han Pyo Choong, M.D. (hereinafter "defendant"). Plaintiff claims that defendant's counsel, Elizabeth McConnell, violated the Rules of Professional Conduct and case law prohibiting *ex parte* communication between an attorney

and a non-party treating physician by mailing a letter complete with attachments to one of plaintiff's physicians prior to his deposition. The trial court denied plaintiff's request for sanctions, concluding as a matter of law that defense counsel violated neither the North Carolina Supreme Court's holding in *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990), nor Ethics op. RPC 162, which prohibits communication "with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents." The trial court certified the order for appellate review pursuant to G.S. § 1A-1, Rule 54(b).

A litigant is entitled to appeal either from a final judgment or from an interlocutory order which affects a substantial right. *Hart v. F.N. Thompson Const. Co.*, 132 N.C. App. 229, 511 S.E.2d 27 (1999) (citing N.C. Gen. Stat. § 1-277(a); N.C. Gen. Stat. § 7A-27). An interlocutory order affects a substantial right when the order "deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991) (citation omitted). Our Supreme Court has held that it is typically necessary to determine whether a substantial right is affected on a case by case basis " 'by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.' " *Sharpe v. Worland*, 351 N.C. 159, 162-63, 522 S.E.2d 577, 579 (1999) (citation omitted). Although a trial court may certify the issues for immediate review pursuant to G.S. § 1A-1, Rule 54(b) and G.S. § 1-277, this certification does not bind the appellate court because " 'ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.' " *First Atlantic Management Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 61 (1998) (quoting *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984)).

As a general rule, discovery orders do not affect a substantial right and are not immediately appealable. *See Norris v. Sattler*, 139 N.C. App. 409, 533 S.E.2d 483 (2000) (denial of defendant-hospital's motion seeking permission to contact non-party physician, who allegedly caused the plaintiff's injury, did not implicate substantial right of the hospital because the hospital could gather evidence through formal discovery). Although North Carolina's appellate courts have permitted review of discovery orders when a substantial right is affected, no North Carolina court has allowed review of the denial of a motion for sanctions for an alleged violation of the rules

against *ex parte* communications on the grounds that a substantial right is affected. The trial court's order denying plaintiff's motion for sanctions does not implicate a substantial right of plaintiff which will be lost if this particular case moves forward to a final judgment.

Appeal dismissed.

Panel consisting of:

EAGLES, C.J., MARTIN, and BIGGS, JJ.

LASSIE M. SHARPE, PLAINTIFF v. DAVID ERIC WORLAND, GREENSBORO ANESTHESIA ASSOCIATES, P.A., WESLEY LONG COMMUNITY HOSPITAL, INC., JOHN DOES I THROUGH XXV, AND JANE DOES I THROUGH XXV, DEFENDANTS

No. COA00-1471

(Filed 18 December 2001)

Medical Malpractice— prefiling certification—ordinary negligence claim against hospital

Assuming that N.C.G.S. § 1A-1, Rule 9(j) is constitutional, the medical malpractice pre-filing certification requirement did not bar corporate negligence claims against a hospital because plaintiff did not allege that the hospital committed medical malpractice. Rule 9(j) certification is not necessary for ordinary negligence claims, even if defendant is a health care provider.

Appeal by plaintiff from order entered 13 July 1999 by Judge Russell G. Walker in Superior Court, Guilford County. Heard in the Court of Appeals 7 November 2001.

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

Sharpless & Stavola, by Joseph M. Stavola and Joseph P. Booth, III for defendant-appellant.

WYNN, Judge.

We recited the facts of this matter in *Sharpe v. Worland*, 137 N.C. App. 82, 527 S.E.2d 75 (2000). In brief, Lassie M. Sharpe brought claims against Wesley Long Community Hospital and others for

alleged injuries arising from the negligent provision of medical care to her.

On 15 November 1993, an anesthesiologist gave Ms. Sharpe an epidural for post-surgery pain management. The anesthesiologist and his practice group had the exclusive contractual right to provide anesthesia services at the Wesley Long Community Hospital. While administering the epidural, the anesthesiologist injured Ms. Sharpe's spinal cord resulting in injury to her including an inability to walk.

On 21 May 1999, Wesley Long Community Hospital filed a Motion to Dismiss, citing plaintiff's failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. On 13 July 1999, the trial court dismissed all of plaintiff's claims including her common law corporate negligence claims, *res ipsa loquitor* claims, and respondeat/vicarious liability claims against Wesley Long Community Hospital.[1]

Recently in *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 62 (2001), a different panel of this Court held that the pre-filing certification of Rule 9 (j) of the North Carolina Rules of Civil Procedure was unconstitutional and void. Thus, we must reverse the trial court's dismissal of this matter on the basis of Rule 9(j). Nonetheless, we hold that even if Rule 9(j) was a constitutionally affirmed law, it would not control the outcome of plaintiff's claim of corporate negligence because it was based on ordinary negligence rather than medical malpractice.

