NORTH CAROLINA COURT OF APPEALS REPORTS

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148 N.C. APP.

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

SIDNEY S. EAGLES, JR.

Judges

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WANDA G. BRYANT

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GERALD ARNOLD

Former Judges

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DISTRICT	JUDGES	ADDRESS
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3A	W. Russell Duke, Jr.	Greenville
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7B	Milton F. (Toby) Fitch, Jr.	Wilson
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3B	Benjamin G. Alford	Morehead City
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4B	Charles H. Henry	Jacksonville
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8B	Jerry Braswell	Goldsboro
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	Stafford G. Bullock	Raleigh
	Abraham P. Jones	Raleigh
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	Evelyn W. Hill	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	A. Leon Stanback, Jr.	Durham
	Ronald L. Stephens	Durham
	David Q. LaBarre[2]	Durham
	Kenneth C. Titus[3]	Durham
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DISTRICT	JUDGES	ADDRESS
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11A	WILEY F. BOWEN	Dunn
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12	E. LYNN JOHNSON	Fayetteville
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	JACK A. THOMPSON	Fayetteville
	JAMES F. AMMONS, JR.	Fayetteville
13	WILLIAM C. GORE, JR.	Whiteville
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16A	B. CRAIG ELLIS	Laurinburg
16B	ROBERT F. FLOYD, JR.	Lumberton
	GARY L. LOCKLEAR	Pembroke
	Fifth Division	
17A	MELZER A. MORGAN, JR.	Wentworth
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	ANDY CROMER[5]	King
18	W. DOUGLAS ALBRIGHT	Greensboro
	CATHERINE C. EAGLES	Greensboro
	HENRY E. FRYE, JR.	Greensboro
	LINDSAY R. DAVIS, JR.	Greensboro
	JOHN O. CRAIG III	Greensboro
19B	RUSSELL G. WALKER, JR.	Asheboro
	JAMES M. WEBB	Whispering Pines
21	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM Z. WOOD, JR.	Winston-Salem
	L. TODD BURKE	Winston-Salem
	RONALD E. SPIVEY	Winston-Salem
23	MICHAEL E. HELMS	North Wilkesboro
	Sixth Division	
19A	W. ERWIN SPAINHOUR	Concord
19C	LARRY G. FORD	Salisbury
20A	MICHAEL EARLE BEALE	Wadesboro
20B	SUSAN C. TAYLOR	Monroe
	W. DAVID LEE[6]	Monroe
22	MARK E. KLASS	Lexington
	KIMBERLY S. TAYLOR	Hiddenite
	CHRISTOPHER COLLIER	Mooresville
	Seventh Division	
25A	BEVERLY T. BEAL	Lenoir
	ROBERT C. ERVIN[7]	Lenoir
25B	TIMOTHY S. KINCAID	Hickory
	NATHANIEL J. POOVEY[8]	Hickory
26	SHIRLEY L. FULTON[9]	Charlotte
	ROBERT P. JOHNSTON	Charlotte
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	W. ROBERT BELL	Charlotte
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27B	FORREST DONALD BRIDGES	Shelby
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	Eighth Division	
24	JAMES L. BAKER, JR.	Marshall
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28	DENNIS JAY WINNER	Asheville
	RONALD K. PAYNE	Asheville
29	ZORO J. GUICE, JR.	Rutherfordton
	E. PENN DAMERON, JR.[12]	Marion
30A	JAMES U. DOWNS	Franklin
30B	JANET MARLENE HYATT	Waynesville

SPECIAL JUDGES

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G. K. BUTTERFIELD, JR.[13]	Wilson
ALBERT DIAZ[14]	Charlotte
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D. JACK HOOKS[15]	Whiteville
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	JERRY CASH MARTIN	King
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	JAMES E. RAGAN III[17]	Oriental
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	THOMAS W. SEAY, JR.	Spencer
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JOHN B. LEWIS, JR.	Farmville
DONALD L. SMITH	Raleigh

1. Elected and sworn in 2 January 2003.
2. Retired 31 December 2002.
3. Elected and sworn in 1 January 2003 to replace David Q. LeBarre who retired 31 December 2002.
4. Elected and sworn in 9 January 2003.
5. Elected and sworn in 5 January 2003 to replace Clarence W. Carter who retired 31 December 2002.
6. Appointed and sworn in 10 January 2003 to replace Sanford L. Steelman, Jr. who was elected to the Court of Appeals.
7. Elected and sworn in 1 January 2003 to replace Claude S. Sitton who retired 31 December 2002.
8. Elected and sworn in 1 January 2003.
9. Retired 31 January 2003.
10. Elected and sworn in 2 January 2003.
11. Elected and sworn in 1 January 2003.
12. Appointed and sworn in 1 January 2003 to replace Loto Greenlee Caviness who retired 31 August 2002.
13. Appointed and sworn in 1 January 2003.
14. Appointed and sworn in 1 January 2003.
15. Appointed and sworn in 9 January 2003.
16. Appointed and sworn in 2 January 2003.
17. Appointed and sworn inl 9 January 2003.
18. Appointed and sworn in 2 January 2003.
19. Appointed and sworn in 6 January 2003

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
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	BETH SPENCER DIXON	Salisbury
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	SCOTT T. BREWER[6]	Albemarle
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	LISA V. L. MENEFEE	Winston-Salem
	LAWRENCE J. FINE	Winston-Salem
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	BUFORD A. CHERRY	Hickory
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	JOHN R. MULL[12]	Hickory
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	JAMES A. JACKSON	Gastonia
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	K. DEAN BLACK	Denver
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	PETER L. RODA	Asheville
	SHIRLEY H. BROWN	Asheville
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	MARVIN P. POPE, JR.	Asheville
	PATRICIA A. KAUFMANN[16]	Asheville
29	ROBERT S. CILLEY (Chief)	Pisgah Forest
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	DAVID KENNEDY FOX	Hendersonville
	LAURA J. BRIDGES	Hendersonville
	C. RANDY POOL	Marion
	C. DAWN SKERRETT	Cedar Mountain
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	STEVEN J. BRYANT	Bryson City
	RICHLYN D. HOLT	Waynesville
	BRADLEY B. LETTS	Sylva

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J. PATRICK EXUM	Kinston
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GEORGE T. FULLER	Lexington
RODNEY R. GOODMAN	Kinston
ADAM C. GRANT, JR.	Concord

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	JAMES A. HARRILL, JR.	Winston-Salem
	PATTIE S. HARRISON	Roxboro
	ROLAND H. HAYES[17]	Winston-Salem
	ROBERT W. JOHNSON	Statesville
	WILLIAM G. JONES	Charlotte
	LILLIAN B. JORDAN[18]	Asheboro
	ROBERT K. KEIGER	Winston-Salem
	JACK E. KLASS	Lexington
	C. JEROME LEONARD, JR.	Charlotte
	EDMUND LOWE	High Point
	JAMES E. MARTIN	Ayden
	J. BRUCE MORTON	Greensboro
	DONALD W. OVERBY	Raleigh
	L. W. PAYNE, JR.	Raleigh
	STANLEY PEELE	Chapel Hill
	MARGARET L. SHARPE	Winston-Salem
	RUSSELL SHERRILL III	Raleigh
	CATHERINE C. STEVENS	Gastonia

RETIRED/RECALLED JUDGES

WILLIAM A. CREECH	Raleigh
T. YATES DOBSON, JR.	Smithfield
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HARLEY B. GASTON, JR.	Gastonia
WALTER P. HENDERSON	Trenton
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed and sworn in 31 January 2003 to replace Kenneth F. Crow who was elected to the Superior Court.
2. Elected and sworn in 2 December 2002.
3. Elected and sworn in 2 December 2002.
4. Elected and sworn in 2 December 2002 to replace Lillian B. Jordan who retired 30 November 2002.
5. Elected and sworn in 2 December 2002.
6. Elected and sworn in 2 December 2002.
7. Elected and sworn in 30 December 2002 to replace Roland H. Hayes who retired 13 December 2002.
8. Elected and sworn in 2 December 2002.
9. Elected and sworn in 2 December 2002.
10. Appointed Chief Judge effective 21 November 2002.
11. Elected and sworn in 2 December 2002.
12. Elected and sworn in 2 December 2002.
13. Elected and sworn in 2 December 2002.
14. Elected and sworn in 2 December 2002 to replace Resa L. Harris who retired 30 November 2002.
15. Appointed Chief Judge effective 2 December 2002 to replace Earl Justice Fowler, Jr., who retired 30 November 2002.
16. Elected and sworn in 2 December 2002.
17. Appointed and sworn in 13 December 2002.
18. Appointed and sworn in 2 December 2002.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
JULIA S. WHITE

Deputy Chief of Staff
KRISTI J. HYMAN

Director of Administrative Services
STEPHEN C. BRYANT

Deputy Attorney General for Policy and Planning
KELLY CHAMBERS

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J. B. KELLY
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Chief Deputy Attorney General
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Senior Deputy Attorneys General

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

WILLIAM F. MEDEARIS, III AND WIFE, PAULINE PHISTER MEDEARIS, PETITIONERS-APPELLANTS v. TRUSTEES OF MYERS PARK BAPTIST CHURCH, C.D. SPANGLER FOUNDATION, INC., AND QUEENS COLLEGE, INC., RESPONDENTS-APPELLEES

No. COA01-114

(Filed 28 December 2001)

Deeds— restrictive covenants—residential purposes—radical changes—implied waiver

The trial court did not err in a declaratory judgment action determining the rights of petitioner homeowners to enforce a restrictive covenant requiring the pertinent property to be used only for residential purposes by granting summary judgment in favor of respondents who were attempting to expand a church complex by building a family life and learning center, because: (1) the changes to the pertinent restricted lots are so radical as practically to destroy the essential objects and purposes of the agreement, thus terminating the restrictive covenant; (2) petitioners impliedly waived their rights to enforce the residential restrictions by their conduct and statements which led respondents to believe that petitioners dispensed with their right to challenge the nonconformity; and (3) enforcing the restriction would impose an undue hardship on respondents since they incurred tremendous expenses before petitioners filed suit.

Appeal by petitioners from judgment entered 21 November 2000 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 September 2001.

DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for petitioners-appellants.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by Roy H. Michaux, Jr., for respondent-appellee Trustees of Myers Park Baptist Church.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, for respondent-appellee C.D. Spangler Foundation, Inc.

Guthrie, Davis, Henderson & Staton, P.L.L.C., by Robert E. Henderson, for respondent-appellee Queens College.

BRYANT, Judge.

This is an appeal by William F. Medearis, III, and his wife, Pauline Phister Medearis [petitioners] from an order granting the Trustees of Myers Park Baptist Church [MPBC], the C.D. Spangler Foundation, Inc. [Foundation] and Queens College, Inc. [collectively "respondents"] summary judgment on a petition for declaratory judgment to determine the rights of the petitioner-homeowners to enforce a restrictive covenant. Petitioners assign as error the trial judge's granting of summary judgment to respondents after concluding, inter alia, that: 1) real property that was restricted to residential use only had undergone such a radical change as to practically render the restrictive covenant nugatory; and 2) petitioners waived their right to enforce the restriction.

The facts of this case span eighty-five years and are not in dispute. At issue is a residential restriction covering twelve of fourteen lots in Block 37 of the Myers Park subdivision in Charlotte. Petitioners seek to prevent respondents from expanding a church complex by building the Cornwell Family Life and Learning Center [Cornwell Center], named after the Spangler family.

From 1914 to 1921, the Stephens Company developed Block 37, dividing it into fourteen lots. *See* Illustration 1. The lots are numbered as follows: 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14A and 14B. There is no Lot 2. Lots 3 through 14A form a rectangle, with Lots 3 through 8 on one side, and Lots 9 through 14A on the other, 9 being across from 8. Lots 3 through 14A contain identical deed restrictions, including a covenant that the property only be used for residential purposes. The deeds also provide that "[i]t is expressly understood and agreed . . . that all of the foregoing covenants, conditions and restrictions, which are for the protection and general welfare of the community shall be covenants running with the land." Lots 1 and 14B are

adjacent to Lots 3 and 14A, respectively. They do not contain residential restrictions.[1]

By 1929, ten of the twelve restricted lots had residences on them. *See* Illustration 2. Two of the ten lots—9 and 10—were owned and continue to be owned by the Medearis family. In 1943, the Efirds transferred lots 1, 14A and 14B to MPBC. Between 1948 and the early 1950s, MPBC built a sanctuary and educational building on Lots 1 and 14B, the unrestricted lots. In 1955, MPBC acquired Lot 3 to provide for the future expansion of the church. The structure on the lot was used for church offices. In the early 1960s, plans were approved for construction of a classroom building, fellowship hall and church offices on Lots 1, 3 and 14A. The structure on Lot 3 was demolished to clear the way for this construction. No waivers from the residential restrictions on Lots 3 and 14A were requested.

In 1962, Queens College transferred Lot 5 to MPBC to provide for future expansion of the church. The structure was removed in 1963, and since then the lot has been used for parking and as a playground. Therefore, in the first forty years since the formation of the block, MPBC had acquired three of the twelve restricted lots, removed structures from two of them and built offices and classrooms on two of them.

In 1962, MPBC acquired Lot 13 and the Wilkes-Riley House subject to a life estate. Following termination of the life estate, MPBC demolished the house in 1980 and has used the lot since then as a vehicle turn-around for church activities and for recreational purposes.

In 1971, Queens College acquired Lot 7 and the Jones House. The lot has been used for parking since 1974. In 1989, MPBC acquired Lot 6 and the Pressley House. MPBC rented the house for residential purposes until 1994, when it was then used by MPBC to house its ministers until 1989. Thereafter it was vacant for one year until it was demolished by MPBC in 2000. In 1991, MPBC acquired Lot 4 and the Withers House. The property was leased to Queens College until 2000 for continuing education classes, conferences, receptions and private functions. MPBC agreed to sell the house to Queens College in 2000 and move the house to Lot 8, where it now stands.

In 1997, the Foundation acquired Lot 12 and the Archer House. It agreed to donate the lot to MPBC. The Foundation sold the house for one dollar. The house was moved off the property in 2000. Lot 12 has been vacant since then.

1. These lots contain other restrictive covenants not pertinent to this action. Therefore, we will refer to them as the "unrestricted lots."

In December 1998, petitioners purchased Lots 9 and 10 from Mr. Medearis's parents for $880,000. Petitioners moved in on 31 October 1999. In November 1999, the Foundation acquired Lot 11 and its structure, the Baldwin House, for $1.5 million. This house was demolished on 2 February 2000 to prevent MPBC from having to obtain a zoning variance to build the Cornwell Center. Therefore, in roughly eighty years since the completion of Block 37, MPBC acquired six of the twelve restricted lots, removed or demolished at least five structures, and built several buildings for the church complex. Two of the remaining six restricted lots belong to the Foundation, which moved a house from Lot 12 and demolished the house on Lot 11. Two of the remaining lots belong to Queens College and are used for parking, classes and social events. The remaining two restricted lots belong to petitioners, who use both lots for a single residence. *See* Illustration 3.

Petitioners filed an action for declaratory judgment on 3 August 2000 seeking to enforce the residential restrictions against MPBC, the Foundation and Queens College. MPBC and the Foundation filed a joint motion for summary judgment on 12 September 2000. Petitioners filed a notice of voluntary dismissal without prejudice as to Queens College on 18 September 2000, then filed a motion for summary judgment on 27 September 2000. A consent motion to join Queens College was filed on 29 September 2000. Queens College filed a motion for summary judgment on 13 October 2000. The trial court granted respondents' motions for summary judgment on 21 November 2000 and petitioners appealed.

I. Summary Judgment

North Carolina courts have held that summary judgment is an appropriate procedure in an action for declaratory judgment. *Frank H. Connor Co. v. Spanish Inns Charlotte*, 294 N.C. 661, 242 S.E.2d 785 (1978); *Montgomery v. Hinton*, 45 N.C. App. 271, 262 S.E.2d 697 (1980). The Declaratory Judgment Act [Act] provides that orders, judgments and decrees under the Act "may be reviewed as other orders, judgments and decrees." N.C.G.S. § 1-258 (1999); *see also Nationwide Mutual Ins. Co. v. Allison*, 51 N.C. App. 654, 277 S.E.2d 473 (1981) (stating that the Act provides for the application of the same rules of review used in cases not brought under the Act). Therefore, on review of a declaratory judgment action, we apply the standards we would use when reviewing a trial court's denial of a 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.* The moving party has the burden of proving that a genuine issue of material fact does not exist. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). Once the moving party "makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664-65, *appeal dismissed and review denied by* 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, — U.S. —, 151 L. Ed. 2d 261 (2001). The court must examine the moving party's evidence and resolve all inferences against the moving party. *Id.*

II. Restrictive Covenants

Restrictive covenants are generally not favored by the courts; therefore, ambiguities will be construed in favor of the unrestricted use of the land. *Black Horse Run Prop. Owners Ass'n v. Kaleel*, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987). However, "such covenants must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction." *Id.* (citing *Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967)). When enforced, restrictive covenants will be enforced to the same extent as any valid contractual relationship. *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 436, 527 S.E.2d 40, 42 (2000). Restrictive covenants may be enforced by and against any grantee " '[w]here the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement . . . .' " *Sedberry v. Parsons*, 232 N.C. 707, 710, 62 S.E.2d 88, 90 (1950). Restrictions under a general plan of development may be enforced against subsequent purchasers

of the land who take with notice of the restriction. *Id.* at 711, 62 S.E.2d at 91. The test for determining whether a general plan of development exists is whether substantially common restrictions apply to all similarly situated lots. *Id.*

Restrictive covenants may be terminated in several ways. Covenants may be terminated when they provide for their own termination. *See Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 120 S.E.2d 817 (1961). Covenants may also be terminated when changes within the covenanted area are "so radical as practically to destroy the essential objects and purposes of the agreement." *Id.* at 39, 120 S.E.2d at 828 (quoting *Rombauer v. Compton Heights Christian Church*, 40 S.W.2d 545, 553 (Mo. 1931)). Absent the termination of a restrictive covenant, the party against whom the covenant is sought to be enforced may still prevail on theories such as waiver, estoppel or laches. *See, e.g., Williams v. Paley*, 114 N.C. App. 571, 442 S.E.2d 558 (1994) (holding that intermittent violation of restrictive covenant did not waive plaintiff's right to enforce covenant); *Williamson v. Pope*, 60 N.C. App. 539, 299 S.E.2d 661 (1983) (holding that prior waiver of right to object to violation of restrictive covenant did not waive right to object to subsequent and more radical departure from permitted use); *Rodgerson v. Davis*, 27 N.C. App. 173, 218 S.E.2d 471 (1975) (holding that all parties waived their rights to enforce set-back restrictions by either violating restrictive covenant or failing to object to violations).

III. Radical Change

We first address whether the covenant has been terminated. There is nothing in the record to indicate that the covenant has a termination provision. Therefore, we must examine whether the property underwent a radical change. Although Lots 1 and 14B are subject to restrictive covenants, they are not limited to residential uses. Therefore, we look solely at Lots 3 through 14A and conduct our review based on their use. *See* Illustration 4.

A. Residential

Lots 9 and 10 are owned and occupied by the Medearis family and are being used for residential purposes. Therefore, they comply with the restrictive covenants.

B. Parking

Lots 5, 7 and 8 are currently used for parking. Lot 5 has been used for parking since 1963. Lots 7 and 8 have been used for parking since

1974. Therefore, three of the twelve lots containing the residential restrictions in Block 37 are being used for parking. Although our courts have held that parking lots do not constitute such a radical change as to nullify the residential restrictive covenants, *Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 39-40, 120 S.E.2d 817, 828 (1961); *H. L. Mills v. HTL Enters.*, 36 N.C. App. 410, 418-19, 244 S.E.2d 469, 474-75 (1978), this is not always the case. Whether or not a radical change has taken place depends on the facts and circumstances of each case. *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 437, 527 S.E.2d 40, 43 (2000).

Prior cases involving parking lots on restricted lots are distinguishable. In *H. L. Mills v. HTL Enters.*, 36 N.C. App. 410, 244 S.E.2d 469 (1978), for example, the defendant owned a fast food restaurant in a block with restricted and unrestricted lots. The restaurant was on an unrestricted lot. When the defendant attempted to build a parking lot on an adjacent restricted lot, the plaintiffs sought to enjoin the construction and uphold the restriction. This Court held that construction of the parking lot was not significant enough to destroy the restrictive covenant or to constitute waiver or estoppel. *Id.* at 417-18, 244 S.E.2d at 473-74. We find *H. L. Mills*, where only one lot was being used in violation of the restrictive covenant, to be distinguishable from the case at bar, where three lots are currently used for parking.

In *Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 120 S.E.2d 817 (1961), the plaintiffs owned property in three of eight blocks of Myers Park that were subject to residential restrictions. The plaintiffs brought an action to determine their rights, if any, to use their lots for non-residential purposes. The defendants were using seven restricted lots for office parking. There were approximately eighty-five lots containing the residential restriction. The trial court concluded that the defendants' use of the seven lots for parking was in violation of the residential restriction, but that the use was not so radical a change as to render the restrictive covenant unenforceable. *Id.* at 34, 120 S.E.2d at 824. This Court affirmed, holding that it would be inequitable to hold otherwise. In *Tull*, unlike this case, only a small percentage of restricted lots were being used for parking in violation of the restrictive covenant. As stated earlier, one quarter of the lots in Block 37 are currently used for parking. Based on the facts of the instant case, we find *H. L. Mills* and *Tull* distinguishable, and hold that parking *could*, under certain circumstances, constitute such a radical change as to destroy the restrictive

covenant. However, our analysis does not end here, as there are other lots to consider.

C. Vehicle Turn-around

The Wilkes Riley House on Lot 13 was demolished by MPBC after the life tenant moved off the property around 1980. Since then, it has been used as a vehicle turn-around for church activities and for recreational purposes. The vehicle turn-around is substantially similar to the lots being used for parking; therefore, it is a factor which we will consider in determining the nature of the change in Block 37. Like the parking lots in *Tull*, the vehicle turn-around is a violation of the covenant restricting use of the lot to residential purposes.

D. Offices and Classrooms

Lots 3 and 14A have been used openly and notoriously by MPBC for offices and classrooms since the mid-1950s and early 1960s. The parties stipulated that this use is in violation of the restrictive covenant. Therefore, these violations are also factors to consider in determining whether there has been such a radical change in Block 37 as to practically destroy the essential purpose of the covenant.

We note that in 1929, ten of the twelve restricted lots had residences. When MPBC acquired Lots 3 and 14A forty to forty-five years ago and began using the structures for offices, classrooms, etc., eight of the twelve restricted lots in Block 37 still had residences.

E. Vacant Lots

Lot 4, the site of the Withers House when it was obtained by MPBC in 1991, was leased to Queens College for continuing education classes, conferences, receptions and private functions. The Withers House was recently moved from Lot 4 to Lot 8. Lot 4 is now vacant.

Lots 6, 11 and 12, which once contained structures that were residential in nature, are now vacant. Lot 6 was the site of the Pressley House when it was acquired by MPBC in 1989. The Pressley House was demolished in July 2000 to allow the Withers House to be moved from Lot 4 to Lot 8. Lot 11 was the site of the Baldwin House when the house and lot were purchased in November 1999 by the Foundation for $1.5 million. The Foundation demolished the Baldwin House in February 2000 to eliminate the need for a zoning variance to build the Cornwell Center. Lot 11 is now vacant. Lot 12 was the site of the Archer House when it was acquired by the Foundation in 1997.

The Foundation sold the house for one dollar in January 2000 to make room for the Cornwell Center. The purchaser moved the Archer House across the street and out of Block 37. Lot 12 is now vacant.

F. Summary

In summary, Lots 5, 7 and 8 are currently used for parking, in violation of the restrictive covenant. Lot 13 is now used as a vehicle turn-around for church activities, in violation of the restrictive covenant. Lots 3 and 14A are currently used by MPBC as offices and classrooms in violation of the restrictive covenant. Lot 4, the site of a house used for almost ten years in violation of the restrictive covenant, is now vacant. Lots 6, 11 and 12 are now vacant after all residential structures were either demolished or moved to prepare for the building of the Cornwell Center. Therefore, at this point in our analysis, six of the twelve lots containing a residential restriction in Block 37 are in open and obvious violation of the restriction. Four other lots—4, 6, 11 and 12—previously used for residential purposes now stand vacant in preparation for building the Cornwell Center. As of the filing of this appeal Block 37 contained one residential structure. *See* Illustration 4.

G. Radical Change

Based on our examination of the use of the lots in Block 37, we hold that the trial court did not err in granting summary judgment for respondents because the changes to Block 37 are "so radical as practically to destroy the essential objects and purposes of the agreement." *Tull*, 255 N.C. at 39, 120 S.E.2d at 828. We recognize that the residential restriction was put in place for the "protection and general welfare of the community." We also recognize that residential restrictions are generally a property right of distinct worth. *Id.* at 41, 120 S.E.2d at 829. However, in this case, the changes have destroyed "the uniformity of the plan and the equal protection of the restriction." *Starkey v. Gardner*, 194 N.C. 74, 79, 138 S.E. 408, 410 (1927). Therefore, summary judgment was appropriate.

Other cases have held that residential restrictions were terminated because of radical changes within the restricted areas. In *Muilenburg v. Blevins*, 242 N.C. 271, 87 S.E.2d 493 (1955), for example, the plaintiffs owned a lot with a residential restriction that was imposed in 1911 when the property was just outside the city limits of Charlotte. Forty-four years later, when the city had expanded beyond the plaintiffs' lot, the plaintiffs entered into an agreement to

sell the property. The buyer, the defendant, wanted to buy the property free and clear of all encumbrances to use for commercial purposes. The defendant refused to pay the plaintiffs when they delivered the deed because of the residential restriction. The plaintiffs brought an action for specific performance. The trial court declared the restriction void because the nature of the neighborhood had changed. The lot was surrounded by shopping areas, supermarkets, restaurants, offices, and gas stations. Our Supreme Court affirmed, finding ample evidence of a radical change that warranted the termination of the residential restriction. Similarly, in the case at bar, the nature of Block 37 has changed over eighty-five years such that the residential restriction must be deemed terminated.

In *Starkey v. Gardner*, 194 N.C. 74, 138 S.E. 408 (1927), the plaintiff and defendant owned lots developed under a common plan of development. The lots had covenants prohibiting the building of a " 'commercial or manufacturing establishment, or factory, or tenement, or apartment house, or house or building to be used as a sanatorium or hospital, or allow at any time any buildings erected thereon for any such purpose.' " *Id.* at 75, 138 S.E. at 408. The defendant wanted to erect a building in violation of the covenant, and the plaintiff sought an injunction. The trial judge found that restrictions had been terminated because more than eighty percent of the owners of lots in the subdivision had waived the restrictions by building businesses. *Id.* at 76, 138 S.E. at 408. The trial judge also found that the road adjoining the restricted property had developed into a major thoroughfare and was worth at least one hundred percent more than its value as residential property. *Id.* Our Supreme Court affirmed in a case of first impression.

IV. Waiver

Even assuming that the trial court erred in granting summary judgment to respondents on the basis that the residential restriction terminated, we agree with the trial court that petitioners waived their right to enforce the restrictive covenant.

Waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466 (1938); *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949). Almost any right may be waived, so long as the waiver is not illegal or contrary to public policy. *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949).

Waiver is an affirmative defense. *Cantrell v. Woodhill Enters., Inc.*, 273 N.C. 490, 160 S.E.2d 476 (1968). Rule 8(c) of the North Carolina Rules of Civil Procedure requires that pleadings contain short, plain, statements of "any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." N.C.G.S. § 1A-1, Rule 8(c) (1999); *see Cantrell*, 273 N.C. at 498, 160 S.E.2d at 482. Although waiver is a mixed question of law and fact, it is solely a question of law when the facts are not in dispute. *Gouldin v. Inter-Ocean Ins. Co.*, 248 N.C. 161, 166, 102 S.E.2d 846, 849 (1958).

In the case at bar, respondents raise waiver as a defense in their answers to petitioners' petition for declaratory judgment. We first determine whether respondents' pleadings meet the requirements of Rule 8(c). The Foundation's answer states,

> Petitioners and their predecessors in interest acquiesced to Myers Park Baptist Church . . . using numerous lots on Block 37, which were initially restricted to residential use only, for non-residential purposes. Petitioners and their predecessors in interest also have acquiesced to Queens College Inc.'s . . . use of Lots 7 and 8 for non-residential purposes.

Similarly, MPBC's answer states, "By allowing the extensive non-residential use of seven out of twelve lots in Block 37 over the years and by failing to otherwise exercise any right to enforce the restrictions . . . , the petitioners and their predecessors in title have waived any right to enforce any non-residential use . . . ." in Block 37. Finally, Queens College's answer states:

> Petitioners and their predecessors in interest have acquiesced to the Church's continuous, nonresidential use of residential-restricted lots for significant church buildings . . . . Likewise, Petitioners and their predecessors in interest have also acquiesced to the nonresidential use of residential-restricted lots owned by Queens College, Inc. . . . Based on the foregoing, Petitioners have waived any right to enforce the residential restrictions . . . .

We find these affirmative defenses sufficient to meet the pleading requirements of Rule 8(c).

A waiver may be express or implied. *See Turnage Co. v. Morton*, 240 N.C. 94, 81 S.E.2d 135 (1954). Neither the record nor the parties

indicate that petitioners expressly waived their right to enforce the residential restriction. Therefore, we determine whether there was an implied waiver by conduct.

A waiver is implied when a person dispenses with a right "by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right." *Guerry*, 234 N.C. at 648, 68 S.E.2d at 275. This Court previously ruled on a similar issue. In *Rodgerson v. Davis*, 27 N.C. App. 173, 218 S.E.2d 471 (1975), plaintiff landowners sought to enjoin defendants from building duplexes on lots containing several restrictive covenants, including a property line set-back provision and a prohibition against multi-unit family residences. While the restrictions were in place, plaintiffs built several dwellings in violation of the set-back provision, and defendants began constructing duplexes in violation of the set-back and single-family residence covenants. Plaintiffs sought an injunction to halt further construction and remove the duplexes. Defendants counterclaimed for an injunction requiring plaintiffs to comply with the set-back restriction. The other property owners were made parties to the action.

The trial court found that the restrictive covenants were valid. The court enjoined defendants from further construction and dismissed their actions because defendants had violated several covenants. *Id.* at 176, 218 S.E.2d at 473. Furthermore, the court found that plaintiffs would suffer undue hardship if required to conform to the set-back requirements because their structures were already complete. *Id.* Defendant appealed. Plaintiffs also appealed the trial court's refusal to enjoin defendants from using their incomplete structures because plaintiffs had also violated the covenants and the other property owners did not object to the violations. *Id.* at 177, 218 S.E.2d at 474.

This Court affirmed, holding that all of the parties waived their rights to enforce the set-back restrictions. The plaintiffs and defendants waived their rights to enforce the set-back provision because they, too, had violated the restriction. The other property owners waived their rights to enforce the restrictions by failing to object to the violations.[2]

---

2. Although the *Rodgerson* court did not expressly state that failure to object was the reason why the plaintiffs who were later joined waived their rights, the opinion states that the mandatory injunction against the defendants would be inequitable because "none of the additional party plaintiffs objected to any violations of the defendants or the original plaintiffs prior to having been made parties to this action."

The case at bar is analogous to *Rodgerson*. In this case, petitioners first learned of MPBC's plans to construct the Cornwell Center in June 1998 when they were invited as prospective homeowners to a meeting with the church. Petitioners purchased their house from Mr. Medearis's parents in December 1998. On 16 June 1999, Mr. Medearis sent a petition to neighbors requesting support to oppose a zoning variance needed by MPBC because it did not have enough land to meet the floor-to-area ratio needed to build the Cornwell Center. In the petition, Mr. Medearis stated that his understanding of the petition was that it would not stop the building; rather, it would only limit its size.

Petitioners moved into their residence on 31 October 1999. Thereafter, on 24 November 1999 the Foundation purchased Lot 11 and on 3 February 2000 demolished the Baldwin House to eliminate MPBC's need for a zoning variance. Mrs. Medearis testified that shortly after the demolition, she told the church congregation, "[M]y family did not oppose the building of the [Cornwell Center] and . . . we were prepared to go to the zoning hearing and tell them so."

The first time petitioners raised the issue of enforcing the residential restriction was on 18 May 2000. Prior to that time, petitioners did nothing to prevent MPBC from constructing the Cornwell Center; rather, they negotiated to reduce the size, orientation and placement of the building on MPBC property. Petitioners negotiated with MPBC repeatedly to redesign the plans for the Cornwell Center so that they would support a zoning variance. Notwithstanding the numerous negotiations, Mr. Medearis never requested that MPBC not build the Cornwell Center.

Consequently, in the year prior to petitioners' filing for declaratory judgment, the Foundation and MPBC incurred significant expenses preparing to build the Cornwell Center. The Foundation purchased Lot 11 containing the Baldwin House on 24 November 1999 for $1.5 million, then spent $16,195 to tear down the house. The Foundation also sold the Archer House on Lot 12 for $1, which was $252,579 less than the tax value. MPBC sold the Withers House to Queens College for $1.00 which was $392,229 less than the tax value. MPBC also pledged $100,000 to Queens College, which owns Lot 8, to move the Withers House in preparation for the construction of the Cornwell Center.

Rodgerson, 27 N.C. App. at 177, 218 S.E.2d at 474. Therefore, it is proper to infer this reason.

Based on the foregoing information, we hold that the trial court did not err in concluding that petitioners waived their rights to enforce the residential restrictions. Petitioners, by their conduct and statements, impliedly led respondents to believe that petitioners dispensed with their right to challenge the nonconformity. Furthermore, enforcing the restriction would impose an undue hardship on respondents because they incurred tremendous expenses before petitioners filed suit. Therefore, like the plaintiffs in *Rodgerson*, petitioners waived their rights to enforce the restriction.

V. Conclusion

We hold that the trial court did not err in granting respondents' motion for summary judgment and declaring that the residential restrictions for Block 37 have been terminated because radical changes have practically destroyed the purpose of the restrictions. We also hold that, even if the restrictions were valid, petitioners waived their rights to enforce the restrictions. Accordingly, we affirm.

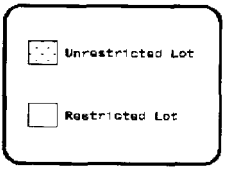
Affirmed.

Judges WYNN and McCULLOUGH concur.

Illustration 1

Myers Park
Block 37

Lots



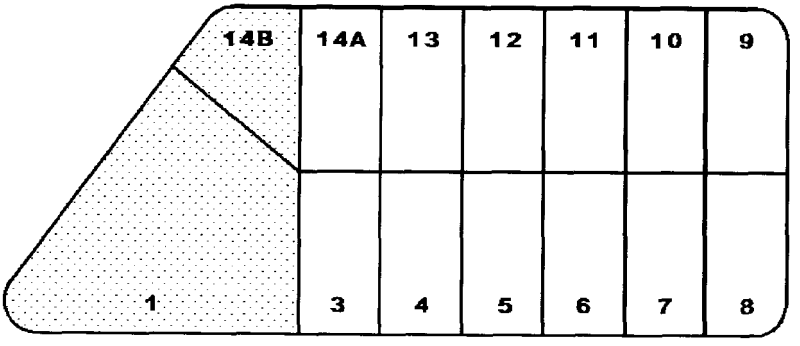
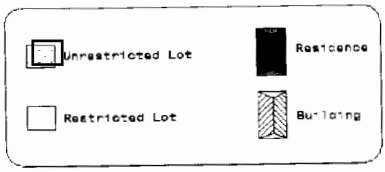


Illustration 2

Myers Park
Block 37

1929



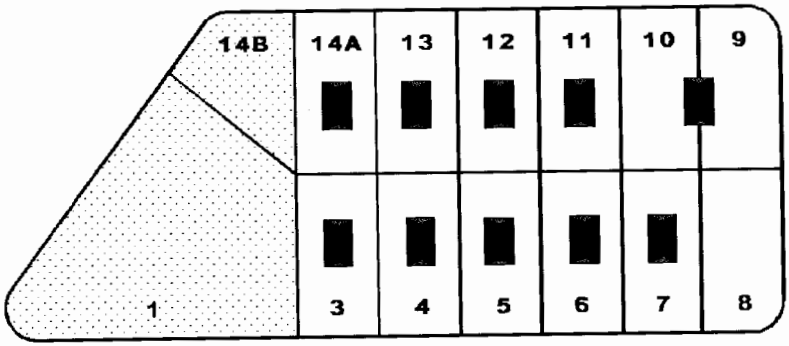
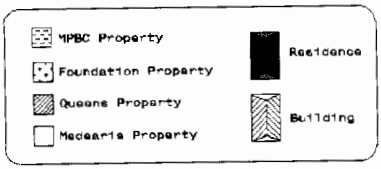


Illustration 3

Myers Park
Block 37

August 2000



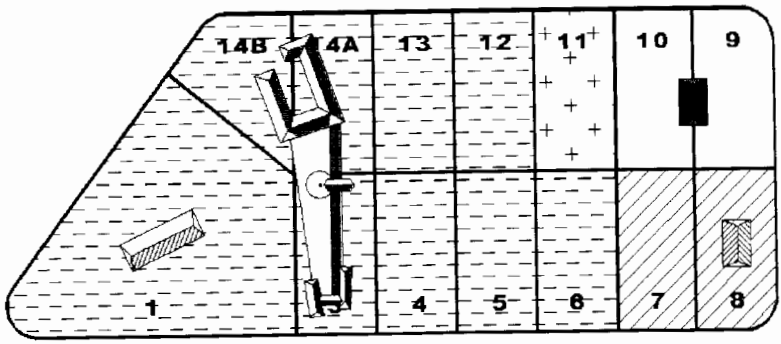
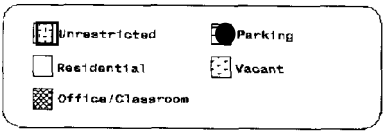
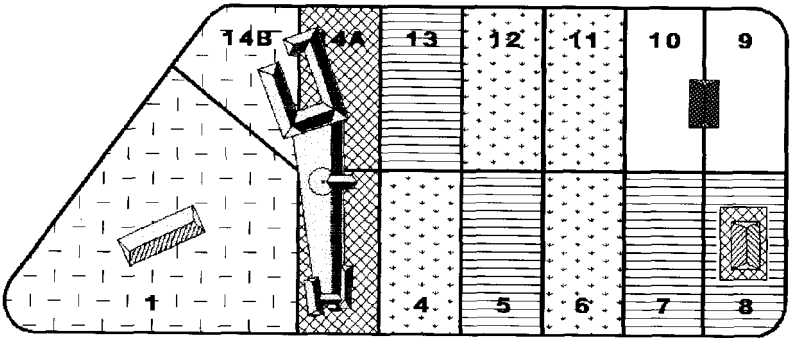


Illustration 4

Myers Park
Block 37

Lot Usage





STATE OF NORTH CAROLINA v. HAROLD RAY FLEMING
(A/K/A HAROLD RAY FLEMMING)

No. COA00-1412

(Filed 28 December 2001)

1. Robbery— dangerous weapon—BB gun—no evidence of capability to inflict death or great bodily harm

The trial court erred by not dismissing an armed robbery charge where it was clear that the weapon was a BB gun, even giving the State all reasonable inferences which could be drawn from the facts, and there was no evidence in the record of the BB gun's capability to inflict death or great bodily injury. The presumption that a brandished instrument which appears to be a dangerous weapon is what it appears to be applies in the absence of any evidence to the contrary. Finally, there was plain error in that the trial court instructed on robbery with a dangerous weapon and on common law robbery using the Pattern Jury Instruction, but did not define "dangerous weapon."

2. Evidence— failure to rule on objection—evidence admissible—error not prejudicial

There was no prejudicial error in an armed robbery prosecution where defendant contended that the court erred by failing to rule on his objection to a question to a police detective as to whether he had defendant on videotape for other robberies where the evidence was properly admitted because defendant had opened the door.

Appeal by defendant from judgment entered 13 July 2000 by Judge Clarence W. Carter in Forsyth County Superior Court. Heard in the Court of Appeals 17 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General Robert R. Gelblum for the State.

J. Clark Fischer for defendant appellant.

McCULLOUGH, Judge.