In its brief, Wesley Long Community Hospital argued that since plaintiff's corporate negligence claims involved hospital staff, the trial court properly dismissed her action for failure to comply with Rule 9(j). It further contended that an action against a hospital arising out of furnishing or failure to furnish professional services in the performance of medical care is a "medical malpractice action" action. *See* N.C. Gen. Stat. § 90-21.11 (2001).

Rule 9(j) requires that, at the time a plaintiff files a complaint, the plaintiff must certify that the medical care at issue has been reviewed by a witness reasonably expected to qualify as an expert under Rule 702 of the Rules of Evidence, and who is willing to testify that the

1. The claims against the anesthesiologist and his practice group were resolved on 21 July 2000, when the plaintiff settled her claims against them. In the Notice of Voluntary Dismissal, the plaintiff noted that "no other party to this action is dismissed by this Notice of Dismissal, by way of example and not limitation, the action against Wesley Long Community Hospital, Inc. is not dismissed by this Notice of Dismissal."

medical care did not comply with the applicable standard of care. *See* N.C. Gen. Stat. § 1A-1, Rule 9 (j) (1999). Compliance with Rule 9(j) must be made at the time the complaint is filed. *See Keith v. North Hosp. District of Surry County*, 129 N.C. App. 402, 499 S.E.2d 200, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 646 (1998).

However, nowhere in Ms. Sharpe's allegations does she claim that the Wesley Long Community Hospital committed medical malpractice, breached applicable standard of care or provided medical care to Ms. Sharpe. Instead, the Complaint alleged that Wesley Long Community Hospital violated direct duties owed to plaintiff. Rule 9(j) certification is not necessary for ordinary negligence claims, even if defendant is a health care provider. *See Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998). We find ample authority that Wesley Long Community Hospital's independent duties owed to Ms. Sharpe can be judged by a "reasonable person standard" which does not require expert testimony at trial. *See Muse v. Charter Hosp. of Winston Salem, Inc.*, 117 N.C. App. 468, 452 S.E.2d 589, *review on add'l issues denied*, 340 N.C. 114, 455 S.E.2d 663, *decision affirmed*, 342 N.C. 403, 464 S.E.2d 44 (1995); *Blanton v. Moses H. Cone Hosp., Inc.*, 319 N.C. 372, 354 S.E.2d 455 (1987); *Burns v. Forsyth County Memorial Hosp. Auth., Inc.*, 81 N.C. App. 556, 344 S.E.2d 839 (1986).

Finally, we note that since this Court's decision in *Anderson* remains on appeal to our Supreme Court as a matter of right, we summarily hold that if Rule 9(j) was indeed constitutionally sound, then our decision on the remaining issues in this appeal would be: (1) No expert was needed to support plaintiff's claim based on *res ipsa loquitor*; (2) Plaintiff did not satisfy the requirements of Rule 9(j) with respect to the claims based on nursing care; and, (3) Plaintiff's notice of appeal to this Court was timely filed.

Reversed.

Judges WALKER and THOMAS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 DECEMBER 2001

AUTEN v. LICOMFELT No. 01-437	Iredell (98CVD1701)	Reversed and remanded
BEASLEY v. DIV. OF MOTOR VEHICLES No. 00-1157	Nash (99CVS1635)	Affirmed
BROWN v. HOECHST CELANESE No. 00-1461	Ind. Comm. (I.C. 237849)	Affirmed
BYRON v. CAROLINA ORTHOPAEDIC SPECIALISTS, P.A. No. 00-1440	Catawba (00CVS1931)	Affirmed
FIRST UNION NAT'L BANK v. BURGESS No. 00-1404	Forsyth (99CVS2488)	Affirmed
GASTON CTY. ex rel. WEST v. SANDERS No. 00-1096	Gaston 90CVD2566	Motion to dismiss allowed; appeal dismissed; motions dismissed
GWATHNEY v. CHARLES D. GOODWIN, INC. No. 01-54	Ind. Comm. (I.C. 446162) (I.C. 446581)	Affirmed
HALL v. TOREROS II, INC. No. 00-1446	Durham (98CVS1903)	Dismissed
HICKS v. ALFORD No. 01-527	Forsyth (99CVD1902)	Vacated and remanded
HILL v. HILL No. 00-381-2	Carteret (96-CVS-1157)	No error
HOFFMAN v. GWYNN No. 00-1476	Onslow (99SP135)	Affirmed
IN RE NORTON No. 00-1396	Buncombe (98J264)	Affirmed
IN RE RIDDICK No. 01-177	Perquimans (99J5)	Affirmed
IN RE SEVERANCE No. 01-611	Iredell (98J194) (98J195)	Affirmed
KENNEDY v. SPENCER No. 00-1475	Tyrrell (98CVS43)	Dismissed