Defendant Harold Ray Fleming was tried at the 12 July 2000 Criminal Session of Forsyth County Superior Court after being charged with two counts of robbery with a dangerous weapon. Evidence for the State showed that on 11 March 2000 a man, later identified as defendant, went to Advance America, a cash/payday advance service located in Winston-Salem, North Carolina. The only person inside the business was employee Shannon Qayd. Once inside, defendant inquired about opening an account. Ms. Qayd noticed that defendant was wearing a black toboggan and had some discoloration of his lower lip. When Ms. Qayd brought defendant the requested information, he displayed a gun and a white plastic bag in one hand and told Ms. Qayd to give him the money. Ms. Qayd complied and gave defendant the money from the cash register. Defendant then told Ms. Qayd to give him the money out of the safe. Defendant followed Ms. Qayd to the back of the store and told her, "I'm coming with you." He was still holding the gun and the white plastic bag.

Ms. Qayd opened the safe and gave defendant the money inside. Defendant then asked Ms. Qayd to give him the store's videotape. She replied that the system was fake and that there was no tape. Defendant told Ms. Qayd to go to the back of the store, and he left with $1,321.00 in cash from Advance America.

On 14 March 2000, defendant entered All Care Insurance Agency (All Care) located a few stores away from Advance America in the same shopping center in Winston-Salem. Once inside, defendant requested automobile insurance quotes. Defendant was again wearing a toboggan and witnesses noticed a white discoloration on his lower lip. Three employees were present at All Care at the time defendant entered the business. Ms. Robin Vantorre, one of the employees, asked defendant to get the vehicle identification number from his car so she could give him an accurate insurance quote. Defendant responded by placing a white plastic bag on the counter, saying, "Why don't you fill this up with your money." When Ms. Vantorre did not immediately comply, defendant opened his coat long enough for her to see the butt of a gun sticking out of the waistband of his pants. He then stated, "I'm serious, fill up the bag with the money." Ms. Vantorre then filled the bag with money from the cash register, while All Care owner William Lambert gave defendant his money.

Defendant asked Mr. Lambert where the safe was, and was told, "That's all there is." Defendant walked to the back room with Ms. Vantorre, her coworker, and Mr. Lambert, and told them to remain in that room until he left. Ms. Vantorre and Mr. Lambert kept the door to the back room cracked open and heard defendant exit the business less than five minutes later. They watched defendant wander around the parking lot for a few minutes, then saw him get into a red Mitsubishi Eclipse and leave the area.

Ms. Vantorre called 911 and described both defendant and his vehicle to the dispatcher. A few minutes later, Officer R.B. Rose of the Winston-Salem Police Department stopped a red Mitsubishi Eclipse driven by defendant. Officer Rose noted that defendant had a white discoloration on his lower lip, which was also described by employees at both All Care and Advance America. Upon searching defendant, Officer Rose and the investigating officer assisting him recovered a BB gun from defendant's waistband. After looking inside the car, the officers found a white plastic bag between the driver's seat and the console. The bag contained $286.00 in cash, the same amount Mr. Lambert testified was taken from All Care during the robbery.

The officers also recovered a black toboggan from beneath the driver's seat and a pair of zippered gloves from a side pocket in the driver's door of the Mitsubishi Eclipse. When shown the items at trial, Ms. Qayd testified that the gloves and the toboggan appeared to be

the same ones worn by the man who robbed Advance America. Ms. Vantorre testified that the jacket defendant was wearing when he was stopped by the officers appeared to be the same one worn by the man who robbed All Care.

Defendant was arrested and read his *Miranda* rights by Detective R.W. Beasley of the Winston-Salem Police Department. Thereafter, he signed a waiver of those rights and wrote out a confession regarding the robbery of All Care: "Went on Peters Creek, robbed the insurance company." On 1 May 2000, defendant was indicted on two counts of robbery with a dangerous weapon and was tried before a jury after the charges were joined for trial. The jury found defendant guilty on both counts. During sentencing, defendant was found to have a prior record level of IV and was sentenced to consecutive terms of 146-185 months' imprisonment on each conviction. Defendant appealed only his conviction in the 14 March 2000 All Care robbery.

On appeal, defendant argues that the trial court committed reversible error by (I) denying his motion to dismiss the All Care robbery with a dangerous weapon charge because the evidence showed that the weapon, a BB gun, was not a deadly weapon; and (II) failing to rule on his objection to the State's redirect examination of a police detective regarding whether the detective had defendant on videotape in a different robbery. For the reasons set forth, we vacate defendant's conviction of robbery with a dangerous weapon and remand the case for resentencing on the lesser included offense of common law robbery.

Nature of the Weapon

[1] By his first assignment of error, defendant argues the trial court should have granted his motion to dismiss because the evidence showed that the weapon used by him in the All Care robbery was a BB gun, which does not qualify as a "dangerous weapon" under N.C. Gen. Stat. § 14-87 (1999).

Defendant was charged with two counts of robbery with a dangerous weapon, a crime codified by N.C. Gen. Stat. § 14-87. Section 14-87(a) states:

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business,

residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

"Under G.S. 14-87, an armed robbery is defined as the nonconsensual taking of the personal property of another in his presence or from his person by endangering or threatening his life with a firearm or other deadly weapon, with the taker knowing that he is not entitled to the property and intending to permanently deprive the owner thereof." *State v. Bates*, 309 N.C. 528, 534, 308 S.E.2d 258, 262 (1983). To sustain a conviction of robbery under N.C. Gen. Stat. § 14-87, the State must prove "(1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement or means'; and (3) danger or threat to the life of the victim." *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978) (quoting N.C. Gen. Stat. § 14-87(a)). A dangerous weapon "is generally defined as any article, instrument or substance which is likely to produce death or great bodily injury." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981). "[A]ctual possession and use or threatened use of firearms or other dangerous weapon is necessary to constitute the offense of robbery with firearms or other dangerous weapon." *State v. Faulkner*, 5 N.C. App. 113, 119, 168 S.E.2d 9, 13 (1969). With these general principles in mind, we turn to defendant's motion to dismiss.

"In ruling on a motion to dismiss, all evidence admitted must be considered in the light most favorable to the State, giving the State the benefit of all reasonable inferences to be drawn therefrom." *In re Stowe*, 118 N.C. App. 662, 664, 456 S.E.2d 336, 337 (1995). Defendant's motion to dismiss "is properly denied if the evidence, when viewed in the above light, is such that a rational trier of fact could find beyond a reasonable doubt the existence of each element of the crime charged." *State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993), *judgment vacated on other grounds sub nom. N.C. v. Bryant*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994).

Defendant maintains the State failed to prove all the elements of the charge of robbery with a dangerous weapon. More specifically, defendant argues that the lives of the employees at All Care were not in danger because he did not use an instrument that was likely to inflict death or great bodily injury, since the weapon he used was a BB gun. We agree.

Ms. Vantorre, an employee at All Care, testified as follows:

[Prosecutor]: At some point did the Defendant—or did the man who walked in the store show you a gun?

[Ms. Vantorre]: He opened his jacket—when he asked for the money to start with I didn't respond immediately because I was just like, did you say what I thought you just said, he opened his coat and all I could see was the butt, that appeared to me to look like a butt of a gun sticking in his waistband, and then he shut his coat back up.

. . . .

[Prosecutor]: Showing you what's been marked as State's Exhibit 1 for identification, did you see this gun on that day, on the 14th?

[Ms. Vantorre]: I couldn't tell you if it was that gun. I didn't see the whole gun that day.

[Prosecutor]: The gun that you saw on the Defendant that he showed to you, it was stuffed in his pants?

[Ms. Vantorre]: Uh-huh.

[Prosecutor]: Okay. Do you recognize any of this—

. . . .

[Ms. Vantorre]: I don't remember. I was just—it just scared me to death. I could tell it was a gun.

[Prosecutor]: But you cannot identify State's Exhibit 1 as the gun that was used.

[Ms. Vantorre]: No.

On cross-examination, Ms. Vantorre admitted that only a few minutes elapsed from the time defendant showed her the weapon in his waistband to the time he went to his car. Defendant's attorney also asked questions which revealed that defendant was apprehended by police officers just minutes after the 911 call was made by Ms. Vantorre. Officer Rose retrieved a BB gun from defendant's waistband during a pat-down search, a total of five minutes after Ms. Vantorre saw it tucked in the waistband of the man who robbed All Care. Even giving the State all reasonable inferences which may be drawn from the above-recited facts, it is clear the weapon in question was, in fact, a

BB gun. Defendant maintains that these facts constitute sufficient evidence to conclude that a dangerous weapon was not used, such that he could not be convicted of robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87.

"Our Supreme Court has established rules with which to resolve sufficiency of evidence questions in armed robbery cases where the instrument used appears to be, but may not in fact be a dangerous weapon capable of endangering or threatening life." *State v. Summey*, 109 N.C. App. 518, 528, 428 S.E.2d 245, 251 (1993). The rules are as follows:

> (1) When a robbery is committed with what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim and there is no evidence to the contrary, there is a mandatory presumption that the weapon was as it appeared to the victim to be. (2) If there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened. (3) If all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.

State v. Allen, 317 N.C. 119, 124-25, 343 S.E.2d 893, 897 (1986).

Defendant argues that his case falls under subsection (3) above, while the State maintains that defendant's case falls under subsection (2), wherein the jury is permitted to infer that the instrument used was a dangerous weapon. The State argues that it is not completely clear whether the BB gun found by the officers was the same instrument used by defendant in the robbery of All Care. We reject this argument, as set forth previously. We agree that defendant's case could fall under *Allen* subsection (2), if the State had introduced evidence of the BB gun's capability to inflict death or great bodily injury. Had the State presented such evidence, the jury would have been allowed to make a permissible inference "which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened." *See Allen*, 317 N.C. at 124-25, 343 S.E.2d at 897.

With regard to the charges of robbery with a dangerous weapon, the trial court instructed the jury as follows:

> The second case, which has been referred to as the All Care Insurance Agency case, in that case the Defendant has been accused of robbery with a firearm, which is taking and carrying away the personal property of another from his presence—from his person or in his presence without his consent by endangering or threatening a person's life with a firearm, the taker knowing that he was not entitled to take the property and intending to deprive another of its use permanently.
>
> Now, I charge that for you to find the Defendant guilty of robbery with a firearm the State must prove seven things beyond a reasonable doubt. First, that the Defendant took property from the person of another or in his presence.
>
> Second, that the Defendant carried the—away the property.
>
> Third, that the person did not voluntarily consent to the taking and carrying away of the property.
>
> Fourth, that the Defendant knew he was not entitled to take the property.
>
> Fifth, that at the time of taking, the Defendant intended to deprive the person of its use permanently.
>
> Sixth, that the Defendant had a firearm in his possession at the time he obtained the property or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer that the said instrument was what the Defendant's conduct represented it to be.
>
> And seventh, that the Defendant obtained the property by endangering or threatening the life of that person, with the firearm.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant had in his possession a firearm and took and carried away property from the person or presence of a person without his [sic] voluntary consent by endangering or threatening her life with the use or threatened use of a firearm, the Defendant knowing that he was not entitled to take the property, and intending to deprive

> that person of its use permanently, it would be your duty to return a verdict of robbery with a firearm.
>
> However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of robbery with a firearm.

In *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979), our Supreme Court stated:

> When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be—a firearm or other dangerous weapon.

The *Thompson* scenario is not applicable in the current case because we have concluded that the only reasonable inference to be drawn from the evidence presented at trial was that a BB gun was utilized by defendant. Thus, there was affirmative testimony "tending to prove the absence of an element of the offense charged and required the submission of the case to the jury on the lesser included offense of common law robbery as well as the greater offense of robbery with firearms or other dangerous weapons." *State v. Alston*, 305 N.C. 647, 651, 290 S.E.2d 614, 616 (1982). In the present case, the trial court instructed the jury on both robbery with a dangerous weapon and common law robbery.

Alston is also helpful to our determination of whether the BB gun was a "dangerous weapon." "In determining whether evidence of the use of a particular instrument constitutes evidence of use of 'any firearms or other dangerous weapon, implement or means' within the prohibition of G.S. 14-87, the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened." *Alston*, 305 N.C. at 650, 290 S.E.2d at 614 (quoting N.C. Gen. Stat. § 14-87). Based on the facts presented at trial, the *Alston* Court concluded that a BB gun could not be a firearm or other dangerous weapon within the meaning of N.C. Gen. Stat. § 14-87 because it was incapable of endangering or threatening the life of a person. *Id.* at 651, 290 S.E.2d at 616; *see also Allen*, 317 N.C. at 123, 343 S.E.2d at 896. We decline to hold, as a matter of law, that a BB gun can *never* be a dangerous weapon. *See State v. Westall*, 116 N.C. App. 534, 540, 449 S.E.2d 24, 28, *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994) (declining to hold, as a matter of

law, that a pellet gun is or is not a dangerous weapon). For a jury to find that a BB gun *is* a dangerous weapon, there must be evidence in the record of the BB gun's capability to inflict death or great bodily injury. Such evidence is lacking in the case at bar.

In furtherance of this point, our Supreme Court has also stated:

> [I]n a case where the instrument used to commit a robbery is described as appearing to be a firearm or other dangerous weapon capable of threatening or endangering the life of the victim and there is no evidence to the contrary, it would be proper to instruct the jury to conclude that the instrument was what it appeared to be. The jury should not be so instructed if there is evidence that the instrument was not, in fact, such a weapon, but was a toy pistol or some other instrument incapable of threatening or endangering the victim's life even if the victim thought otherwise.

Allen, 317 N.C. at 125, 343 S.E.2d at 897.

In the present case, after the trial court instructed the jury on robbery with a dangerous weapon, it then gave the standard instruction on common law robbery. This was precisely the action taken by the trial court in *Summey*, 109 N.C. App. 518, 428 S.E.2d 245. In *Summey*, defendant was convicted of robbery with a dangerous weapon. *Id.* at 528, 428 S.E.2d at 250. Defendant moved to dismiss the case because there was evidence that the victims were robbed with a pellet pistol and a BB rifle with a broken stock, and he maintained that no dangerous weapon was used. *Id.* In concluding that defendant's motion to dismiss was properly denied, the *Summey* Court noted the following:

> Thus, there is evidence that it appeared to the victims that the robbery was committed with dangerous weapons as well as evidence tending to show that the weapons in question were not dangerous weapons within the contemplation of G.S. 14-87. *State v. Alston*, 305 N.C. 647, 290 S.E.2d 614 (1982). Therefore, the trial court was required to submit the case to the jury on the lesser included offense of common law robbery, as well as armed robbery, and it was for the jury to determine the nature of the weapon used. *Id.*; *State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986). In this case, the jury was given instructions as to both armed and common law robbery *and a definition of "dangerous weapon" as "one which is likely to cause death or serious bod-*

> *ily injury.*" We find no error in the trial court's denial of defendant's motion to dismiss the charges of armed robbery.

Id. at 529, 428 S.E.2d at 251 (emphasis added). While we note that the trial court's instruction was identical in all pertinent respects to N.C.P.I., Crim. 217.20, we also note that the trial court failed to define a dangerous weapon. We conclude that, in the context of this case, such an omission constitutes plain error.

We thus hold that, when a weapon such as a BB gun is determined to be the weapon used in a particular case, the record must contain evidence to support the jury's finding that the instrument was a dangerous weapon. Moreover, the jury must be properly instructed with a definition of a dangerous weapon. The absence of both these requirements compels us to vacate defendant's conviction of robbery with a dangerous weapon and remand the case to the trial court for resentencing on the lesser included offense of common law robbery.

Detective's Testimony

[2] Defendant next argues that the trial court erred in failing to rule on his objection to a question posited by the State to a police detective on redirect as to whether he had defendant on videotape for other robberies. Defendant essentially argues the detective's testimony was impermissible Rule 404(b) testimony that should have been excluded. We do not agree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999) states:

> (b) Other crimes, wrongs, or acts.—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. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

At trial, the State called Detective R.W. Beasley to testify about his contact with defendant after he was arrested for the robbery of All Care. Detective Beasley testified that he read defendant his *Miranda* rights, got a confession from defendant, and later prepared a photographic line-up, with defendant's photo in the group. Ms. Qayd

positively identified defendant as the man who robbed Advance America. When defendant's attorney cross-examined Detective Beasley, the following exchange took place:

> [Defense Attorney]: Whenever you were questioning Mr. Fleming, did you ever tell him that he was caught on video camera or videotape?
>
> [Prosecutor]: Objection. If we could approach.
>
> THE COURT: Step up here. (Counsel approach the bench; discussions were off the record.)
>
> [Defense Attorney]: Officer Beasley—or Detective Beasley, sorry, let me ask you this, when you were questioning Mr. Fleming regarding the robbery at the All Care Insurance Company and the robbery at the Advance America business on Peters Creek Parkway, did you tell him that he was on videotape in either one of those?
>
> A. I don't remember; it is very possible though. I can't sit up here and tell you for sure, but I will tell you it's very possible I did tell him that.
>
> Q. And if you did tell him that, that wouldn't have been the truth, would it?
>
> A. No, sir, it wouldn't have been true.
>
> Q. Do you often lie to the people you are interrogating?
>
> [Prosecutor]: Objection.
>
> THE COURT: Sustained.
>
> [Defense Attorney]: That's all.
>
> [Prosecutor]: In fact, you had him on video for some other robberies, did you not, Detective Beasley?
>
> [Defense Attorney]: Objection.
>
> THE COURT: Well, you opened the door.
>
> [Defense Attorney]: Your Honor, I did not—
>
> [Prosecutor]: You called—excuse me.
>
> THE COURT: That's what I cautioned you about when you were up here.

[Defense Attorney]: Specific question was with respect to these two that he is charged with and being tried for today.

THE COURT: Step back up here. I cautioned you about it while you were up here. (Counsel approach the bench; discussions were off the record.)

THE COURT: Anybody got any more questions or you want to leave it right where it is?

[Prosecutor]: I think I'll leave it right where it is, Judge.

We agree with defendant that "[a]ny party is entitled as a matter of law to a ruling on an objection." *State v. Alford*, 339 N.C. 562, 572, 453 S.E.2d 512, 517 (1995). Defendant further asserts that failing to rule on an objection is tantamount to overruling the objection. *Id.* at 572, 453 S.E.2d at 517. Defendant argues the trial court allowed prejudicial information into evidence in violation of Rule 404(b). We note that the asking of the question is not itself evidence. We further note that defendant failed to ask the trial court for a limiting instruction at the time the questions were asked.

The State, on the other hand, argues that it was defendant's duty to obtain a ruling if he wanted to preserve this issue for appeal. *See* N.C. R. App. P. 10(b)(1) (1999); and *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). While this is a correct statement, we also recognize that defendant cannot prevail on this assignment of error even if we consider it on the merits.

To prevail, defendant must show that this error was prejudicial; put another way, defendant must show " 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Gardner*, 316 N.C. 605, 613, 342 S.E.2d 872, 877 (1986) (quoting N.C. Gen. Stat. § 15A-1443(a) (1983)). The State maintains that defendant's guilt was well established by this point in the trial, based almost entirely on eyewitness testimony from Ms. Qayd, Ms. Vantorre, Officer Rose, and Detective Beasley. We agree.

We are unpersuaded by defendant's argument that the evidence regarding videotape of defendant committing prior robberies was too prejudicial to be admitted. "Such highly probative evidence necessarily is prejudicial to the defendant—otherwise it would not have such great probative value." *State v. Mercer*, 317 N.C. 87, 95, 343 S.E.2d 885, 890 (1986). The State correctly points out that the test is whether

"[the evidence's] probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (1999). This determination is in the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). After careful review of the record below, we conclude the evidence was properly admitted because defendant "opened the door," and the State was permitted to rehabilitate Detective Beasley, who was attacked by defense counsel. After careful review of the entire record, we conclude that this assignment of error is without merit, and is overruled.

Defendant's conviction for robbery with a dangerous weapon is hereby vacated, and his case is remanded to the trial court for resentencing on the lesser included offense of common law robbery.

Vacated and remanded for resentencing.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. WARREN DAVID ISENBERG, SR.

No. COA00-1381

(Filed 28 December 2001)

1. Witnesses— expert—qualifications

The trial court did not err in a first-degree statutory sexual offense and taking indecent liberties with a minor case by finding a licensed professional counselor witness was an expert in the area of counseling behavior of sexually abused children under N.C.G.S. § 8C-1, Rule 702, because: (1) the witness did not testify as to whether, in his expert opinion, the minor victim had been sexually abused, but instead testified that the victim's behavior was consistent with a child who had been sexually abused; and (2) the witness was in a better position than the jury, based on his training and experience, to determine what behavior was consistent or inconsistent with children who had been sexually abused.