LUDWIG v. HUANG No. 01-354	Wake (98CVD13076)	Dismissed
McCRIMMON v. HIRAM'S WOODS, LLC No. 01-364	Moore (96SP71)	Affirmed
MORGAN v. MORGAN No. 01-97	Scotland (97CVS653)	Affirmed
STATE v. ALIBO No. 00-1259	Wake (00CRS1997) (00CRS1998) (00CRS1999) (00CRS2000)	No error
STATE v. ALLEN No. 00-1395	Gaston (99CRS27446) (99CRS27447) (99CRS40379) (99CRS42220) (00CRS52140) (00CRS52141) (00CRS52142) (00CRS52144)	Affirmed
STATE v. BARNES No. 00-1386	Gaston (98CRS16220) (98CRS16222) (98CRS16229)	No error
STATE v. BRINKLEY No. 01-411	Halifax (99CRS3140)	Affirmed
STATE v. BROOKS No. 01-243	Gaston (99CRS15568) (99CRS15569) (99CRS15570) (99CRS15571) (99CRS15572) (99CRS15573) (99CRS15574) (99CRS15575) (99CRS15576) (99CRS15577)	No error
STATE v. BROOKS No. 01-264	Wake (99CRS028345)	No error
STATE v. BUEY No. 00-1263	Forsyth (00CRS50611)	No error
STATE v. CASTILLO No. 01-86	Wilson (99CRS54890)	No prejudicial error

STATE v. CONGLETON No. 01-456	Wake (97CRS5049) (97CRS5050)	Affirmed
STATE v. DAVIS No. 00-1431	Alamance (00CRS632)	No error
STATE v. ELLIOT No. 00-1216	Union (99CRS007778) (00CRS001839)	No error
STATE v. FEIMSTER No. 01-368	Iredell (99CRS13684) (99CRS13685) (99CRS13686) (99CRS13688) (99CRS16747)	Motion allowed; no error at trial
STATE v. FLORES No. 01-16	Forsyth (99CRS21912) (99CRS21913) (99CRS21914)	No error
STATE v. FOREMAN No. 00-1015	Hertford (97CRS127) (97CRS196)	No error
STATE v. FRAZIER No. 00-1517	Wake (00CRS26501) (00CRS26502) (00CRS26503) (00CRS26504) (00CRS26505) (00CRS29528)	No error
STATE v. GREEN No. 01-492	Mecklenburg (99CRS18051) (99CRS18052) (99CRS18053) (99CRS18054) (99CRS18055) (99CRS18056)	Remanded with instructions
STATE v. HANKS No. 00-1227	Caswell (99CRS620)	No error
STATE v. HARSHAW No. 01-424	Caldwell (00CRS934)	No error
STATE v. HEDGEPETH No. 01-166	Nash (99CRS13483)	Affirmed
STATE v. JOHNSON No. 01-337	Forsyth (00CRS50002)	No error

STATE v. JONES No. 00-1276	Alamance (99CRS53735) (99CRS53737) (99CRS53738) (99CRS53739) (99CRS53740) (99CRS53741) (99CRS53742) (99CRS53743) (99CRS53744) (99CRS53745) (99CRS53746) (99CRS53765) (99CRS53766) (99CRS53767)	Affirmed
STATE v. JONES No. 01-205	Mecklenburg (98CRS150713) (98CRS150714) (98CRS150715)	No error
STATE v. KAYLOR No. 01-395	Burke (96CRS11433) (97CRS3174)	No error
STATE v. KERR No. 00-1330	Rowan (94CRS3342) (94CRS3343)	No error
STATE v. LOWERY No. 00-1249	Robeson (95CRS19922)	No error
STATE v. MARTIN No. 00-1298	Mecklenburg (98CRS14171) (98CRS14172) (98CRS14173) (98CRS14176) (98CRS14177) (98CRS14178) (98CRS14180) (98CRS14181) (98CRS14183)	No error
STATE v. MARTINEZ No. 00-1025	Cumberland (98CRS070450)	New trial
STATE v. McCOOK No. 01-260	Forsyth (99CRS53461) (99CRS53462) (99CRS53463)	Reverse
STATE v. McMILLAN No. 00-1510	Scotland (94CRS1825) (94CRS1826) (94CRS1827)	No error