2. Evidence— hearsay—residual exception—unavailable witness

The trial court did not err in a first-degree statutory sexual offense and taking indecent liberties with a minor case by allow-

ing a licensed professional counselor expert witness's testimony to be introduced as substantive evidence based on the residual exception to the hearsay rule under N.C.G.S. § 8C-1, Rule 804(b)(5), because: (1) the trial court found that the victim was unavailable; (2) the trial court found that the State presented sufficient guarantees of trustworthiness since the minor victim was personally present and had personal knowledge of the incidents at issue, the expert did not indicate that the victim had any motivation to make a false statement, the victim was not angry with defendant, neither the expert nor the victim's parents prompted the statement of the minor, and the victim did not recant her statements during the counseling sessions with the expert; and (3) the trial court attempted on two different occasions to speak with the minor victim to have her answer questions, and the victim did not respond in any meaningful manner.

3. Evidence— hearsay—medical diagnosis exception

The trial court did not err in a first-degree statutory sexual offense and taking indecent liberties with a minor case by permitting hearsay statements made by the minor victim to a pediatric nurse and to a doctor to be introduced as substantive evidence based on the medical diagnosis exception under N.C.G.S. § 8C-1, Rule 803(4), because: (1) the interviews of the victim met the trustworthiness requirement; and (2) the minor victim's statements stating how and by whom she was inappropriately touched were reasonably pertinent to diagnosis since the identification of defendant as the perpetrator was pertinent to continued treatment of the possible psychological and emotional problems resulting from the sexual offense.

4. Evidence— expert testimony—credibility of victim

The trial court did not err in a first-degree statutory sexual offense and taking indecent liberties with a minor case by permitting a licensed professional counselor and a doctor to testify as to the credibility of the minor victim, because: (1) defendant made general objections to the statements during the trial, but at no time requested a limiting instruction; (2) an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such instruction; and (3) the witnesses did not testify that the minor victim suffered from a post-traumatic stress disorder, but instead testified as to the general characteristics of children who suffer from sexual abuse.

5. Sexual Offenses— first-degree—sufficiency of evidence

The trial court did not err by failing to dismiss the charge of first-degree sexual offense because there was sufficient evidence of genital penetration.

6. Sexual Offenses— indecent liberties with a minor—sufficiency of evidence

The trial court did not err by failing to dismiss the charges of taking indecent liberties with a minor, because there is sufficient testimony in the record to support five counts of this crime.

7. Evidence— instructions—statements of minor victim—substantive purposes

The trial court did not err in a first-degree statutory sexual offense and taking indecent liberties with a minor case by instructing the jury that the statements of the minor victim to a licensed professional counselor, a pediatric nurse, and a doctor were admitted as substantive evidence concerning the truth of what the victim stated at an earlier time, because the Court of Appeals has already determined that these statements were properly admitted as substantive evidence by meeting the requisite guarantees of trustworthiness.

Appeal by defendant from judgment entered 25 May 2000 by Judge Kimberly S. Taylor and amended 28 June 2000, in Superior Court, Cabarrus County. Heard in the Court of Appeals 17 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

Bender and Barnett, by Harold J. Bender, for defendant-appellant.

McGEE, Judge.

Warren David Isenberg, Sr. (defendant) was indicted for first degree statutory sex offense on 21 February 2000, and five counts of taking indecent liberties with a minor on 15 May 2000. A jury found defendant guilty of all charges on 25 May 2000. The cases were consolidated for sentencing purposes, and defendant was sentenced to 192 to 240 months in prison. Defendant appeals.

The evidence presented at trial by the State tended to show the minor victim's family and defendant's family were acquainted through the friendship of the minor victim's brother and defendant's son. The families did various activities together such as cookouts, Cub Scouting events, attending movies together, and babysitting each others' children. Defendant and his family invited the minor victim and her brother to spend the night at their home on 1 May 1999 and 22 May 1999.

Following several incidents at school in which the minor victim exhibited uncharacteristic episodes of violent behavior, the minor victim's mother took the minor victim to see Randy Howell (Howell), a licensed professional counselor, for several counseling sessions beginning on 19 May 1999. Howell testified he employed a technique called "draw therapy" during his counseling sessions, in which the minor victim would draw pictures and then the two would discuss the pictures. Over the course of several sessions, the minor victim drew pictures of herself in the shower, a "sad" bed and a "happy" bed, penises, and a picture of herself with no mouth, which Howell testified was characteristic of children who have been sexually or physically abused.

The minor victim's mother testified that during the seventh session on 30 June 1999, the minor victim drew a picture of defendant sitting on a toilet. The minor victim explained to Howell that defendant was showing her his penis with "white pee-pee" coming out, and she made a motion which indicated defendant was masturbating. At this point, the minor victim's mother and Howell began to suspect sexual abuse, and they discussed reporting this information to the police. The minor victim's mother decided to wait because she felt her daughter was safe from repeated offenses, and she wanted to be certain before she brought such allegations against a friend. The minor victim's mother and Howell agreed to have a few more sessions.

At the 11 August 1999 session, the minor victim stated defendant had touched her vagina and bottom. After this session, the minor victim's parents contacted Detective Doug Wilhelm of the Concord Police Department. Detective Wilhelm arranged a visit to the Children's Advocacy Center, located on the pediatric floor of Northeast Medical Center. The minor victim was interviewed by Julie Brafford (Brafford), a pediatric nurse, and then physically examined by Dr. Amy Morgan. The interview with Brafford was videotaped, and the jury watched this video. During the interview,

the minor victim stated she was touched on her vagina and her bottom by defendant.

Dr. Morgan testified she performed a physical examination of the minor victim on 30 August 1999. The minor victim told Dr. Morgan that defendant touched her vagina and inside her vagina. Dr. Morgan also testified that during the examination she noted a notch on the minor victim's hymen, which she described as consistent with sexual abuse.

Defendant testified at trial and denied he ever engaged in any inappropriate touching of or any sexual conduct with the minor victim. Defendant's wife also testified that she was with the minor victim during the weekends the minor victim spent the night at her and defendant's home, and she testified her husband did not do anything inappropriate with the minor victim. Defendant also presented character witnesses who testified that his character and reputation in the community was very good.

I.

[1] Defendant first argues the trial court erred in finding that Howell, a licensed professional counselor, was an expert in the area of counseling behavior of sexually abused children. We disagree.

In general, whether "a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court." *State v. Goodwin*, 320 N.C. 147, 150, 357 S.E.2d 639, 641 (1987). A "finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it." *State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989) (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)). "Under N.C.G.S. § 8C-1, Rule 702 a witness may be qualified as an expert if the trial court finds that through 'knowledge, skill, experience, training, or education' the witness has acquired such skill that he or she is better qualified than the jury to form an opinion on the particular subject." *Goodwin*, 320 N.C. at 150-51, 357 S.E.2d at 641.

In the case before us, Howell testified he had a master's degree in education, which included 2,000 hours at a day treatment center for children with behavioral problems stemming from both violent and sexual abuse; he was a licensed professional counselor in North Carolina; and he had six years of experience at Gaston Mental Health

at Court Drive School and Rowan County Behavioral Healthcare, where he counseled and treated children in a highly structured environment who had been traumatized by sexual and physical abuse. He was tendered as an expert in the counseling of and the behavior of sexually abused children.

Defendant argues the trial court erred in qualifying Howell as an expert witness, pursuant to *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993) and *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987). However, in both *Parker* and *Trent* the trial court determined the expert was a qualified and properly tendered expert, but the court in both cases held neither expert was qualified to give an expert opinion concerning whether or not the victim in the case was sexually abused.

Conversely, in the case before us, Howell did not testify as to whether, in his expert opinion, the minor victim had been sexually abused. He testified that her behavior was consistent with a child who had been sexually abused. Experts "in the field may testify on the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent with this profile." *State v. Hall*, 330 N.C. 808, 818, 412 S.E.2d 883, 888 (1992). While Howell, based on his experience and training, was not in a better position than the jury to make the ultimate determination of sexual abuse, he was in a better position than the jury, based on his training and experience, to determine what behavior was consistent or inconsistent with children who had been sexually abused. The "nature of the experts' jobs and the experience which they possess make them better qualified than the jury to form an opinion as to the characteristics of abused children." *State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 184 (2001). The trial court did not err in qualifying Howell as an expert witness in that his testimony was of the nature that would assist the jury in their ultimate determination of sexual abuse. This assignment of error is without merit.

II.

[2] Defendant next argues the trial court erred in allowing the testimony of Howell to be introduced as substantive evidence under the residual exception to the hearsay rule. The trial court found the minor victim to be unavailable because the minor victim refused to answer questions asked of her at trial.

N.C. Gen. Stat. § 8C-1 Rule 804(b)(5) (1999) "permits the admission of statements having equivalent guarantees of trustworthiness

where a declarant is unavailable." *State v. Pretty*, 134 N.C. App. 379, 384, 517 S.E.2d 677, 682 (1999). To be admissible, the trial court must determine that the declarant is unavailable, and the statement must meet a six-step analysis:

> (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
>
> (2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);
>
> (3) *That the statement possesses "equivalent circumstantial guarantees of trustworthiness"*;
>
> (4) That the proffered statement is offered as evidence of a material fact;
>
> (5) Whether the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means"; and
>
> (6) Whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."

State v. Wagoner, 131 N.C. App. 285, 288, 506 S.E.2d 738, 740 (1998) (quoting *State v. Swindler*, 339 N.C. 469, 473-74, 450 S.E.2d 907, 910 (1994)) (other citations omitted) (emphasis in original). "While no showing of necessity or trustworthiness is required for the other 'firmly rooted hearsay exceptions,' a showing of necessity and trustworthiness is required for statements admitted under the catch-all exception to the hearsay rule to avoid violating the constitutional right to confront." *Wagoner*, 131 N.C. App. at 289, 506 S.E.2d at 741 (quoting *State v. Jackson*, 348 N.C. 644, 654, 503 S.E.2d 101, 107 (1998)).

In the case before us, the trial court found that the victim was unavailable and made findings to satisfy the six requirements in *Wagoner*. Defendant has chosen to focus his assignment of error on factor three in *Wagoner* and argues the trial court erred in finding the State presented sufficient guarantees of trustworthiness. We disagree.

In order to evaluate circumstantial guarantees of trustworthiness, the court must examine the

(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination.

Wagoner 131 N.C. App. at 290, 506 S.E.2d at 741 (quoting *State v. Triplett*, 316 N.C. 1, 10-11, 340 S.E.2d 736, 742 (1986). The trial court found that the minor victim was personally present and had personal knowledge of the incidents at issue; Howell did not indicate that the victim had any motivation to make a false statement, that the victim was angry with defendant, or that Howell or the parent had prompted the statement of the minor victim; the minor victim did not recant her statements during the counseling sessions with Howell. The record also shows the trial court attempted on two different occasions to speak with the minor victim to have her answer questions. The minor victim did not respond in any meaningful manner when asked questions, especially questions concerning the trial proceedings. There is evidence to support the trial court's findings, and we will not disturb the trial court's conclusion of law. We dismiss this assignment of error.

III.

[3] Defendant next argues the trial court erred by permitting hearsay statements made by the minor victim to Julie Brafford, a pediatric nurse, and to Dr. Amy Morgan to be introduced as substantive evidence pursuant to N.C. Gen. Stat. § 8C-1 Rule 803(4) (1999), the medical diagnosis exception.

Rule 803(4) "requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000). Testimony admitted under the medical diagnosis exception "is considered inherently reliable because of the declarant's motivation to tell the truth in order to receive proper treatment." *Id.* at 286, 523 S.E.2d at 669. Therefore, "the proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* at 287, 523 S.E.2d at 669. Due to the difficulty in ascertaining "whether a declarant understood the purpose of his or her statements[] . . . the trial court should consider

all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Id.* at 287-88, 523 S.E.2d at 669-70.

Defendant argues that because Dr. Morgan examined the minor victim pursuant to a request by Detective Wilhelm of the Concord Police Department following the arrest of defendant, the examination was in preparation for trial and not for medical treatment; consequently, the hearsay statements are not admissible under the Rule 803(4) exception. Defendant relies on *State v. Stafford*, 317 N.C. 568, 346 S.E.2d 463 (1986), in which our Supreme Court excluded the testimony of a physician because in his examination he "neither treated nor diagnosed any condition" of the victim, nor was there any testimony that the victim visited the physician "for the purpose of treatment or obtaining a diagnosis." *Id.* at 574, 346 S.E.2d at 467. Our Supreme Court held that under "Rule 803(4) a prerequisite to admissibility for substantive purposes of statements made to physicians is that they be 'made for the purpose of medical diagnosis or treatment.' " *Id.* In *Stafford*, the victim visited the physician only once, three days before the start of the trial. The trial court determined the victim's statements to the physician were "not for purposes of diagnosis or treatment but for the purpose of preparing and presenting the state's 'rape trauma syndrome' theory at trial which was to commence three days later." *Id.*

Defendant also relies on *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597 (2000), where our Court determined the trial court erred in admitting hearsay testimony of a psychologist because the interview between the psychologist and the child victim did not possess a "treatment motive," the victim did not know why she was at the interview, and the psychologist did not make it clear to the child victim that she needed treatment. *Bates* at 746, 538 S.E.2d at 600. Furthermore, the psychologist did not emphasize the need to be truthful, and the interview was performed in a child-friendly environment containing only small furniture and lots of toys, an environment our Supreme Court has stated "does not emphasize the need for honesty." *Id.*

However, the case before us is distinguishable from both *Bates* and *Stafford*. Regarding the statements of Brafford, the trial court made the following findings of fact: Brafford's interview of the minor victim took place in a hospital, and the victim was taken to the pediatric ward of the hospital; Brafford was wearing hospital uniform attire when she spoke to the minor victim, and she had a badge on

identifying her as a nurse; before the interview, Brafford explained to the minor victim that following the interview the minor victim would see a doctor for a physical examination; and Brafford asked the minor victim whether she understood the difference between the truth and a lie and instructed her to be truthful during the interview. These findings support the first prong of the medical exception analysis. The assurances of trustworthiness the medical exception requires were present.

The required assurances of trustworthiness were also present in the statements made to Dr. Morgan. The examination occurred in a regular medical examination room. Dr. Morgan told the minor victim she would be examined from "head to toe." Dr. Morgan performed the examination similar to any other standard physical examination, starting by checking the minor victim's nose, throat, and ears. Dr. Morgan testified that when she performs a physical examination, she does

> a head to toe check-up. Kind of start at the top, ears, eyes, nose, throat, tummy, etcetera; and then as I get closer to or down to the area of the genitals, I tell them that just like their other doctor might have checked them there, that I need to check them there today to see if they're okay.

Furthermore, Brafford testified the purpose of the "interview and . . . medical exam is to make sure that we get . . . factual information from the child and to make sure [that they] are physically okay and that they don't have any harm." Dr. Morgan testified the purpose of the examination "is to determine if the child has been injured and then if the child has been injured, to render any treatment and perform any diagnostic studies and make appropriate referrals to specialists, whether they be for medical problems or psychiatric or psychological problems." The trial court found the purpose of the examination was "dual, in that it was both for the purpose of medical intervention and for the purpose of future prosecution[,]" which meets the first prong of the test.

The minor victim's statements also are sufficient to meet the second prong of the *Hinnant* test. The statements the minor victim made were "reasonably pertinent to diagnosis." The minor defendant stated how and where she was inappropriately touched. She also stated by whom she was touched. The "victim's identification of the defendant as perpetrator was pertinent to continued treatment of the possible psychological and emotional problems resulting from the [sexual

offense]." *State v. Aguallo*, 318 N.C. 590, 597, 350 S.E.2d 76, 81 (1986). Defendant's assignment of error is dismissed.

IV.

[4] Defendant next argues the trial court erred by permitting Howell and Dr. Morgan to testify as to the credibility of the minor victim.

In general, it is not error for experts "to testify concerning the symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse." *State v. Kennedy*, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366 (1987). The testimony is admissible if the testimony, "if believed, could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim." *Id.*

Defendant argues, based on *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992) and *State v. Hensley*, 120 N.C. App. 313, 462 S.E.2d 550 (1995), that the evidence is admissible, if at all, only with a limiting instruction that it be considered for corroborative and not substantive purposes. In *Hall*, the Supreme Court found error in the admission of testimony concerning the victim's diagnosis of post-traumatic stress disorder and conversion disorders. The Court did not rule this type of evidence was always inadmissible, but instead found the testimony

> was not limited by the trial court to any particular purpose. It was admitted for the substantive purpose of allowing the jury to infer that [the victim] had in fact been raped. Because this evidence was not limited by the trial court to corroborating [the victim's] version of the events . . . we find error in its admission.

Hall, 330 N.C. at 823, 412 S.E.2d at 891-92. Likewise in *Hensley*, a physician's testimony concerning the symptoms of post-traumatic stress disorder exhibited by the victim,

> while not mentioning defendant's name specifically, without question intimates the cause of the alleged victim's post-traumatic stress syndrome was the sexual abuse inflicted by *defendant*. This testimony was thus erroneously admitted as substantive evidence to prove [the victim] suffered a sexual assault by anal penetration and that defendant committed the offense.

Hensley, 120 N.C. App. at 319, 462 S.E.2d at 554 (emphasis in original). However, in the case before us, defendant made general objections to these statements during the trial, but at no time requested a limiting instruction. In North Carolina, the rule "has long been that an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such instruction." *State v. Quarg*, 334 N.C. 92, 101, 431 S.E.2d 1, 5 (1993).

Furthermore, we note the decisions in both *Hall* and *Hensley* are limited to post-traumatic stress disorders and conversion disorders. In *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993), our Court distinguished the underlying facts from *Hall* because the expert in *Richardson* testified to "basic characteristics of sexually abused children, reasons for children failing to report abuse to parents, and various events leading to disclosure." *Id.* at 65, 434 S.E.2d at 662. Our Court determined that since no "testimony as to an abuse 'profile' or 'syndrome' was given . . . the analysis set forth in *Hall* is inapplicable." *Id.* Likewise, in the case before us neither Howell nor Dr. Morgan testified that the minor victim suffered from a post-traumatic stress disorder. They both testified as to the general characteristics of children who suffer from sexual abuse. We therefore dismiss this assignment of error.

V.

Defendant next argues the trial court erred by failing to dismiss the charge of first degree sex offense and the charges of taking indecent liberties with a minor.

[5] Defendant argues the charge of first degree sexual offense should have been dismissed because there was no evidence of penetration. We disagree. "For a charge of sexual offense to withstand a motion to dismiss for insufficient evidence, there must be evidence of anal or genital penetration by any object." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997). Howell testified that the minor victim had reported that defendant touched her inside her vagina. Dr. Morgan testified that when she examined the minor victim, she questioned the minor victim while using a soft cotton swab to touch areas of the minor victim's body. When Dr. Morgan touched the minor victim inside her vagina, the minor victim stated defendant had touched her there. Dr. Morgan testified:

> When I placed the Q-tip on the vaginal area in between the labia or the lips of the vagina, she stated that she had been

> touched there; and when I placed the Q-tip just touching the hymen but not inserting it into the vaginal canal, she stated . . . she had been touched there.
>
> . . . .
>
> I did ask her during the course of these questions, as I always do, who touched you there. . . . and she did answer my question and she said [defendant] touched me.

Dr. Morgan also found a notch on the minor victim's hymen, which Dr. Morgan testified was evidence that was consistent with sexual abuse. In

> ruling on a motion to dismiss, the trial court must view all of the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. A motion to dismiss must be denied where substantial evidence exists of each essential element of the crime charged and of the defendant's identity as the perpetrator. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

State v. McAllister, 138 N.C. App. 252, 259-60, 530 S.E.2d 859, 864 (2000) (quoting *State v. Williams*, 127 N.C. App. 464, 467, 490 S.E.2d 583, 586 (1997)) (other citations omitted). The evidence at trial of penetration was sufficient to survive a motion to dismiss and be weighed and decided by the jury.

[6] Defendant also argues there was not sufficient evidence to submit to the jury five counts of taking indecent liberties with a child. N.C. Gen. Stat. § 14-202.1(a) (1999) states that:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of any sex under the age of 16 years.

There is again sufficient testimony in the record of five counts of defendant taking indecent liberties with the minor victim. We therefore dismiss this assignment of error.

VI.