STATE v. MITCHELL No. 00-1529	Lenoir (99CRS8605) (99CRS11393)	No prejudicial error; remanded for correction of judgment
STATE v. MUNDAY No. 01-549	Catawba (00CRS3547)	No error
STATE v. MURPHY No. 01-334	Forsyth (00CRS52325)	No error
STATE v. NARDONE No. 01-340	Buncombe (00CRS4551) (00CRS4552)	No error
STATE v. NELMS No. 00-1301	Graham (98CRS822)	No error
STATE v. PATTERSON No. 00-1318	Guilford (98CRS89654) (98CRS89655) (98CRS89656)	No error
STATE v. PETIT No. 01-174	Robeson (93CRS13282)	Affirmed
STATE v. PUGH No. 00-1364	Alamance (99J19)	Affirmed
STATE v. SCURLOCK No. 00-1365	Randolph (99CRS11172)	New trial
STATE v. SMITH No. 01-5	Robeson (99CRS7714) (99CRS7715)	Affirmed
STATE v. SOTO No. 01-310	Guilford (98CRS40982)	No error
STATE v. WADE No. 01-343	Rockingham (99CRS12363)	No error
STATE v. WASHINGTON No. 01-506	Wake (99CRS30734)	No error
STATE v. WIGGINS No. 00-1388	Mecklenburg (99CRS992) (99CRS993) (99CRS994) (99CRS995)	No error
STATE v. WINDHAM No. 01-182	Onslow (98CRS17530)	No error

STATE v. WOODY No. 01-188	Cleveland (99CRS13679) (00CRS5102) (00CRS5103)	No error
TANNER v. BD. OF COMM'RS OF MOORE CTY. No. 00-1399	Moore (00CVS409)	Reversed
YOUNTZ v. YOUNTZ No. 00-1344	Davidson (99CVD1690)	Affirmed

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

to redact a reference to a polygraph from one of the exhibits where defendant requested that the exhibit be published to the jury even though the court warned that it was not properly redacted. If admission of this evidence was error, it was invited error. **State v. Barber, 69.**

No citation to authority—case of first impression—An assignment of error was not deemed abandoned where defendant did not cite authority in support of his argument because there was no such authority. It was sufficient that defendant stated an argument; otherwise, the ability of parties to bring cases of first impression would be inhibited. **State v. Stitt, 77.**

Notice of appeal—filing in county—timeliness—A motion to dismiss an appeal was denied where judgment was entered on 24 August and served on defendant on 1 September; defendant served notice of appeal upon plaintiff on 20 September 2000 but the notice of appeal was filed in the Court of Appeals rather than with the Clerk of Superior Court; a proper notice of appeal was filed with the Clerk of Superior Court on 10 October; and the certificate of service required by N.C.G.S. § 1A-1, Rule 5(d) was not filed until 26 October 2000. The running of the time for filing and serving a notice of appeal was tolled until plaintiff's compliance with the filing requirement of Rule 3(a) of the Rules of Appellate Procedure and defendant's notice of appeal was timely. **Davis v. Kelly, 102.**

Preservation of issues—composition of jury panel—no objection at trial—A first-degree murder defendant did not preserve for appellate review a challenge to the jury panel where she did not object at trial. A defendant must satisfy the requirements of N.C.G.S. § 15A—1211(c) to challenge the composition of a jury panel. **State v. Stroud, 549.**

Preservation of issues—constitutionality of act—not brought before trial court—An argument concerning the constitutionality of the N.C. Sex Offender and Public Protection Registration Program was not brought before the trial court and was not addressed on appeal. **State v. Parks, 485.**

Preservation of issues—failure to object—Although defendant contends the trial court committed plain error in an indecent liberties and first-degree sexual offense case by entering the jury room with the jury after the verdict was recorded but before the sentencing hearing, defendant failed to properly preserve this issue for appellate review because he did not object to the judge's behavior at trial, and plain error review applies only to instructions and evidence. **State v. Carpenter, 386.**

Preservation of issues—failure to object—plain error not asserted—Defendant waived his right to appellate review of the instructions given by the trial court where defendant did not object at trial and did not assert plain error in an assignment of error. **State v. Parks, 485.**

Preservation of issues—interlocutory appeal—Rule 60 motion to add certification—An appeal was dismissed as interlocutory where the trial court's original order was not certified for appellate review pursuant to N.C.G.S. § 1A-1, Rule 54(b) and plaintiffs failed to argue in their brief that delay would deprive them of a substantial right. Although plaintiffs subsequently filed a motion to amend the order pursuant to N.C.G.S. § 1A-1, Rule 60 to add the certification, Rule 60(a) provides a limited mechanism to amend erroneous judgments and is not an appropriate means for seeking an amendment to add a Rule 54(b) certifi-