[7] Defendant next argues the trial court erred in instructing the jury that the statements of the minor victim to Howell, Brafford, and Dr. Morgan were admitted as substantive evidence of the truth of what the minor victim stated at an earlier time. However, as we have already determined these statements were properly admitted as substantive evidence by meeting the requisite guarantees of trustworthiness, it was not error for the trial court to instruct the jury accordingly. We therefore dismiss this assignment of error.

No error.

Judges TIMMONS-GOODSON and JOHN concur.

GERALDINE A. BEST, PLAINTIFF-APPELLANT v. FORD MOTOR COMPANY, SAM JOHNSON'S LINCOLN MERCURY, INC. AND TRW, INC., DEFENDANTS-APPELLEES

COA00-1083

(Filed 28 December 2001)

1. Release— mutual mistake—conclusory statements—insufficient

The trial court properly granted Ford's motion for summary judgment in an action arising from an automobile accident where plaintiff had signed a release as to the other driver, his employer, and "all other persons, firms and corporations" but contended that it resulted from mutual mistake. Upon defendants' motions for summary judgment based upon the release, the burden shifted to plaintiff to produce a forecast of evidence demonstrating specific facts as opposed to allegations. Plaintiff merely offered conclusory statements that the release was executed under conditions amounting to mutual mistake and failed to state with particularity the circumstances surrounding the alleged mutual mistake.

2. Release— unintended—no evidence of mutual mistake

The trial court properly granted summary judgment for the dealer which sold plaintiff her car and the manufacturer of the air bag which injured her where she had signed a covenant releasing certain parties and "all other persons, firms and corporations." Although plaintiff argued that she never intended to release these parties, she presented no evidence of mutual mistake.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 22 May 2000 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 August 2001.

Wallace & Graham, P.A., by Richard J. Lutzel, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Kirk G. Warner and Johanna Searle Fowler, for defendant-appellee Ford Motor Co.

Lawrence M. Baker, for defendant-appellee Sam Johnson's Lincoln Mercury, Inc.

Nelson, Mullins, Riley & Scarborough, L.L.P., by Paul J. Osowski, and Lord, Bissell & Brook, by David R. Reed, for defendant-appellee TRW, Inc.

BRYANT, Judge.

Plaintiff, Geraldine A. Best, and her husband were injured on 4 September 1996 when their 1995 Ford Lincoln Town car was struck by a vehicle driven by Roderick Lane Hart, an employee of Westport Corporation. The passenger-side air bag deployed, striking plaintiff in the face and causing serious bodily injury. The air bag was designed and manufactured by TRW, Inc. Plaintiff's car was purchased from Sam Johnson's Lincoln-Mercury, Inc., which had purchased the car from Ford.

On 1 August 1997, plaintiff and her husband signed a Covenant Not to Execute [Covenant][1] in consideration of $25,000. The

1. There are two release documents discussed throughout this opinion. The term "Covenant" refers to a document titled "Covenant Not to Execute," which was signed 1 August 1997. The term "Release" refers to the document titled "Release and Settlement" signed in December 1997.

Covenant released Hart, Hart's wife, Nationwide Mutual Insurance Company (Hart's insurer), and "all other persons, firms and corporations *except* the Westport Corporation, [and] Ford Motor Company" or their insurance carriers (emphasis added). Several months later, plaintiff and her husband settled with Hart and his employer, Westport, for $175,000. At that time, the Bests signed a Release and Settlement [Release] provided by Westport's insurance company, Crum & Forster Insurance Co., Inc., (Crum & Forster Insurance). The Release specifically released "Roderick Hart and Westport Corporation," as well as "all other persons, firms and corporations . . . from any and all actions, claims and demands, whatsoever which claimant [has] on account of or arising out of [the accident]." Unlike the earlier Covenant, the December 1997 Release did not include any exceptions.

On 4 August 1999 plaintiff filed this action against Ford, Sam Johnson's and TRW, alleging, inter alia, negligence and breach of warranty. Ford, Sam Johnson's and TRW filed motions for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 56 (1999). The trial court granted defendants' motions after finding that both the Covenant and Release were binding. Therefore, plaintiff waived her rights to bring subsequent actions arising out of the accident. Plaintiff appealed.

The sole issue presented in this case is whether the trial court erred in granting defendants' motions for summary judgment after determining there was no genuine issue of material fact as to whether a mutual mistake of fact existed when the parties executed the Release. We hold the trial court did not err. Accordingly, we affirm.

I. Releases, Covenants and 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.* The moving party has the burden of proving that a genuine issue of material fact does not exist. *Pembee Mfg. Corp. v. Cape Fear*

Constr. Co., 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). Once the moving party makes the required showing, "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway,* 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied,* —— U.S. ——, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001). The court must examine the moving party's evidence and resolve all inferences against the moving party. *Id.*

A release is a "formal written statement reciting that the obligor's duty is immediately discharged." E. Allan Farnsworth, *Contracts* § 4.24 (2d ed. 1990). A release given for valuable consideration is a complete defense to a claim for damages due to injuries. *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E.2d 718 (1981). Releases and covenants not to sue are treated the same under the Uniform Contribution Among Tort-feasors Act (Act). *See* N.C.G.S. § 1B-4 (1999). Under the Act, a release or covenant not to sue that is given in good faith to one or more persons liable for the same injury does not discharge other tortfeasors, unless otherwise provided. *Id.* However, absent other evidence, a release that releases all other persons or entities is valid. *Cunningham v. Brown*, 51 N.C. App. 264, 269, 276 S.E.2d 718, 723 (1981) (citing *Caudill v. Chatham Mfg. Co.*, 258 N.C. 99, 102, 128 S.E.2d 128, 130 (1962)).

A release may be avoided upon evidence that it was executed as a result of fraud or mutual mistake. As this Court stated in *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E.2d 718 (1981), a motion for summary judgment may be avoided if affidavits submitted in opposition to the motion create a genuine issue of material fact regarding the parties' intentions in releasing unnamed tortfeasors. *Id.* at 273, 276 S.E.2d at 725 (1981) (citing *Evans v. Tillet Bros. Constr. Co.*, 545 S.W.2d 8, 12 (Tenn. Ct. App. 1976)). In *Cunningham*, plaintiffs, who were husband and wife, were injured when a tractor-trailer changed lanes into the lane in which they were traveling on a motorcycle. Defendant requested an admission that plaintiffs' insurance carrier had paid plaintiffs $4975. When plaintiffs failed to answer, defendant moved for summary judgment against plaintiff wife on the grounds that the request for an admission was deemed admitted because of plaintiff wife's failure to answer. Plaintiff wife submitted an affidavit stating that the insurance adjuster delivered a check and a document requiring a signature, and that plaintiff wife thought she was signing a receipt for a check. The adjuster allegedly told plaintiff

wife that the dealings between plaintiff wife and the insurance company would not affect claims against other defendants. *Id.* at 266, 276 S.E.2d at 721. The trial court held that the parol evidence rule barred the admission of the affidavit. *Id.* at 270, 276 S.E.2d at 724. This Court reversed, holding that the affidavit was admissible to show that the release was procured under circumstances amounting to fraud or mutual mistake. *Id.* at 274, 276 S.E.2d at 726.

II. Ford Motor Company

[1] We first address the effect of the December Release on Ford's liability since Ford was expressly excepted from the August Covenant. The Release stated in pertinent part that plaintiffs "hereby [r]emise, [r]elease and [f]orever [d]ischarge Roderick Hart and Westport Corporation . . . [and] all other persons, firms and corporations whomsoever of and from any and all actions, claims and demands, whatsoever which claimant now [has] . . . on account of or arising out of [the] accident. . . ." Plaintiff argues that a mutual mistake existed at the execution of the Release which specifically discharged Hart and Westport in December 1997.

Plaintiff bases her argument on her March 2000 affidavit and the April 2000 affidavit of Jack Chappell, *former* adjuster for Crum & Forster Insurance. In her affidavit plaintiff states that "[a]t no time did I agree to, nor did I intend to release Ford Motor Company, Sam Johnson's Lincoln Mercury, Inc. or TRW, Inc." Jack Chappell states in his affidavit that "[a]t no time was it the intention of Crum & Forster Insurance to absolve Ford Motor Company, Sam Johnson's Lincoln Mercury, or TRW, Inc. from any potential liability owed to Geraldine Best." He further stated that "at no time was it the intention of Crum & Forster Insurance to include in the Release and Settlement any other company or corporation not specifically mentioned therein." The affidavits were sworn in March and April 2000, respectively.

Ford, on the other hand, argues that the Release was unambiguous and executed in the presence of plaintiff's attorney. Furthermore, plaintiff had a duty to read the Release and is charged with knowledge of its contents. Ford also argues that the fact that plaintiff and her attorney had specifically excluded Ford and Westport from the Covenant indicates there was no mutual mistake as to the Release.

Ford further argues that plaintiff failed to present clear and convincing evidence of mutual mistake. Mutual mistake is " 'a mistake common to *all* the parties to a written instrument . . . [which] usually

relates to a mistake concerning its contents or its legal effect.' " *Sykes v. Keiltex Indus., Inc.*, 123 N.C. App. 482, 486, 473 S.E.2d 341, 344 (1996) (alteration in original) (emphasis added) (quoting *M.P. Hubbard & Co. v. Horne*, 203 N.C. 205, 208, 165 S.E. 347, 349 (1932)). Here, Ford argues that plaintiff failed to show mutual mistake because she failed to submit any evidence that Hart and Westport—the other parties to the Release—were mistaken as to the effect of the Release.

We find this argument persuasive. As we discussed in *Cunningham*, the parol evidence rule does not bar the admission of affidavits to show mutual mistake or fraud. Because a mutual mistake is one that is common to *all the parties to a written instrument*, *Sykes*, 123 N.C. App. at 486, 473 S.E.2d at 344, the party raising the defense must state with particularity the circumstances constituting mistake as to all of the parties to the written instrument.

In the case at bar, plaintiff submitted affidavits in support of her argument that there was a mutual mistake as between herself and Crum & Forster Insurance, which represented Hart and Westport, the other parties to the Release. We find these affidavits, which lack particularity, to be insufficient to withstand a motion for summary judgment. Upon defendants' motions for summary judgment based on the release, the burden shifted to plaintiff "to produce a forecast of evidence demonstrating *specific facts, as opposed to allegations*, showing that [s]he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, — U.S. —, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001) (emphasis added). Plaintiff, in her affidavit, merely states that she never intended to release Ford, Sam Johnson's or TRW. Specifically, plaintiff states that "if any language in the Release can be construed in a manner to apply to Ford Motor Company, Sam Johnson's Lincoln Mercury, Inc. or TRW, Inc., it is only through mutual mistake." Similarly, Jack Chappell merely alleged in his affidavit that Crum & Forster Insurance never intended to release any party not specifically mentioned in the Release. Plaintiff's affidavit contains conclusory statements that the Release was executed under conditions which amounted to mutual mistake. To raise a genuine issue of material fact, plaintiff must allege specific facts upon which she intends to rely in establishing mutual mistake. *See In re Loftin's Estate*, 21 N.C. App. 627, 631, 205 S.E.2d 574, 576, *aff'd*, 285 N.C. 717, 208 S.E.2d 670 (1974).

Plaintiff argues that *Peede v. Gen. Motors Corp.*, 53 N.C. App. 10, 279 S.E.2d 913 (1981), is on point and supports her contention. We disagree. In *Peede*, the plaintiff, a passenger in a car owned and being driven by his brother, was injured in a collision with another car. The plaintiff's brother's car was manufactured by General Motors Corporation [GMC]. The plaintiff settled with his brother and the brother's insurance company. The agreement released "all other tort feasors" from liability. The plaintiff then sued GMC and the driver of the other car. The defendants moved for summary judgment on the grounds that plaintiff's claim was barred by the release in the settlement agreement. The plaintiff also moved for summary judgment on the grounds that there was a mutual mistake as to the language in the release. The plaintiff, in support of his motion, submitted affidavits from himself and his brother's insurance adjuster. The trial court granted defendants' motion for summary judgment.

This Court reversed, holding that the affidavits and other materials offered by the plaintiff in opposition to the defendants' motion were sufficient to raise a genuine issue of material fact as to whether a mutual mistake existed when the parties executed the release. *Id.* at 17, 279 S.E.2d at 918. The Court relied in part on the affidavits submitted by the plaintiff and the insurance adjuster. Specifically, the plaintiff testified that the insurance adjuster told her that "it is a release which releases your brother only." *Id.* at 13, 279 S.E.2d at 916. Similarly, the insurance adjuster testified in his affidavit:

> I told [the plaintiff] and made it perfectly clear to [him] and his wife that this was releasing only [the insurance company and the plaintiff's brother]. That was my intent, and as far as I know, that was Mr. Peede's intent.
>
> . . . .
>
> . . . My only intent was to release his brother and [the insurance company]. . . .

Id. at 15, 279 S.E.2d at 917. The insurance adjuster further testified that "[t]he words 'all other' tort feasors in the fifth line was mistakenly left in and included in the release." *Id.* at 16, 279 S.E.2d at 917.

Unlike the plaintiff in *Peede*, plaintiff in the case at bar has failed to state with particularity the circumstances surrounding the alleged mutual mistake. Neither plaintiff's affidavit nor that of Jack Chappell indicated any conversation contemporaneous with the signing of the Release that would indicate mutual mistake of fact; plaintiff merely

offers statements from herself and Chappell that they never intended to release anyone other than Hart and Westport. Further, we are not convinced that an affidavit, signed over three years after the execution of the Release, by a *former* claims adjuster, can appropriately state the intent of the company when the Release was executed. This is insufficient to produce a forecast of evidence demonstrating specific facts to show that plaintiff could establish a prima facie case at trial. Thus, the trial court properly granted Ford's motion for summary judgment.

III. Sam Johnson's Lincoln Mercury, Inc.

[2] Plaintiff argues that she never intended to release Sam Johnson's. In her affidavit, plaintiff stated:

> 4. That prior to filing a lawsuit, I reached an agreement with the insurance company for Roderick Hart and his employer, Westport Corporation. The insurance company was Crum & Forster Insurance Company.
>
> 5. That as part of the agreement, I signed a Release and Settlement Form, provided to me by Crum & Forster, that released Roderick Hart and Westport Corporation form [sic] further liability.
>
> 6. At no time did I agree to, nor did I intend to release Ford Motor Company, Sam Johnson's Lincoln Mercury, Inc. or TRW, Inc.

According to Chappell's affidavit, the Release was executed on or about 23 December 1997. The Covenant Not to Execute was executed several months earlier on 1 August 1997.

It is clear from the record and plaintiff-appellant's brief that plaintiff alleges mutual mistake only as to the December Release and Settlement. Because the Release was executed several months after the Covenant, we must address whether the Covenant released Sam Johnson's from liability.

As we stated earlier in this opinion, a release or covenant not to sue that is given to one or more persons liable for the same injury does not discharge other tortfeasors, if given in good faith. N.C.G.S. § 1B-4 (1999). However, absent other evidence, a release which releases all other persons or entities is valid. *Cunningham v. Brown*, 51 N.C. App. 264, 269, 276 S.E.2d 718, 723 (1981) (citing *Caudill v. Mfg. Co.*, 258 N.C. 99, 102, 128 S.E.2d 128, 130 (1962)). The Covenant Not to Execute in the case at bar provided that plaintiff agreed to:

> release and discharge . . . Kristen and Roderick Hart and Nationwide Mutual Insurance Company, . . . *and all other persons, firms and corporations* except the Westport Corporation, Ford Motor Company or any Insurance Carrier providing coverage to Westport Corporation, Ford Motor Company their heirs, executors, administrators, successors, assigns, employees, bailees, agents and servants from all and all manner of actions, causes of action, suits, debt, accounts, judgments, claims and demands whatsoever in law or equity as a result of, growing out of or in any way connected with any and all injuries both to persons and/or damages to property resulting or to result or which might result in the future from an accident which occurred on or about the 4th day of September, 1996, at or near Gastonia, North Carolina . . . .

(emphasis added). The Covenant specifically excluded Westport and Ford. However, Sam Johnson's fell within the catch-all phrase, "and all other persons, firms and corporations." Therefore, Sam Johnson's was released and discharged by Plaintiff's Covenant.

Plaintiff presents no evidence regarding mutual mistake as to the Covenant. The scope of review on appeal is limited to consideration of the assignments of error set out in the Record on Appeal. N.C. R. App. P. 10(a). Because the Covenant released Sam Johnson's from liability, the subsequent Release and Settlement had no effect on Sam Johnson's. Accordingly, the trial court properly granted Sam Johnson's motion for summary judgment.

IV. TRW, Inc.

Plaintiff also argues that she never intended to release TRW, Inc. For the reasons stated in the discussion of Sam Johnson's motion for summary judgment, we hold that the trial court properly granted TRW's motion for summary judgment.

V. Conclusion

The trial court did not err in finding the Covenant and Release signed by plaintiff were binding, and in granting defendants' motions for summary judgment. As to Ford, plaintiff failed to present adequate evidence of mutual mistake as to all the parties to the Release. As to Sam Johnson's and TRW, plaintiff failed to assign error to the trial court's granting of summary judgment on the grounds that the Covenant was executed under mutual mistake. Accordingly, we must affirm.

Affirmed.

Judge CAMPBELL concurs.

Judge GREENE dissents with a separate opinion.

GREENE, Judge, dissenting.

As I believe a genuine issue of material fact exists as to whether the Release and the Covenant were executed under circumstances amounting to mutual mistake, I respectfully dissent.

"A release, like any other contract, is subject to avoidance by a showing that its execution resulted from . . . mutual mistake of fact." *Cunningham v. Brown*, 51 N.C. App. 264, 269, 276 S.E.2d 718, 723 (1981). A mistake of fact occurs if a release fails to accomplish the result intended by the parties to the release.[2] *Id.* at 273-74, 276 S.E.2d at 726. Thus, if affidavits are submitted which would permit a finding that the parties to the release intended to release only a certain party or individual, but the actual release contains "language contrary to this mutual agreement and intention in that by its terms it released other joint tortfeasors as well," a genuine issue of fact is raised precluding entry of summary judgment. *Id.* at 273, 276 S.E.2d at 726. Although it may be determined at trial " 'that the weight of the evidence compels the conclusion that the language of the release instrument must prevail or that [the release] is consistent with the intention of the parties, the existence of [a] genuine issue of fact precludes a determination of the matter upon the record.' " *Id.* (quoting *Evans v. Tillett Bros. Constr. Co.*, 545 S.W.2d 8, 12 (Tenn. App.), *cert. denied* (Tenn. 1976)).

In this case, Plaintiff stated in her affidavit that, as part of the settlement agreement with Hart and Westport, she "signed a Release and Settlement Form . . . that released Roderick Hart and Westport Corporation from further liability." At no time did Plaintiff "agree to, nor did [she] intend to release Ford Motor Company, Sam Johnson's Lincoln Mercury, Inc. or TRW, Inc" from liability. Moreover, Jack Chappell (Chappell),[3] an insurance adjuster for Crum & Forster

2. As a general proposition, the parties to a release are the releasor, the one who releases her claim, and the releasee, the one who is released from the claim. If a release is secured for the releasee by his insurance representative, the insurance representative is a party to the release, in lieu of the releasee.

3. The majority finds "persuasive" Ford's argument that "Plaintiff failed to show mutual mistake because she failed to submit any evidence that Hart and Westport—the

Insurance Company (the insurance company that insures Westport and its employees acting within the course and scope of their employment), stated in his affidavit that the settlement was reached "on behalf of Westport Corporation and Roderick Hart." Moreover, at the time the Release was signed, it was not the "intention of Crum & Forster Insurance to include in the Release . . . any other company or corporation not specifically mentioned therein." Crum & Forster did not intend "to absolve Ford Motor Company, Sam Johnson's Lincoln Mercury, or TRW, Inc." from liability. Viewing this evidence in the light most favorable to Plaintiff, I believe a genuine issue of fact exists as to whether the Release was executed under circumstances amounting to mistake of fact.[4] Accordingly, summary judgment was improperly granted.

AMANDA DIXON TUCKER AND JIMMY L. HODGES AND BECKY J. HODGES v. THE MECKLENBURG COUNTY ZONING BOARD OF ADJUSTMENT, MARSHALL GUS THOMAS, JR. AND RHONDA GOLDEN-THOMAS

No. COA00-1426

(Filed 28 December 2001)

Zoning— multi-family residential—dog kennel

The trial court erred by reversing the Mecklenburg County Zoning Board of Adjustment's decision determining that respondents' dog kennel is a private kennel and not a commercial kennel, and is thus allowable in a district zoned multi-family residential under the pertinent ordinance, because a de novo review reveals

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other parties to the Release—were mistaken as to the effect of the Release." I disagree. Hart and Westport were not parties to the Release. In any event, this Court has held that sufficient evidence of mutual mistake exists where the plaintiff and the insurance adjuster for the defendant's insurance company submit affidavits alleging mutual mistake, even without evidence from the releasee. *See Cunningham*, 51 N.C. App. at 274, 276 S.E.2d at 726 (affidavit by plaintiff-wife was sufficient to raise a genuine issue of fact); *see also Peede v. General Motors Corp.*, 53 N.C. App. 10, 13-17, 279 S.E.2d 913, 916-17 (affidavits of plaintiff, his wife, and the insurance adjuster were sufficient to raise a genuine issue of material fact), *disc. review denied*, 304 N.C. 196, 285 S.E.2d 100 (1981).

4. Although the Covenant did not specifically exclude Sam Johnson's and TRW, Plaintiff and Chappell both have stated in their affidavits that neither intended to release Sam Johnson's and TRW from liability. Accordingly, a genuine issue of material fact also exists as to whether the Covenant was executed under circumstances amounting to mistake of fact.

that: (1) the Board's determination that requesting a donation and attaching conditions regarding the care of the dog at the time of adoption does not constitute a sale and is not arbitrary or a manifest error of law; and (2) even though respondents purchased the lot with the operation of a kennel in mind, a private kennel is a permitted accessory use as long as it complies with certain regulations.

Judge GREENE dissenting.

Appeal by respondents Marshall Gus Thomas, Jr. and Rhonda Golden-Thomas from judgment entered 31 July 2000 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2001.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by John H. Carmichael, for petitioner-appellees.

Ruff, Bond, Cobb, Wade & Bethune, L.L.P., by James O. Cobb, for respondent-appellee.

Nelson, Mullins, Riley & Scarborough, L.L.P, by Paul J. Osowski, for the respondent-appellants.

THOMAS, Judge.

Respondents, Marshall Gus Thomas, Jr. and Rhonda Golden-Thomas, appeal the trial court's reversal of a decision by the Mecklenburg County Zoning Board of Adjustment (Board).

The Board determined that respondents' kennel is not a "commercial kennel" and is thus allowable in a district zoned multi-family residential under the Mecklenburg County Zoning Ordinance (Ordinance). The trial court, finding the kennel to be commercial, reversed the Board's decision and issued a cease and desist order. We reverse the decision of the trial court.

The pertinent facts are as follows: Respondents established Project HALO Corporation (HALO) as a non-profit organization with the primary goal being the rescue of stray and unwanted dogs. Respondents, who pay the county licensing and registration fees and taxes, own all of the animals in their kennel. HALO then pays all expenses associated with caring for the dogs. On average, respondents keep approximately ten to fifteen dogs in pens located between their residence and the rear lot line.

Some of the dogs are eventually adopted, and those taking the animals sign an adoption contract. The contract includes provisions requiring the adoptive family to establish regular contact with a veterinarian, provide the animal with health check-ups, inoculations, and heartworm treatment. The new owner also must notify HALO if the animal is no longer wanted. The contract provides that ownership of the animal "reverts to Project: H.A.L.O." if the conditions are not met. Despite this provision, we note that at the time of adoption, respondents, and not HALO, legally own the dogs. In addition, a donation to HALO is requested but not required.

In March of 1999, a zoning enforcement code inspector with the Mecklenburg County Engineering and Building Standards Department conducted an inspection of the kennel and concluded it was in violation of the ordinance. The inspector issued a notice of violation, and respondents appealed to the Mecklenburg County Zoning Board of Adjustment. After a hearing, the Board reversed the inspector's decision by a 5-1 vote and ruled that respondents operate a private kennel that is permitted as an accessory use in the multi-family zoning district.

Petitioners, Amanda Dixon Tucker, Jimmy L. Hodges, and Becky J. Hodges, neighbors of respondents, filed a petition in superior court for writs of certiorari and mandamus and a decree of mandatory injunction. The trial court reversed the Board, finding that respondents do operate a commercial kennel in violation of the zoning ordinance. Respondents appeal.

I. Scope and Standard of Review

A. Initial Reviewing Court

Judicial review of town decisions is provided for in N.C. Gen. Stat. § 160A-388(e): "Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C. Gen. Stat. § 160A-388(e) (1999). Although the North Carolina Administrative Procedure Act (APA) expressly excludes from its purview the decisions of local municipalities, "[w]e cannot believe that our legislature intended that persons subject to a zoning decision of a town board would be denied judicial review of the standard and scope we have come to expect under the North Carolina APA." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 624, 265 S.E.2d 379, 382, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). Accordingly, our Supreme Court extrapolated from the Act in determining the task of the initial reviewing court:

(1) reviewing the record for errors of law;

(2) ensuring that procedures specified by law in both statute and ordinance are followed;

(3) ensuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents;

(4) ensuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record; and,

(5) ensuring that decisions are not arbitrary and capricious.

Id. at 626, 265 S.E.2d at 383.

The proper standard of review for the superior court depends on the particular nature of the issues presented on appeal. *See In re Appeal of Willis*, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725 (1998). When the petitioner correctly contends that the agency's decision was either unsupported by the evidence or arbitrary and capricious, the appropriate standard of review for the initial reviewing court is "whole record" review. *Id.* (citing *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)). If, however, petitioner properly alleges that the agency's decision was based on error of law, *de novo* review is required. *Id.*

De novo review requires a court to consider the question anew, as if not considered or decided by the agency or, as here, the local zoning board. *Id.* (citing *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)). The "whole record" test requires the reviewing court to examine all competent evidence (the "whole record") to determine whether the board's decision is supported by substantial evidence. *Id.* A reviewing court may use more than one standard of review if the nature of the issues raised so requires. *See Willis*, 129 N.C. App. at 502, 500 S.E.2d at 726.

B. Appellate Review

On review of a superior court order regarding a board's decision, this Court examines the trial court's order for error of law by determining whether the superior court: (1) exercised the proper scope of review, and (2) correctly applied this scope of review. *Id.* at 501-02, 500 S.E.2d at 726 (stating that, although our Supreme Court articu-

lated this two-step process for *agency* decisions, "[w]e believe appellate review of a superior court judgment on writ of certiorari regarding the action of a quasi-judicial body (such as the Board herein), being derivative of the power of the superior court to review the action . . . is "likewise governed by analogy to the APA.") (internal quotations omitted). Further, this Court determines the actual nature of the contended error and then proceeds with an application of the proper standard of review. *Id.* at 501, 500 S.E.2d at 725-26.

Here, the parties presented arguments to the superior court regarding: (1) whether the Board's determination that respondents operated a private kennel is an error of law; (2) whether the Board's decision is not supported by substantial evidence in the whole record; and (3) whether the Board's decision is arbitrary and capricious.

The superior court states in its order that, regarding issues (2) and (3) above, the proper standard of review is a whole record review. After finding that the odor, noise, and increased traffic caused by the dogs impairs the use and enjoyment of petitioners' properties and makes it difficult for them to sleep, the superior court concluded that the Board's decision was not supported by competent, material and substantial evidence, and that it was arbitrary and capricious.

The standard the superior court applied to issue (1) is not as clear. The court stated in its order that, "the Board's conclusion that the kennel operated on [respondents'] [p]roperty is a private kennel . . . is a question of interpretation and as such, it is subject to review by this [c]ourt." The court then concluded the Board's decision on this issue is "erroneous."

Because the *actual* nature of the contended error in this case is a question of law, we apply review *de novo*. *See Willis*, 129 N.C. App. at 501, 500 S.E.2d at 725 (errors of law require *de novo* review); *see also Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118 (where the initial reviewing court should have conducted *de novo* review, this Court will directly review the [quasi-judicial] decision under a *de novo* review). All parties here agree that respondents operate a kennel in a multi-family district, and that the kennel complies with the technical requirements of an accessory use. The error each party assigns is with respect to the interpretations of "private kennel" and "commercial kennel," and to a lesser extent, "principal use" and "accessory use." Thus, the sole issue presented is whether the Board correctly interpreted definitions in the zoning ordinance in determining that

respondents operate a private kennel as a permitted accessory use, and the proper standard of review is *de novo* review.

We note initially that the function of a board of adjustment is to interpret local zoning ordinances. *CG & T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 39, 411 S.E.2d 655, 659 (1992). Some deference is given to the board's interpretation of its own city code. *Id.* Therefore, on review we do not determine whether another interpretation might reasonably have been reached by the Board, but whether the Board acted arbitrarily, oppressively, manifestly abused its authority, or committed an error of law. *Taylor Home of Charlotte v. City of Charlotte*, 116 N.C. App. 188, 193, 447 S.E.2d 438, 442, *disc. review denied*, 338 N.C. 524, 453 S.E.2d 170 (1994).

II. Analysis

The Board here determined that, under the Ordinance, respondents operate a private kennel permitted as an accessory use in the multi-family zoning district. Section 12.410 of the Ordinance provides that a private kennel is permitted as an accessory use if it meets the following conditions:

> (1) [The kennel] is . . . located between the principal structure and rear lot line, shall occupy no more than 20 percent of the rear yard and shall be located no closer than 10 feet to any side lot line.
>
> (2) Extensions of or additions to property line fences to confine animals to a part of the property abutting the lot line shall not be permitted.
>
> (3) No such accessory use shall be operated for commercial purposes.

Petitioners do not contend the kennel violates (1) or (2) of the foregoing requirements. Rather, they argue that the kennel is a commercial kennel and therefore not permitted under the Ordinance. A commercial kennel is defined in the Ordinance as:

> A use or structure intended and used for the breeding or storage of animals for sale or for the training or overnight boarding of animals for persons other than the occupant of the lot.

A private kennel is defined as:

> A structure used by the occupant of the property for the outdoor storage of animals and not operated on a commercial basis.

"Private kennel" is defined broadly and in the negative, as a kennel that is "not operated on a commercial basis." At the hearing, the Board noted that respondents' kennel, operated by a non-profit organization, fits the definition of private kennel, because "commercial use" is defined under the Ordinance as an "enterprise that's carried on for profit." The Board also heard evidence pertaining to the definition of "commercial kennel." The Ordinance has no other definition for the outdoor storage of animals, such as an animal shelter. If respondents' kennel does not meet the requirements of a commercial kennel, by default it falls under the definition of "private kennel."

Among the Board's findings of facts were the following:

(1) There is no breeding, selling, storage of animals for sale, grooming, training, or overnight boarding of the animals.

(2) Does meet[] the private kennel definition and the requirements of the Zoning Ordinance set forth in Section 12.410.

(3) The animals kept on the residence are cared for by the Thomas[es] on behalf of Project Halo, a non-profit organization, for which donations are accepted.

(4) The Thomas[es] own the animals, and pay the County licensing tax fee for every dog.

(5) The Applicant[s] ha[ve] over three acres as their principal residence and operate[] the kennel on site as an accessory use.

(6) Code Section 12.410 Requires—The private kennel use occupies less than 20% of the rear yard. The property complies with this provision.

Respondents contend the Board correctly decided that the kennel is not commercial because there is no evidence that it is used for "the breeding or storage of animals for sale." The dogs are not sold. They are either adopted or they are kept by respondents. A donation is *requested* of adoptive families to defray maintenance expenses. Respondents further argue there is no evidence that the kennel is used for "training or overnight boarding of animals for persons other than the occupant of the lot." They own the dogs unless the dogs are adopted, and at that point the dogs do not return to the kennel to be fed and housed.

Petitioners, on the contrary, contend the judgment of the trial court was correct because the kennel houses numerous dogs, causes

increased traffic by attracting customers and volunteers to the property, has a brochure, and utilizes an adoption contract. In essence, petitioners argue that because the kennel exhibits some of the characteristics of a commercial kennel, the Board's decision that the kennel is private is erroneous. Petitioners also contend that the storage of dogs with the intent to find an adoptive family is equivalent to "storage for sale" as set forth in the definition of a commercial kennel. Applying a *de novo* review, we note that the dictionary supports the Board's interpretation that "sale" does not include the transfer of the dog from respondents to a new owner. "Sale" is defined as "the act of selling: a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration) . . . distinguished from a gift." *Merriam Webster's Third New International Dictionary* 2003 (1968). A gift is "a voluntary transfer of real or personal property without any consideration or without a valuable consideration—distinguished from a sale." *Id.* at 956. An adoptive family is not required to give an amount of money in exchange for a dog. The adoption contract, however, does require that the adoptive family provide certain services and refrain from certain conduct regarding the dog's care. Upon failure to do so, the contract provides that ownership of the dog reverts back to HALO.

The Board may have characterized this transaction as a conditional gift, a partial gift, or may have determined that "sale" requires the exchange of money. In whichever case, the determination is not arbitrary or a manifest error of law. Based on the definitions of "sale," "gift," and the evidence presented at the Board hearing, the Board's determination that requesting a donation and attaching conditions regarding the care of the dog at the time of adoption does not constitute a sale, is far from arbitrary or a manifest error of law.

Petitioners also argue that even though respondents reside on the property, the kennel is the lot's principal use, or "the primary purpose or function that a lot serves," and therefore the kennel is not permitted as an accessory use even if it is not commercial. The only evidence petitioners advance in support of this argument is that the respondents purchased the lot with the operation of a kennel in mind. Under the Ordinance, however, a private kennel is a permitted accessory use as long as it complies with certain regulations. Petitioners do not contend that the kennel violates these regulations. We uphold the Board's determination that the kennel is an accessory use of respondents' residential lot.

Accordingly, we hold that the Board's interpretation of the Ordinance is not affected by error of law. Under the Mecklenburg County Zoning Ordinance, respondents' kennel is a private kennel that meets the requirements of a permitted accessory use. The order of the trial court is therefore reversed.

REVERSED.

Judge HUNTER concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

As I believe the dog kennel operated by respondents was a commercial kennel, I dissent.

Because the facts are not in dispute, the issue of whether respondents' dog kennel was either a private or a commercial kennel presents a question of law and is reviewable *de novo* by this Court. *See Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 530, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994). If the decision of the Board constitutes an error of law, that decision must be reversed. *Id.* at 531, 439 S.E.2d at 201. Construction of an ordinance by a board is entitled to "some deference," provided, however, the construction is "within the bounds of the law." *CG&T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 39, 41, 411 S.E.2d 655, 659-60 (1992).

In this case, a commercial kennel is defined in the Ordinance as one "used for the breeding or storage of animals for sale or for the training or overnight boarding of animals for persons other than the occupant of the lot." Mecklenburg County, N.C., Mecklenburg County Zoning Ordinance § 2.201 (Jan. 1992) [hereinafter Ordinance]. A private kennel is defined as one "not operated on a commercial basis." *Id.*

Because respondents own the dogs until the time of their adoption, the determinative issue is thus whether respondents kept the dogs "for sale."[1] I agree with the majority's definition of "sale" as a

1. I acknowledge the Ordinance does define the term "commercial use" as "[a]n occupation, employment, or enterprise that is carried on for profit by the owner." Ordinance § 2.201. This term is not used in the kennel section of the Ordinance, although it is used in other sections. For example, the Ordinance defines a boarding

"contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration)." *Meriam Webster's Third New International Dictionary* 2003 (1968). Because the dogs were held for adoption and the persons adopting the dogs were required to abide by numerous provisions contained in an "Adoption Contract" (the contract),[2] consideration was given in exchange for receipt of the dogs. *See Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 147, 139 S.E.2d 362, 368 (1964) (any benefit or right to the promisor or any forbearance, detriment, or loss to the promisee is valid consideration). Accordingly, the dogs were kept "for sale," which qualifies the kennel as a "commercial" kennel. Thus, the Board's decision to the contrary was not within the bounds of the law. *See CG&T*, 105 N.C. App. at 41, 411 S.E.2d at 660. Consequently, the trial court correctly reversed the decision of the Board, and the trial court's decision should be affirmed.

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stable as "[a] building in which horses are kept for *commercial use* including boarding, hire, sale or show." *Id.* (emphasis added). As the kennel section of the Ordinance has its own definition for "commercial," it is not appropriate to use the "commercial use" definition to determine the meaning of a "commercial" kennel.

2. The contract employed by respondents reads in pertinent part: "In consideration of a donation of $_____ . . . HALO agrees to deliver unto the Adopter, the following described animal." In addition, the contract contains numerous conditions, failure of which to comply with reverts ownership to HALO at its election. The animal must be spayed or neutered within a certain time frame; regular contact with a veterinarian is required, including provision of health check-ups, inoculations, and heartworm prevention; the Adopter must agree never to abandon the animal, release the animal to a pound, or permit the animal's use in scientific experiments; the Adopter must provide a suitable fenced yard and may never tie or chain an outdoor dog; the Adopter must not place the animal in the back of an open vehicle; HALO has the right to inspect the Adopter's home and surroundings before and *after* the adoption and can remove the animal immediately upon finding unsuitable conditions; if the Adopter no longer wishes to keep the animal, the Adopter cannot place the animal with someone else but must give it back to HALO; finally, if the animal is ever picked up by animal control, ownership automatically reverts to HALO.

STATE OF NORTH CAROLINA v. JUAN CHRISTOPHER SANTIAGO

No. COA01-191

(Filed 28 December 2001)

1. Evidence— expert pediatrician—injury the result of abuse—admissible

The trial court did not abuse its discretion by permitting a doctor to testify that an injury to the rectum of a one-month old child was the result of abuse where defendant contended that the opinion was based solely on other signs of abuse and that the doctor was no better qualified than the jury to determine whether the rectal tear was the result of abuse. The doctor's testimony was related to a diagnosis based upon her medical examination of the victim and the doctor was an expert in pediatrics and the identification of child abuse who had examined thousands of children.

2. Criminal Law— plea agreement—rejection by judge

There was no error where the trial court rejected a plea agreement by which defendant would have pled guilty to felonious child abuse in exchange for dismissing a first-degree sexual offense charge and a limit on his sentence. A plea agreement must have judicial approval before it is effective, and a decision by a judge disapproving a plea agreement is not subject to appeal. N.C.G.S. § 15A-1023(b).

3. Sexual Offenses— first-degree—sufficiency of circumstantial evidence—every reasonable hypothesis of innocence—not required to be excluded

The trial court did not err by not dismissing a charge of first-degree sexual offense where the evidence was circumstantial, but, giving the State the benefit of every reasonable inference, a reasonable mind might accept it as adequate to support the conclusion that defendant was responsible for the child's rectal injury. It is not the rule in North Carolina that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence.

Appeal by defendant from judgments entered 15 June 2000 by Judge Loto G. Caviness in Yancey County Superior Court. Heard in the Court of Appeals 6 December 2001.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jennie Wilhelm Mau, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

HUNTER, Judge.

Juan Christopher Santiago ("defendant") appeals convictions for first degree sexual offense and felonious child abuse. We conclude there was no error in defendant's trial.

Evidence presented at trial tended to establish that defendant is the father of the victim, Deanna, born 17 October 1999. Andrea Palazzolo ("Palazzolo"), Deanna's mother, maintained custody of Deanna. Although defendant and Palazzolo did not live together, defendant often spent weekend nights with Palazzolo and Deanna at Palazzolo's residence.

On 13 November 1999, when Deanna was approximately one month old, defendant was visiting Palazzolo at her residence. Defendant told Palazzolo that he had been lying with Deanna on his chest, and that he had fallen asleep and forgotten she was there. Defendant told Palazzolo that he woke up and began to roll over when he realized Deanna was on his chest. Defendant said he had to grab Deanna quickly to prevent her from falling, and that it may have caused a bruise. Palazzolo testified that prior to that weekend, Deanna was a normal baby with a generally happy demeanor. Palazzolo testified that following the weekend of 13 November 1999, Deanna's demeanor changed, she stayed up all night screaming, "[n]othing would comfort her," and she could not keep down baby formula.

Defendant was at Palazzolo's residence again on 19 November 1999. Palazzolo testified she was in the living room and defendant and Deanna were in the bedroom when she heard Deanna scream. When Palazzolo entered the bedroom, defendant asked if she had any fingernail clippers. He told Palazzolo that he had been burping Deanna on his knee when "she flung forward," and as he tried to catch her, his thumb went into her mouth and cut her. Palazzolo observed that Deanna had blood in her mouth. Palazzolo testified both she and defendant were taught to burp Deanna over the shoulder, and that this is the manner in which she had seen defendant burp Deanna before.