CHILD ABUSE AND NEGLECT—Continued

date of the dispositional order to the termination of jurisdiction, and custody was restored to both parents by the order terminating jurisdiction prior to the ninety-day period. Once jurisdiction was terminated, the trial court had no further duty or authority to conduct reviews. Moreover, the parties had a right to file motions for review prior to termination, which would have abrogated the automatic termination of jurisdiction, but neither did so. **In re Dexter, 110.**

Findings—efforts of DSS unsuccessful—not required for neglect action—The trial court did not err in a child neglect action by not making findings that the efforts of DSS to work with plaintiff were not successful or that conditions would not likely be corrected within twelve months as required by N.C.G.S. § 7B-1111(a)(2). That statute refers to termination of parental rights actions. **In re Dexter, 110.**

Neglect—change of custody—sufficiency of findings—The trial court did not abuse its discretion by granting legal and physical custody of neglected children to their father where it was no longer in the children's best interests to stay with their mother. Although the mother argued that the evidence was not sufficient to support the best interests conclusion, the facts found by the trial court are binding absent an abuse of discretion. **In re Dexter, 110.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Attorney fees—findings—The trial court did not err by ordering a contempt defendant to pay plaintiff's attorney fees in the underlying child custody and support action where the initial action encompassed custody and support, rather than support only, so that the court was not required to find that defendant had refused to provide adequate child support; the court determined that the fee was reasonable and appropriate; and the court found that plaintiff was an interested party acting in good faith who did not have sufficient funds to employ counsel. **Reynolds v. Reynolds, 566.**

Calculation of father's income—prior year's part-time earnings—The trial court erred in a 2000 child support action by including defendant's part-time earnings in 1999 where defendant was not earning any part-time income at the time of the hearing. Child support obligations should be determined by a party's actual income at the time the order is made; a party's earning capacity may be used to calculate the award only if defendant deliberately depressed his income or deliberately acted in disregard of his obligation to provide support. **Hodges v. Hodges, 478.**

Support—effective date of order—The trial court abused its discretion in a child support case by setting the effective date of its order as 1 May 2000 as opposed to January 1999, the first month after the filing of the complaint, and the case is remanded to the trial court for findings of fact concerning the propriety of an award of prospective child support from the date of the filing of the complaint. **State ex rel. Miller v. Hinton, 700.**

Support—father's standard of living—no request for deviation from Guidelines—The trial court was not required to deviate from the Child Support Guidelines to ensure that defendant was able to maintain a minimum standard of living where defendant did not request a deviation from the Guidelines. **Hodges v. Hodges, 478.**

CONSTITUTIONAL LAW—Continued

locked and defendant could quit the program at any time. Defendant was not in custody and was no more entitled to credit for time spent in IMPACT than to time spent during required visits to his probation officer. **State v. Hearst, 298.**

Due process—opportunity to be heard—The trial court did not violate defendants' due process rights in a fraud, negligent misrepresentation, civil conspiracy, breach of fiduciary duty, unfair and deceptive trade practices, breach of contract, and negligence action by denying defendants an opportunity to be heard on a motion to compel production of client/investor documents as part of discovery. **Miles v. Martin, 255.**

Due process—unilateral modification of judgments—The trial court did not err by concluding that the North Carolina Department of Correction's policy of unilaterally modifying judgments to comply with state statutes even it this violated an inmate's plea agreement did not violate plaintiff inmates' due process rights. **Hamilton v. Freeman, 195.**

Effective assistance of counsel—defense counsel's cross-examination possibly bolstering the State's case—A defendant in a robbery with a dangerous weapon case was not deprived of effective assistance of counsel based on an allegation that defense counsel's extensive cross-examination regarding the shotgun possibly bolstered the State's case. **State v. McMillian, 707.**

Ineffective assistance of counsel—direct appeal—premature—A claim for ineffective assistance of counsel was prematurely asserted on direct appeal where defendant's arguments concerned potential questions of trial strategy and counsel's impressions and ineffective assistance of counsel could not be found on the face of the record. The procedure to determine those issues would be an evidentiary hearing through a motion for appropriate relief; defendant's direct appeal of this issue was dismissed without prejudice to his right to file that motion. **State v. Stroud, 549.**

Right to remain silent—testimony concerning silence—no prejudice—The trial court did not commit prejudicial error in an impaired driving prosecution by admitting testimony of defendant's failure to answer questions after he had been given his Miranda warnings. While a defendant's exercise of his constitutionally protected right to remain silent may not be used against him at trial, such a constitutional error will not warrant a new trial where it was harmless beyond a reasonable doubt. **State v. Lewis, 274.**