Palazzolo further testified that at approximately 6:00 a.m. on 20 November 1999, she awoke and went to sleep in the living room by the crib of her nephew so that she could hear him if he awoke. Palazzolo left defendant alone in the bedroom with Deanna. She testified that defendant woke her at approximately 10:20 a.m. and handed her Deanna, who was "screaming really bad." Palazzolo observed that Deanna had a mark on her face. She described the mark as looking like Deanna's skin "had been sucked like a hickey," and that the mark was circular, with "teeth bruise marks." Defendant testified that while changing Deanna's diaper, he was trying to calm her down by "rubbing [his] teeth on her cheek" when his weight shifted and his teeth hit her cheek. Palazzolo observed that the whole backside of Deanna's outfit was off, and that her diaper was half off.

Palazzolo testified that defendant then said he was leaving, and stated that he was ". . . 'going to hell' " and was ". . . 'going to go kill [him]self.' " Defendant told Palazzolo that if she brought the baby out of the house, he was ". . . 'going to go to jail.' " He also told Palazzolo that if her mother did not call the police, they could ". . . 'still make this work out.' "

Palazzolo and her mother took Deanna to the police department later that day. Palazzolo then took Deanna to a hospital where she was examined by a hospital doctor who reported that Deanna had a shallow anal tear at the 7:00 position. On 22 November 1999, Deanna was more thoroughly examined by Dr. Cynthia Brown, who testified as an expert in pediatrics and identification of child abuse. Dr. Brown's evaluation of Deanna revealed various abnormalities, including the bruised oval mark on Deanna's cheek, an area on the roof of her mouth where the skin had been torn, and a tear in her rectal area at 12:00 which was more severe than the shallow tear at 7:00. Testing results also revealed Deanna was suffering from six rib fractures. Dr. Brown testified that in her opinion, the abnormalities were the result of abuse, but she never opined that defendant was the perpetrator.

Defendant was indicted on 19 January 2000 for first degree sexual offense and felony child abuse. On 6 March 2000, defendant appeared before the trial court to enter a plea of guilty to felonious child abuse. The trial court rejected the plea, and a trial proceeded on both charges. Defendant testified at trial, denying any wrongdoing. On 15 June 2000, defendant was convicted by a jury of both charges. Defendant was sentenced to a minimum of 300 and a maximum of 369 months in prison for the sexual offense, and a minimum of thirty-one

and a maximum of forty-seven months in prison for felonious child abuse. He appeals.

Defendant brings forth three assignments of error on appeal: (1) the trial court erred in allowing Dr. Brown to opine that Deanna's rectal tear was the result of penetration; (2) the trial court abused its discretion in rejecting defendant's guilty plea; and (3) the trial court erred in denying defendant's motion to dismiss the charge of first degree sexual offense. For reasons stated herein, we conclude defendant's trial was free of error.

I.

[1] Defendant first argues the trial court erred in permitting Dr. Brown to testify that in her opinion, the injury to Deanna's rectum was the result of abuse, and that it was caused by penetration with a foreign object. Defendant contends the sole basis for Dr. Brown's opinion was that because Deanna exhibited other signs of injury indicative of abuse, such as the bite mark and rib fractures, the rectal tear must also have been abuse. Defendant argues this is not a proper scientific basis for concluding the rectal tear was the result of abuse, and that Dr. Brown was no better qualified than the jury to determine whether the other injuries to Deanna made it more likely that the rectal tear was the result of abuse. We disagree.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (1999). " ' "Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences." ' " *State v. Mackey*, 352 N.C. 650, 657, 535 S.E.2d 555, 558-59 (2000) (citations omitted). An essential question in determining admissibility of such evidence is " '. . . "whether the witness, through study or experience, has acquired such skill that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies." ' " *Id.* at 657, 535 S.E.2d at 559 (citations omitted).

Determining whether expert testimony is admissible is within the trial court's ". . . 'wide discretion,' " and a decision of whether to admit such evidence may only be reversed " '. . . "upon a showing that [the trial court's] ruling was so arbitrary that it could not have been

the result of a reasoned decision." ' " *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000) (citations omitted), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

We first note defendant did not object to the trial court's acceptance of Dr. Brown as an expert qualified to testify in matters of pediatrics and the identification of child abuse. Dr. Brown testified that in her experience, she has examined some eight to twelve thousand children. We also note defendant failed to object to Dr. Brown's testimony when she initially stated that in her opinion, all of Deanna's injuries, including the rectal tear, were the result of abuse. " 'Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.' " *State v. Brooks*, 83 N.C. App. 179, 191, 349 S.E.2d 630, 637 (1986) (citation omitted).

In any event, we disagree with defendant's characterization of Dr. Brown's testimony to the extent he maintains her opinion was based solely on the fact Deanna exhibited other injuries in addition to the rectal tear, and that it was not scientifically supported. Dr. Brown described in detail the procedures she used in evaluating Deanna, including the use of a "coposcope," a device which allowed her to examine Deanna's rectal tear in great detail. Dr. Brown testified she has seen similar injuries in several children. She further stated there exists medical significance to the fact that Deanna had a bite mark on her face which appeared about the same time as the rectal tear. Dr. Brown testified that such bite marks, characterized as " 'suck bruise[s],' " principally occur on children in one of two settings: (1) where a parent is trying to teach a child not to bite others, and (2) where children have been sexually abused. According to Dr. Brown, the mark on Deanna's cheek was typical of the kind of bite/suction mark of the second category, which "indicates that the [perpetrator] has applied suction and that is felt to indicate kind of a sexual process."

Dr. Brown further testified that when a child has multiple injuries, doctors must examine the child's history to understand how the injuries occurred, whether a reasonable and plausible explanation has been given, and whether the explanation explains "the forces necessary to cause the injuries seen." She stated that in Deanna's case, based upon the number of injuries, the nature of the injuries, and the implausible explanations given, she believed all of the injuries were the result of abuse. She testified she was not given a plausible explanation as to how the rectal tear occurred, and that, based upon her

examination of Deanna and all of her observations, she was "highly suspicious" that the injury resulted from penetration by a foreign object.

"Our courts have consistently upheld the admission of expert testimony that a victim was sexually abused." *State v. Youngs*, 141 N.C. App. 220, 226, 540 S.E.2d 794, 798 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 397, 547 S.E.2d 430 (2001). " ' "[W]here the expert's testimony relates to a diagnosis derived from the expert's examination of the [child] . . . in the course of treatment, it is not objectionable because it . . . *states an opinion that abuse has occurred.*" ' " *Id.* at 226, 540 S.E.2d at 799 (citations omitted). "Accordingly, an expert may testify to his opinion that a child has been sexually abused as long as this conclusion relates to a diagnosis based on the expert's examination of the child during the course of treatment." *Id.* at 227, 540 S.E.2d at 799.

In this case, Dr. Brown's testimony that in her opinion Deanna's rectal tear was the result of abuse by penetration was related to a diagnosis based upon her medical examination of Deanna. We disagree with defendant that the jury was just as qualified as Dr. Brown, an expert in pediatrics and identification of child abuse who has examined thousands of children, to determine whether the nature of Deanna's injuries was indicative of abuse, and to ascertain whether Deanna's rectal tear was likely the result of penetration.

Our decision is clearly supported by case law involving the admission of similar testimony. *See, e.g.*, *State v. Starnes*, 308 N.C. 720, 733, 304 S.E.2d 226, 233-34 (1983) (expert's opinion testimony that tears in child's genital area were likely caused by a penis was admissible where based upon expert's observations, physical examination of child, and expert's experience); *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999) (expert's opinion testimony that child's narrow hymen could have been caused by penetration and that child had been sexually abused held admissible where testimony was based on expert's own medical examination of child and expert's knowledge of child abuse studies).

Moreover, contrary to defendant's assertion, Dr. Brown never testified that defendant was the person who caused Deanna's rectal injury, or any of the other injuries she sustained. Dr. Brown simply testified as to the injuries she observed on Deanna, and her expert medical opinion as to the cause of such injuries. Defendant has failed to show the introduction of Dr. Brown's testimony was an abuse of

the trial court's wide discretion and so arbitrary that it could not have been the result of a reasoned decision. This assignment of error is overruled.

II.

[2] By his next assignment of error, defendant argues the trial court erred in rejecting his plea agreement. Defendant appeared before the trial court on 6 March 2000 to plead guilty to the charge of felonious child abuse in exchange for the dismissal of the first degree sexual offense charge and a limit on his sentence of a minimum of twenty and a maximum of thirty-three months with credit for time served. The trial court rejected the plea, expressing concern that the arrangement would only subject defendant to a maximum of an additional year and a half in prison.

A plea arrangement involving a recommended sentence must have judicial approval before it is effective. N.C. Gen. Stat. § 15A-1023(b) (1999). "It is well established in this State that a lack of judicial approval renders a proposed plea agreement 'null and void.' " *State v. Johnson*, 126 N.C. App. 271, 274, 485 S.E.2d 315, 317 (1997) (citation omitted). The statute further provides that "[a] decision by the judge disapproving a plea arrangement is not subject to appeal." N.C. Gen. Stat. § 15A-1023(b). We therefore reject this argument. Although defendant cites various federal and state constitutional provisions, arguing rejection of the plea was "fundamentally unfair," our Supreme Court has noted that " '[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.' " *State v. Wallace*, 345 N.C. 462, 467, 480 S.E.2d 673, 676 (1997) (quoting *Mabry v. Johnson*, 467 U.S. 504, 507, 81 L. Ed. 2d 437, 442 (1984)).

III.

[3] In his final argument, defendant contends the trial court erred in denying his motion to dismiss the charge of first degree sexual offense. Defendant argues the evidence gave rise to no more than a suspicion that defendant committed a sexual offense.

In reviewing the denial of a motion to dismiss for insufficient evidence, the trial court must ". . . 'consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom.' " *State v. Bowers*, 146 N.C. App 270, 273,

552 S.E.2d 238, 240 (2001) (citation omitted). A trial court must deny a motion to dismiss where there exits "substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). "[I]f 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 [to dismiss] 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).

Initially, we reject defendant's argument that "[e]ven if the evidence were sufficient to support a reasonable inference that the defendant inserted some object into the rectum of his 33 day old daughter, this would not constitute a first degree sexual offense." Our legislature has determined that a first degree sexual offense occurs when a person engages in a sexual act "[w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.4(a)(1) (1999). A "sexual act" is defined in pertinent part as "the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes." N.C. Gen. Stat. § 14-27.1(4) (1999). Clearly, the insertion of an object into Deanna's rectum by defendant would constitute a first degree sexual offense.

Moreover, we hold the evidence, taken in the light most favorable to the State, was sufficient to allow the charge to be submitted to the jury. The medical evidence presented established that Deanna suffered from two anal tears, a shallow tear at the 7:00 position, and a more severe tear at the 12:00 position. Dr. Brown's testimony, which we have previously held to be proper, provided an expert medical opinion that Deanna's rectal tear at 12:00 was the result of penetration. Her testimony also established a medical connection between the tear and the " 'suck bruise' " mark on Deanna's cheek, which Dr. Brown testified is often a sexual mark which appears concurrently with other sexual abuse injuries. Dr. Brown testified the mark on Deanna's cheek had bruising around it suggesting suction and pro-

longed mouth to skin contact, and was therefore consistent with the type of mark indicative of sexual abuse. She further testified that based upon her information, the cheek bruise and the penetration injury were noted to have appeared "about the same time." Defendant admitted to having inflicted the mark on Deanna's cheek on the morning of 20 November 1999 when he had exclusive control of Deanna.

The evidence also established that on 20 November 1999, defendant maintained exclusive control of Deanna from approximately 6:00 a.m. until 10:30 a.m. when he handed Deanna to Palazzolo and stated he was ". . . 'going to go kill [him]self.' " Palazzolo testified that Deanna was "screaming really bad" and "the whole back part [of her outfit] was off." "The diaper was kind of like half off." She further testified Deanna's cheek "looked like it had been sucked like a hickey" and had "teeth bruise marks." Defendant continued to make several statements immediately following the incident, including: " 'I'm going to hell' "; " '[i]f you take this baby out of the house, I'm going to go to jail' "; " 'I guess we're not going to my dad's house for Thanksgiving' "; and " '[i]f your mom doesn't call the police, we can still make this work out.' "

Although the evidence that defendant committed the sexual offense is circumstantial, "[c]ircumstantial evidence may be utilized to overcome a motion to dismiss ' "even when the evidence does not rule out every hypothesis of innocence." ' " *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229 (2000) (citations omitted), *cert. denied*, —— U.S. ——, 149 L. Ed. 2d 305 (2001); *see also 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").

Giving the State the benefit of every reasonable inference to be drawn from the evidence, we hold there is sufficient evidence as a reasonable mind might accept as adequate to support the conclusion that defendant was responsible for inflicting Deanna's rectal injury. Defendant contends it was possible that Gary Norton, an older friend who lived with Palazzolo, was responsible for the abuse. However, defendant did not present any evidence at trial that Norton or any other individual abused Deanna. In any event, "[i]t is not the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss." *State v. Smith*, 146 N.C.

App. 1, 7, 551 S.E.2d 889, 893 (2001). The trial court did not err in denying defendant's motion to dismiss the charge of first degree sexual offense.

Defendant's additional assignments of error which he has not set forth or argued in his brief are deemed abandoned. N.C.R. App. P. 28(a).

No error.

Judges McGEE and BRYANT concur.

WILLIAM E. MITCHELL, ROBIN P. MITCHELL, AND RUBY P. PARSONS, PLAINTIFFS V. JOHN PAUL LINVILLE, JOYCE GRIFFIN LINVILLE, AND LINVILLE HOME BUILDERS, INC., DEFENDANTS

No. COA00-1485

(Filed 28 December 2001)

1. **Unfair Trade Practices— house construction—structural defects**

The trial court erred by concluding that defendants committed unfair and deceptive trade practices arising from the construction of a house where the court relied upon structural defects in plaintiff's home to conclude that defendants breached the implied warranty of habitability, but did not indicate substantial aggravating circumstances which would transform defendants' action into a Chapter 75 violation.

2. **Unfair Trade Practices— house construction—failure to inform buyer of builder's corporate existence**

The individual defendants' failure to inform plaintiffs of the existence of their corporate construction company did not support conclusions of unfair and deceptive trade practices where all of plaintiffs' damages arose from structural damages to their home. The individual defendants' failure to inform plaintiffs of their company's existence did not impact plaintiffs' damages.

3. **Construction Claims— home builders—individually liable**

The trial court did not err by concluding that defendants were individuality liable for their actions in breaching the implied war-

ranty of habitability where the evidence showed that the initial offer to purchase was signed by defendants as individuals, their corporate building company was not mentioned in any document until five days before closing and after a majority of the construction had been completed, and there was ample evidence that both defendants were actively involved in the construction of plaintiffs' residence.

4. Unfair Trade Practices— attorney fees—improperly awarded

The trial court erred by awarding attorney fees to plaintiffs where the court erroneously concluded that defendant committed an unfair and deceptive trade practice.

Appeal by defendants from judgment entered 4 April 2000 by Judge Henry E. Frye, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 28 September 2001.

Craige, Brawley, Liipfert & Walker, L.L.P., by William W. Walker, for plaintiff appellees.

Sharpless & Stavola, P.A., by Frederick K. Sharpless and Eugene E. Lester, III, for defendant appellants.

TIMMONS-GOODSON, Judge.

John Linville, his wife, Joyce Linville ("the Linvilles") and their construction company, Linville Home Builders, Inc. ("Home Builders") (collectively "defendants"), appeal from the trial court's judgment finding them liable for unfair and deceptive trade practices. On 30 December 1997, William Mitchell and his wife, Robin Mitchell ("plaintiffs"), filed a complaint against defendants alleging negligence, breach of contract, and unfair and deceptive trade practices in the sale and construction of plaintiffs' home. The trial court heard the matter on 26 April 1999, at which time the following evidence pertinent to this appeal was presented:

Plaintiffs entered into an agreement with the Linvilles in May of 1994 for the purchase of a lot and construction of a residence in Kernersville, North Carolina. In the contract, the Linvilles agreed to construct plaintiffs' residence, although neither of the Linvilles held a general contractor's license. The contract did not refer to Home Builders, nor did the Linvilles inform plaintiffs that such corporation existed. Thus, plaintiffs knew of no involvement by Home Builders

in the construction of plaintiffs' residence at the time they signed the contract.

The completion date for the residence was 17 January 1995. On 30 December 1994, the Linvilles conveyed to Home Builders by general warranty deed the lot and the residence, the construction of which was nearly completed. On 11 January 1995, the Linvilles and plaintiffs entered into a second agreement to purchase and contract. Plaintiffs understood that a second contract was necessary because the lot upon which plaintiffs' house stood had been re-numbered, and subsequently, the first contract no longer recited the correct lot number. The second contract listed Home Builders at the top of the document.

Plaintiffs closed on the residence on 16 January 1995. The documents signed by plaintiffs at the closing referred to the seller and contractor as Home Builders. After moving into the residence, plaintiffs discovered numerous and substantial defects in the property.

Upon reviewing the evidence, the trial court concluded that defendants had breached the implied warranty of habitability for plaintiffs' residence and had committed unfair and deceptive trade practices. The trial court therefore trebled plaintiffs' damages and awarded attorneys' fees to plaintiffs. Defendants now appeal to this Court.

Defendants present three questions for review, contending that the trial court erred by (1) concluding that defendants committed unfair and deceptive trade practices; (2) finding the Linvilles individually liable; and (3) awarding attorneys' fees. For the reasons set forth herein, we reverse the judgment of the trial court in part.

I. *Unfair and Deceptive Trade Practices*

[1] Defendants contend that the trial court's findings do not support its conclusion that defendants committed unfair and deceptive trade practices. After careful review of the trial court's findings, we agree with defendants.

North Carolina General Statutes section 75-1.1 declares unlawful "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1 (1999). "To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting

commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991). Whether a trade practice is unfair or deceptive "depends upon the facts of each case and the impact the practice has in the marketplace." *Johnson v. Insurance Co.*, 300 N.C. 247, 262-63, 266 S.E.2d 610, 621 (1980). The language of the statute sets forth two distinct grounds for relief. *See id.* at 262, 266 S.E.2d at 621. If a practice has the capacity or tendency to deceive, it is deceptive for the purposes of the statute. *See id.* at 265, 266 S.E.2d at 622. "Unfairness" is a broader concept than and includes the concept of "deception." *See id.* at 263, 266 S.E.2d at 621. "A practice is unfair when it offends established public policy, as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* Neither an intentional breach of contract nor a breach of warranty, however, constitutes a violation of Chapter 75. *See Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992); *Trust Co. v. Smith*, 44 N.C. App. 685, 691, 262 S.E.2d 646, 650, *disc. review denied*, 300 N.C. 379, 267 S.E.2d 685 (1980), *overruled on other grounds*, *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

In the instant case, the trial court's findings regarding unfair and deceptive trade practices concern two basic issues: (1) construction deficiencies in the home and the failure of defendants to properly address such deficiencies, and (2) the failure of the Linvilles to list Home Builders on the first contract or otherwise inform plaintiffs of the corporation's existence. We address each of these grounds in turn.

The trial court recited the following facts concerning construction deficiencies in plaintiffs' residence in support of its conclusion that defendants committed unfair and deceptive trade practices:

> 84. Defendants installed inferior cabinets that had markedly different shades and were poorly constructed. When given notice of the problems, defendants promised, but then failed to remedy the defects and then refused to replace or repair the cabinets further, although they had the means to do so. The Agreement signed on January 16, 1995, shows plaintiffs' serious concerns about the cabinets and confirms that defendants promised plaintiffs before closing that their concerns would be met. Plaintiffs relied on defendants' assurances as to the cabinets; and plaintiffs would

not have closed but for those assurances. This behavior by defendants caused plaintiffs to suffer damages of $18,144.90.

85. The construction of plaintiffs' house required substantial repairs, and had negative effect on the fair market value of plaintiffs' house. The house as purchased by plaintiffs contained at least six deficiencies that were violations of the North Carolina Building Code. The basement shows signs of settlement, the bay window is pulling away from the house and [affecting] the use of the kitchen floor, and the gas logs were left in an unsafe condition.