State's failure to disclose exculpatory evidence—prejudicial—The State violated a first-degree murders defendant's due process rights by failing to disclose cellular telephone records to defendant until after the trial where the trial court found that the records merely corroborated other evidence, but the records also lent crucial support to a witness whose credibility was questioned by the State. Given the court's finding at the motion for appropriate relief hearing that "very little additional evidence" could have changed the verdict and the jury's obvious difficulties in resolving the issues, it cannot be said that the State's failure to disclose exculpatory evidence did not create a reasonable probability of a different verdict. **State v. Barber, 69.**

CRIMINAL LAW—Continued

IDENTIFICATION OF DEFENDANTS—Continued

percentages of certainty to the words "sure" and "pretty sure" in her identification testimony. **State v. Cole, 637.**

In-court—improper pretrial identification—independent origin—The trial court did not err in a robbery with a dangerous weapon case by finding the victim's in-court identification to be of independent origin and by allowing the identification of defendant before the jury even though defendant contends the in-court identification was tainted by an improper pretrial identification. **State v. McMillian, 707.**

Photographic—computer generated display—The trial court did not err in a first-degree murder prosecution by admitting a witness's pre-trial and in-court identifications of defendant where the display contained 19 thumbnail photographs generated from a computerized system which matched descriptions given by witnesses and the detective merely asked if anyone looked like one of the perpetrators but did not make any comments or suggestions. **State v. Cole, 637.**

IMMUNITY

Sovereign—waiver—liability insurance—doctrine of quasi-estoppel—ministerial duty exception—The trial court erred in a sexual harassment case, based on defendant university's failure to take disciplinary action against a professor, by granting plaintiff students' motion to strike defendant's defense of sovereign immunity and by denying defendant's motion for summary judgment because the State and its agencies did not waive sovereign immunity by the purchase of liability insurance; to the extent sovereign immunity was waived, jurisdiction lies in the Industrial Commission; and the university is not barred from arguing its sovereign immunity defense by quasi-estoppel or the defense of ministerial duty. **Wood v. N.C. State Univ., 336.**

INDECENT LIBERTIES

Jury instruction—symptoms and syndromes—Although the trial court erred in an indecent liberties and first-degree sexual offense case by instructing the jury on expert opinion testimony on symptoms and syndromes even though a review of the expert's testimony reveals that she never stated the victim's delayed and partial disclosures were symptoms of child abuse, the error was harmless. **State v. Carpenter, 386.**

Requested jury instruction—victim's failure to report conduct—credibility—The trial court did not err in an indecent liberties and first-degree sexual offense case by denying defendant's request for an instruction on the victim's failure to report the conduct in an attempt to question the victim's credibility as a witness. **State v. Carpenter, 386.**

Sufficiency of evidence—The trial court did not err in an indecent liberties and first-degree sexual offense case by denying defendant's motion to dismiss the charges. **State v. Carpenter, 386.**

Unanimity of verdicts—more than one act—There was no plain error in a prosecution arising from the sexual abuse of a child where the court's instructions did not require unanimous verdicts regarding the sexual acts of first-degree

ROBBERY—Continued

where the indictment properly specified the name of the person from whose presence the property was attempted to be taken and the place that the offense occurred. **State v. Burroughs, 693.**

SEARCH AND SEIZURE

Cocaine—suspicious behavior in bus terminal—There was no plain error in a prosecution for possessing and trafficking in cocaine in the court's failure to suppress the cocaine on its own motion where there was sufficient evidence from which a trained narcotics officer could form a reasonable, articulable suspicion that defendant may have been involved in criminal activity on the basis of identifiable behaviors that are usually associated with drug couriers as opposed to law abiding citizens. **State v. Butler, 1.**

Fourth Amendment seizure—consensual encounter—volunteered information—There was no Fourth Amendment seizure where an officer recognized defendant, stopped him on suspicion of driving with a revoked license, asked defendant if he could ask some questions after defendant's license proved valid, and defendant volunteered that there was marijuana in the car when he was asked to consent to a search of the car. There was only a consensual encounter from the time defendant consented to additional questioning until the officer began searching the car, and the volunteered information gave the officer probable cause to search the vehicle. **State v. Kincaid, 94.**

Home of another—overnight guest—standing—The trial court did not err in a trafficking in cocaine case by finding that defendant lacked standing to object to the search of his coparticipant's home where contraband was found under the stairwell located in the laundry room even though defendant contends he was an overnight guest temporarily residing in a living area located in the basement area which was connected to the garage and a laundry room. **State v. Sanchez, 619.**

Inevitable discovery—bad faith by officer irrelevant—There was no error in admitting heroin under the inevitable discovery doctrine where there was sufficient evidence upon which the judge could conclude that the State fulfilled its burden of proving that the evidence would have been inevitably discovered in a search pursuant to a valid search warrant. Any bad faith on the part of the investigating officer in searching without a warrant is not relevant to the determination of inevitable discovery. **State v. Woolridge, 685.**

Initial exclusion of heroin—subsequent admission by a different judge—inevitable discovery—There was no error in a heroin prosecution where the judge who heard defendant's motion to suppress the heroin ruled that there were no exigent circumstances for the warrantless search and granted defendant's motion; the State moved during pretrial motions before a different judge to admit the heroin under the inevitable discovery doctrine; and this judge granted the motion. A second judge is not precluded from hearing a new motion to suppress if new allegations are presented; in this case, the only question in the first hearing was whether the heroin was properly seized without a warrant. **State v. Woolridge, 685.**

Investigatory stop—scope—show of force—officers drawing weapons—occupants of vehicle put in handcuffs—The trial court did not err in a trafficking in cocaine case by concluding that the officers' actions did not exceed the

SEARCH AND SEIZURE—Continued

scope of an investigatory stop even though the officers made a show of force by drawing their weapons and placed the occupants of the vehicle in handcuffs. **State v. Sanchez, 619.**

Traffic stop—initial grounds no longer valid—voluntary additional questioning—no coercive action—The trial court did not err by refusing to suppress marijuana seized after a traffic stop which was based upon suspicion of driving with a revoked license where defendant contended that the officer no longer had grounds to detain defendant after the officer returned defendant's license and registration. While it is true that the initial reasonable suspicion evaporated, the officer was neither prohibited from asking if defendant would consent to additional questioning nor prohibited from questioning defendant after receiving his consent. There was no coercive action by the officer. **State v. Kincaid, 94.**

Traffic stop—suspicion of revoked license—reasonable—The trial court did not err by refusing to suppress marijuana seized from a vehicle where defendant contended that the seizure was the result of an illegal stop. The officer testified that he understood that defendant's license had been revoked, that he had never seen defendant drive an automobile in the two or three years he had known him, and that defendant had attempted to conceal his identity when he saw the officer. Although the officer's suspicion that defendant had a revoked license was incorrect, the officer had a reasonable suspicion based on articulated and specific facts. Under this combination of circumstances, the stop was legal. **State v. Kincaid, 94.**

Warrantless search—presence in motel room of another—The trial court did not err in a robbery with a dangerous weapon case by admitting evidence obtained from a warrantless search of the motel room where defendant was found because the room was rented to another person and defendant had no reasonable expectation of privacy in the room. **State v. McMillian, 707.**

SENTENCING

Aggravating factor—firearm of mass destruction—robbery with a dangerous weapon—The trial court did not err in a robbery with a dangerous weapon case by finding as an aggravating factor the use of a firearm of mass destruction where defendant used a sawed-off shotgun. **State v. McMillian, 707.**

Due process rights—unilateral modification of judgments—The trial court did not err by concluding that the North Carolina Department of Correction's policy of unilaterally modifying judgments to comply with state statutes even if this violated an inmate's plea agreement did not violate plaintiff inmates' due process rights. **Hamilton v. Freeman, 195.**

Firearm enhancement statute—first-degree burglary—failure of indictment to allege statutory factors—The trial court erred in a first-degree burglary case by using the firearm enhancement statute under N.C.G.S. § 15A-1340.16A to lengthen defendant's sentence by 60 months where the indictment failed to allege that defendant used or threatened to use a firearm. **State v. Wimbish, 287.**

STATUTES OF LIMITATIONS AND REPOSE—Continued

in a synthetic stucco action on the issue of whether plaintiffs' claims against the original owners of the house were barred by the statute of limitations where the evidence produced during discovery indicated at least three times at which the defects or damage might have reasonably become apparent to plaintiffs. Plaintiffs' claims were not barred by the statute of limitations. **Everts v. Parkinson, 315.**

Waste—accrual of action—first discovery of damage—A 2000 counterclaim for permissive waste by a remainderman against the estate of the life tenant was barred by the statute of limitations where the remainderman admitted visiting the home in 1992 and noticing that the porches and roof were rotting, that boards needed replacing, and that the roof needed "sheathing." A remainderman's action for waste accrues from the date of the first act or omission of the life tenant and N.C.G.S. § 1-52 (16) does not change the fact that the injury springs into existence and completes the cause of action once some physical damage has been discovered. Further damage discovered in 1999, after the life tenant's death, does not permit the remainderman to circumvent the statute of limitations. **McCarver v. Blythe, 496.**

TAXATION

Ad valorem—burden before Commission—role of Court of Appeals—The burden is on the taxpayer to prove entitlement to an exemption in cases before the Tax Commission. The Court of Appeals must decide all relevant questions of law de novo, and review the findings, conclusions, and decision to determine if they are affected by error or are unsupported by competent, material and substantial evidence in view of the entire record. **In re Appeal of Briarfield Farms, 208.**

Ad valorem—farm use exemption—acreage and income requirements—The Tax Commission had substantial evidence before it to conclude that petitioner met the acreage and income requirements to retain its farm-use ad valorem tax exemption under N.C.G.S. § 105-277.3 where it clearly met the acreage requirement and met the $1,000 minimum in 1998 with $1,100 from the sale of hay. The County's contention that each ten-acre tract in active production must produce $1,000 (for a minimum of $19,500 for petitioner) is not supported by case law and would render many farms unable to meet the requirement. This does not appear to be a result intended by the Legislature. **In re Appeal of Briarfield Farms, 208.**

Ad valorem—farm use exemption—activity requirement—The Tax Commission had before it substantial evidence to conclude that petitioner met the activity requirement for retaining its farm-use ad valorem tax exemption for 1998 where the farm was in transition from a dairy and breeding operation to the cultivation of ground crops and the County argued that the only crops grown in 1998 were planted to reseed the farm rather than for commercial sale or consisted of reseeded hay, which was not planted. The Commission had before it substantial evidence that petitioners were engaged in agriculture as that term has previously been defined; the fact that there was evidence to the contrary is not sufficient ground to overturn the Tax Commission's determination. **In re Appeal of Briarfield Farms, 208.**

Ad valorem—farm use exemption—change in operation—notice to county—Petitioner's failure to notify the County of the transition from dairy and

TAXATION—Continued

breeding operations to the cultivation of ground crops did not bar its eligibility for the farm-use exemption. Both the dairy and breeding operations and its cultivation of ground crops qualified petitioner as an agricultural land farm-use property; even so, the only penalty under N.C.G.S. § 105-277.5 for failure to notify is monetary and does not strip the landowner of his right to the classification. **In re Appeal of Briarfield Farms, 208.**

Ad valorem—property valuation—income approach—The Property Tax Commission erred by affirming Durham County's ad valorem tax valuation of a taxpayer's property as though it were not encumbered by 26 U.S.C. § 42 restrictions for low-rent housing. **In re Appeal of Greens of Pine Glen Ltd. Part., 221.**

Sales—statutory exemption—plant growth regulators—The trial court correctly granted summary judgment for plaintiff in an action seeking a sales tax refund under the N.C.G.S. § 105-164.13(2a)d exemption for plant growth regulators or stimulators. **American Ripener Co. v. Offerman, 142.**

Tax Commission—framing of issue—de novo review—The Tax Commission did not err in its framing of an ad valorem tax issue where the issue before the County Board of Equilization and Review was whether petitioner could continue its special use as a dairy farm and the Tax Commission stated the issue as whether the taxpayer's land was part of a farm unit actively engaged in the commercial production or the growing of crops, plants, or animals under a sound management program. The County is barred from discussing information not in the record or transcript, the Tax Commission's hearing is de novo and not limited by the decision of a county board of equalization and review, the County failed to timely object before the Tax Commission, and it was the County which framed the issue by calling the exemption a dairy farm special use. **In re Appeal of Briarfield Farms, 208.**

Tax Commission proceeding—County's failure to present evidence—The Tax Commission did not improperly base its decision on the fact that the County presented no evidence where there was no evidence that the Tax Commission based its decision on that fact. The Commission based its decision on the evidence presented and did not place an improper burden on the County. **In re Appeal of Briarfield Farms, 208.**

TERMINATION OF PARENTAL RIGHTS

Diligent efforts requirement—The trial court did not abuse its discretion by terminating respondent mother's parental rights even though the mother asserts the Department of Social Services (DSS) failed to provide services to the mother to assist her in correcting the conditions that led to her children's removal because that is no longer a statutory requirement. **In re Frasher, 513.**

Lack of stability—clear, cogent, and convincing evidence—Although respondent mother contends the trial court erred by terminating respondent mother's parental rights based on evidence that she still suffered from a mental condition which rendered her incapable of providing for the care and supervision of her children on the date of the termination hearing, the trial court's primary basis for its decision to terminate her parental status was based on her lack of stability, and there was clear, cogent, and convincing evidence that the mother's

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