86. . . . . The defendants [misled] plaintiffs as to the availability of a truss system for the first floor. Defendants misled plaintiffs as to the need for support timbers in their basement. Defendants failed and refused to seriously address and deal with punch list items presented to them on numerous [occasions] by plaintiffs. Defendants failed and refused to pay plaintiffs for damage to the vinyl kitchen floor even though it was agreed by all concerned that the floor needed to be replaced.

As indicated *supra*, "actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and . . . a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Branch Banking and Trust Co.*, 107 N.C. App. at 62, 418 S.E.2d at 700 (citation omitted). " '[S]ubstantial aggravating circumstances' " must attend the breach in order to recover under the Act. *Id.* (quoting *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989)). A violation of Chapter 75 is unlikely to occur during the course of contractual performance, as these types of claims are best resolved by simply determining whether the parties properly fulfilled their contractual duties. *See Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 368, 533 S.E.2d 827, 833, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000); *Stone v. Homes, Inc.*, 37 N.C. App. 97, 105-06, 245 S.E.2d 801, 807-08, *disc. review denied*, 295 N.C. 653, 248 S.E.2d 257 (1978).

In *Stone*, the plaintiffs instituted an action seeking damages for breach of express and implied warranties and for fraud in the sale of a house that was under construction when the plaintiffs purchased it from the defendant corporation. The evidence showed that the defendant repeatedly assured the plaintiffs that their house would be completed in the manner requested by the plaintiffs. Relying upon

these assurances, the plaintiffs moved into the home only to discover that the windows leaked, various lighting circuits were inoperable, and "the septic tank drain field was inadequate so that sewage was released in the backyard which became a breeding ground for rattail maggots." *Stone*, 37 N.C. App. at 99, 245 S.E.2d at 804. The defendant refused to complete construction on the home, moreover, leaving portions of the interior unfinished. Within six months, numerous cracks appeared in the walls and chimney of the home, and substantial defects in the doors and kitchen cabinets materialized. Further, "plaintiffs discovered that the land on which the house was constructed had been filled with vegetable debris." *Id.* The jury awarded the plaintiffs $16,000.00 in damages arising from the structural defects, and $3,500.00 in damages due to the defendant's fraudulent concealment of the vegetable debris beneath the house.

On appeal, this Court agreed that such construction deficiencies breached express and implied warranties, but held that the plaintiffs were not entitled, under Chapter 75, to treble the damages attributable solely to breaches of such warranties. The Court did allow, however, the plaintiffs to treble those damages arising from the defendant's acts of fraud.

In the instant case, the findings concerning the structural defects in plaintiffs' home and subsequent award of damages based upon such defects, while certainly supportive of the conclusion that defendants breached the implied warranty of habitability, do not indicate "substantial aggravating circumstances attending the breach" as to transform defendants' actions into a Chapter 75 violation. For example, the trial court found that, at the 16 January 1996 closing, defendants promised to remedy the inferior-grade cabinets they had installed in plaintiffs' house and that, relying upon defendants' assurances, plaintiffs closed on the house. Defendants thereafter failed to remedy these defects.

Defendants' failure to remedy was not an act tending to mislead or deceive the average consumer, *see Johnson*, 300 N.C. at 265-66, 266 S.E.2d at 622, in that defendants did not affirmatively misrepresent the quality of the cabinets or defendants' ability to replace them. Rather, defendants failed to honor their agreement. *Cf. Rucker v. Huffman*, 99 N.C. App. 137, 142, 392 S.E.2d 419, 422 (1990) (holding that unfair and deceptive trade practices were warranted where the defendant-seller affirmatively misrepresented to the plaintiff-buyers the severity of a problem with standing water under the house). Defendants openly acknowledged at closing that the cabinets were

unacceptable, and they thereafter attempted to replace them. Unfortunately, the replacement cabinets were also substandard, and plaintiffs refused to accept them. By failing to remedy the defective cabinets, defendants breached their agreement, but they did not "offend[] established public policy" or commit an "immoral, unethical, oppressive, unscrupulous, or substantially injurious" act. *Johnson*, 300 N.C. at 263, 266 S.E.2d at 261. Based on the trial court's findings regarding the cabinets, we discern no grounds for elevating defendants' actions beyond breach of contract or warranty.

Additional findings by the trial court concerning structural defects in plaintiffs' residence provide no further support for its conclusion that defendants committed unfair and deceptive trade practices. Although the trial court concluded that defendants "misled" plaintiffs concerning the availability of a truss system for the first floor of their residence and the need for support timbers in the basement, a close examination of the findings does not support such a conclusion. The trial court made the following specific findings regarding the truss system:

> 34. The new Construction Addendum attached to the Offer To Purchase And Contract dated 5-9-94 provided for a truss system in the first floor of plaintiffs' house. Early in the construction, John Linville informed plaintiffs that a truss system could not be used and that a conventional "stick" framing had to be used instead. Construction proceeded on that basis. Defendants gave plaintiffs a $5,000.00 credit for the change.
>
> 35. Plaintiffs discovered later that a truss system could have been used for their floor. As a result of the change to "stick" framing, plaintiffs' use of their basement is restricted by support columns that would not be present if a truss system had been used as originally agreed.

These findings do not support the conclusion that defendants "misled" plaintiffs or otherwise committed unfair and deceptive trade practices. The fact that *John Linville* informed plaintiffs that a truss system would not be possible in their home does not indicate wrongdoing by the other defendants, nor, standing alone, does it indicate bad faith or an affirmative misrepresentation by Mr. Linville. Moreover, plaintiffs received a $5,000.00 credit for the change to "stick" framing, and the trial court assigned no damages arising from plaintiffs' restricted use of their basement. Thus, the trial court's find-

ings concerning the truss system, together with the other findings regarding construction deficiencies, do not indicate unfair and deceptive trade practices by defendants.

[2] The second category of findings recited by the trial court in support of its conclusion that defendants violated Chapter 75 concern the Linville's failure to inform plaintiffs about their construction company. The trial court made the following findings regarding the Linville's actions:

> 83. Joyce Linville . . . did considerably less than John Linville and [Home] Builders, but she was still a part of multiple acts that were unfair to plaintiffs. She was an officer and director of Home Builders, yet she allowed the business to be operated in such a way that plaintiffs had no notice that it was involved in building the residence. She agreed in May 1994 to construct the residence even though she did not have a general contractor's license. She knew (she testified) in May 1994, when she signed the first Offer To Purchase And Contract, that the builder should be shown as Home Builders, but she did not inform plaintiffs of this, and she did not take any steps to correct the Offer To Purchase And Contract. Instead, she allowed the construction to proceed with plaintiffs believing they were dealing with the Linvilles as individuals. In December 1994, when construction was almost complete, she sold her interest in the lot and residence to Home Builders without plaintiffs' knowledge or permission. On January 11, 1995, five days before closing, she tried to change the parties' agreement by inserting Home Builder's name on the second Offer To Purchase and Contract. Before and after closing, she had full knowledge of plaintiffs' complaints about the various construction deficiencies, yet she did nothing to correct the problems.
>
> . . . .
>
> 86. The individual Linvilles built plaintiffs' house even though they did not have a general contractor's license. The Linvilles sold the lot and residence to Home Builders without plaintiffs' knowledge or permission. The Linvilles tried to remove themselves from the construction agreement and place all responsibility on Home Builders without providing a full and fair explanation to plaintiffs.
>
> 87. Defendants' acts described in the preceding paragraphs were in and affecting commerce.

While we agree that the above-stated findings detail potentially misleading and unfair acts by the Linvilles, such findings nevertheless do not establish that the Linville's actions led to plaintiffs' damages. "To be actionable under Chapter 75, an act of deception must have some adverse impact on the individual or entity deceived." *Miller v. Ensley*, 88 N.C. App. 686, 691, 365 S.E.2d 11, 14 (1988). All of plaintiffs' damages arose from structural defects in their home. There was no finding by the trial court that plaintiffs would not have entered into the contract had they known of Home Builder's involvement, or that the Linville's failure to inform plaintiffs of Home Builder's existence caused plaintiffs to suffer damages. The trial court likewise assigned no damages to the Linville's sale of the lot and residence to Home Builders without plaintiffs' knowledge or permission. Because there was no causal connection between the potentially misleading acts by the Linvilles and the damages suffered by plaintiffs as a result of defendants' breach of the implied warranty of habitability, we hold the trial court erred in concluding that defendants committed unfair and deceptive trade practices. *See id.*, 88 N.C. App. at 691-92, 365 S.E.2d at 14 (holding that, where deception by defendant had no impact on plaintiff's damages, remedy under Chapter 75 was inappropriate).

Because defendants' faulty construction of plaintiffs' house did not constitute unfair and deceptive trade practices, and because the Linville's failure to inform plaintiffs of Home Builder's existence did not impact plaintiffs' damages, we hold the trial court erred in concluding that defendants committed unfair and deceptive trade practices.

II. *Individual Liabilty*

[3] The Linvilles further argue the trial court erred in finding and concluding that they were individually liable to plaintiffs. The Linvilles contend that they were acting at all times as agents of Home Builders, and that the trial court erred in finding otherwise. We disagree.

Competent evidence before the trial court tended to show that the initial Offer To Purchase and Contract was signed by the Linvilles in their individual capacities. Home Builders was not mentioned in any document until 11 January 1995, five days before closing and after a majority of the construction of plaintiffs' home had been completed. Further, there was ample evidence that both John and Joyce

Linville were actively involved in the construction of plaintiffs' residence. It is well established that

> in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, . . . the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner.

Hartley v. Ballou, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974). We therefore hold the trial court did not err in concluding that the Linvilles were individually liable for their actions in breaching the implied warranty of habitability.

We note that the trial court failed to apportion damages among defendants, ordering simply that "judgment is entered for plaintiffs." Under the conclusions of law concerning breach of warranty, however, the trial court determined that

> Plaintiffs are entitled to a judgment against each of the defendants for breach of implied warranty of habitability. Each of the defendants entered into an agreement with plaintiffs to construct and sell a residence to plaintiffs. Each of the defendants was in the construction business; and each of the defendants participated in the construction of plaintiffs' residence.

Moreover, in their complaint, plaintiffs requested "judgment against defendants jointly and severally." We therefore hold that the judgment of liability by the trial court against defendants was joint and several.

III. *Attorneys' Fees*

[4] Defendants contend that the trial court erred in awarding attorneys' fees. In light of our conclusion that defendants committed no unfair and deceptive trade practices, we agree that the award of attorneys' fees was inappropriate in the instant case.

In summary, we hold that there were insufficient findings to support the trial court's conclusion that defendants committed unfair and deceptive trade practices in the construction of plaintiffs' home. Plaintiffs are therefore not entitled to an award of attorneys' fees. The record clearly supports the trial court's conclusion that defendants breached the implied warranty of habitability, however, and we remand to the trial court for reinstatement of such award.

The trial court is hereby

Affirmed in part, reversed in part, and remanded.

Judges McGEE and BIGGS concur.

B & F SLOSMAN, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF V. SONOPRESS, INC., A DELAWARE CORPORATION, DEFENDANT

No. COA00-1465

(Filed 28 December 2001)

1. Statute of Frauds— commercial lease agreement—directed verdict—estoppel

The trial court did not err by directing verdict in favor of defendant on plaintiff's claim that defendant breached an oral agreement to lease the pertinent plant for five years based on the trial court's determination that the parties' negotiation summary concerning a commercial lease did not satisfy the statute of frauds, because: (1) a review of the negotiation summary revealed a lack of the mutuality of agreement necessary for the formation of a contract since it simply outlined the various stages in the negotiation process and does not include any language signifying an intention on the part of defendant to be legally bound to a five-year lease; (2) plaintiff's evidence failed to establish that the purchasing manager had the authority to bind defendant to a five-year lease; and (3) defendant was not estopped from raising the statute of frauds as an affirmative defense since the affirmative acts identified by plaintiff did not constitute material misrepresentation or fraud, plaintiff has not shown that defendant intentionally or fraudulently failed to disclose information, the parties were sophisticated businessmen who were experienced with transactions involving commercial leases, and the fact that defendant occupied the additional space during the negotiation process and agreed to pay a monthly rent does not result in defendant's taking two inconsistent positions.

2. Quantum meruit— commercial lease agreement—directed verdict

The trial court did not err by directing verdict in favor of defendant on plaintiff's claim for quantum meruit arising out of the breach of an alleged oral commercial lease agreement, because plaintiff has been compensated for any benefit it conferred upon defendant.

3. Unfair Trade Practices— commercial lease agreement—directed verdict

The trial court did not err by directing verdict in favor of defendant on plaintiff's claim for unfair and deceptive business practices arising out of alleged fraud and the breach of an alleged oral commercial lease agreement, because plaintiff has failed to establish a prima facie case.

Appeal by plaintiff from judgment entered 20 April 2000 by Judge Russell J. Lanier, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 11 October 2001.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed, Jr., for plaintiff-appellant.

Hoguet, Newman & Regal, LLP, by Howard A. Wintner, pro hac vice; and Dungan & Mitchell, P.A., by Robert E. Dungan, for defendant-appellee.

WALKER, Judge.

Plaintiff initiated this action on 7 July 1998 alleging claims for breach of a lease, *quantum meruit*, and unfair and deceptive business practices. The matter came on for trial on 17 April 2000 and, at the close of plaintiff's evidence, defendant moved for a directed verdict. After considering the evidence, the trial court granted defendant's motion with respect to all of plaintiff's claims. The facts at this stage of the proceedings may be summarized as follows:

Plaintiff is a North Carolina general partnership owned by two brothers, Benson and Fred Slosman. Defendant is a Delaware corporation headquartered in Gutersloh, Germany, and is owned by the Bertelsmann Group. In the fall of 1996, plaintiff purchased the Champion Plant (plant) located in Weaverville. The plant encompasses 119,613 square feet, which is divided into three sections and is

designed for both warehousing and manufacturing. In December 1996, plaintiff entered into a two-year lease with Asheville Warehousing, Inc. (AWI), a recycling business owned by Fred Slosman. The lease allowed AWI to occupy two of the plant's smaller sections.

In January 1997, defendant approached plaintiff about leasing space in the plant. Following discussions, the parties agreed that defendant would occupy the plant's remaining section for one year at a rate of $1.625 per square foot. Defendant began moving into the plant in March 1997. Shortly thereafter, defendant informed plaintiff that it was interested in leasing the entire plant. Plaintiff responded that it was already under a two-year lease with AWI and AWI would not vacate the plant without receiving moving expenses and a rent subsidy. Thereafter, the parties began negotiating a potential lease for the entire plant.

On 30 May 1997, as a result of these negotiations, plaintiff sent a letter to defendant which was designed to serve as an interim agreement. The letter outlined various lease conditions including: defendant's payment of $197,500 for AWI's moving expenses and a rent subsidy, financial terms for a three-year occupancy, and plaintiff's completion of certain plant upgrades. Plaintiff also requested that defendant sign and return the letter. Defendant declined to sign the letter but did agree to meet with Benson and Fred Slosman on 20 June 1997. Present at this meeting were several of defendant's employees, including the Vice President of Operations, Richard Smith (Smith) and a purchasing manager, Bob Tanko (Tanko). During this meeting, the parties continued to negotiate the terms of a lease and, in particular, the payment of AWI's moving expenses and a rent subsidy. Defendant's employees testified at trial that they also expressed reservations concerning any lease which extended longer than two or three years and that they informed the Slosmans that a five-year lease would have to be approved by defendant's officials in Germany. At the conclusion of the meeting, plaintiff submitted an offer to "blend" the rent subsidy into a five-year lease and suggested that the moving expenses be paid up front or "blended" into the monthly rent payments, at defendant's option.

Four days later, plaintiff sent a letter to Tanko outlining the terms of this offer and requesting that he "let me know which option to proceed on so that we can have a lease prepared." Tanko made no written response to plaintiff's request but did prepare for defendant a

"Negotiation Summary," which incorporated plaintiff's offer. Nonetheless, plaintiff permitted defendant to begin occupying the two sections within the plant that AWI was vacating.

The evidence shows that the parties intended to formalize their negotiations with a written lease. On 22 July 1997, plaintiff sent defendant a proposed five-year lease. One week later, defendant inquired as to whether plaintiff would be willing to accept a two-year lease with an option for another two years. Plaintiff rejected this counteroffer and continued to hold out for a five-year lease. Meanwhile, AWI signed a lease with S & S Associates for space in another property. Benson Slosman signed the lease as a general partner of S & S Associates.

By October 1997, defendant was occupying the entire plant and was paying plaintiff rent in the amount of $36,481.97 per month. However, defendant refused to sign the five-year lease which plaintiff had requested. This arrangement continued until 17 February 1998, when defendant sent to plaintiff a written notice that it would no longer be "month to month leasing" the plant effective 31 March 1998 and would be vacating the plant.

With this appeal, plaintiff argues it presented sufficient evidence to withstand defendant's motion for directed verdict. The purpose of a motion for directed verdict is to test the legal sufficiency of the evidence to take a case to the jury. N.C. Gen. Stat. § 1A-1, Rule 50(a) (1999); *DeHart v. R/S Financial Corp.*, 78 N.C. App. 93, 98, 337 S.E.2d 94, 98 (1985), *cert. denied*, 316 N.C. 376, 342 S.E.2d 893 (1986). Accordingly, a defendant is not entitled to a directed verdict unless the court, after viewing the evidence in a light most favorable to the plaintiff, determines the plaintiff has failed to establish a *prima facie* case or right to relief. *Goodwin v. Investors Life Insurance Co. of North America*, 332 N.C. 326, 329, 419 S.E.2d 766, 768 (1992).

I. Statute of Frauds

[1] Plaintiff first contends that it presented sufficient evidence to support its claim that defendant breached an agreement to lease the plant for five years. Defendant counters that any alleged lease is unenforceable under the statute of frauds. Plaintiff responds by arguing that defendant should be estopped from raising the statute of frauds as an affirmative defense.

The statute of frauds provides in pertinent part that:

> all . . . leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

N.C. Gen. Stat. § 22-2 (1999). Plaintiff asserts that, although the parties had not executed a written lease, the "Negotiation Summary" prepared and signed by Tanko following the 20 June 1997 meeting, constitutes a memorandum sufficient to satisfy the statute of frauds requirement.

Our review of the "Negotiation Summary" reveals that it simply outlined the various stages in the negotiation process and does not include any language signifying an intention on the part of defendant to be legally bound to a five-year lease. Therefore, the "Negotiation Summary" lacks the mutuality of agreement necessary for the formation of a contract. *See McCraw v. Llewellyn*, 256 N.C. 213, 217, 123 S.E.2d 575, 578 (1962) (holding that to be enforceable under the statute of frauds a writing must show the essential elements of a contract including evidence of a mutuality of agreement between the parties). Furthermore, plaintiff's evidence fails to establish that Tanko was authorized to bind defendant to a five-year lease. *See generally Fuller v. Southland Corp.*, 57 N.C. App. 1, 290 S.E.2d 754, *cert. denied*, 306 N.C. 556, 294 S.E.2d 223 (1982). Therefore, we conclude plaintiff's claim that the "Negotiation Summary" satisfies the statute of frauds has no merit.

Plaintiff also asserts that defendant should be estopped from raising the statute of frauds as an affirmative defense under the theories of: (1) estoppel by fraud or misrepresentation; (2) equitable estoppel based upon wrongful silence and fraud by silence; and (3) equitable estoppel based upon an acceptance of benefits.

"The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result." *Thompson v. Soles*, 299 N.C. 484, 486, 263 S.E.2d 599, 602 (1980). In appropriate cases, equitable estoppel may override the statute of frauds so as to enforce an otherwise unenforceable agreement. *Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.*, 124 N.C. App. 383, 387, 477 S.E.2d 262, 264 (1996), *disc. rev. denied*, 345 N.C. 340, 483 S.E.2d 163 (1997). When faced with oral agreements involving real property interests, our courts have limited the application of the equitable estoppel doctrine

to situations where the party seeking to invoke the statute of frauds has engaged in "plain, clear and deliberate fraud." *McKinley v. Hinnant*, 242 N.C. 245, 253, 87 S.E.2d 568, 574 (1955); *see also Dunn v. Dunn*, 24 N.C. App. 713, 716, 212 S.E.2d 407, 409, *cert. denied*, 287 N.C. 258, 214 S.E.2d 430 (1975). The rationale for applying the equitable estoppel doctrine is quite obvious: A party who engages in fraud should not be permitted to shield itself from liability through the use of a statute which our legislature specifically designed to prevent fraud.

To establish fraud, a plaintiff must demonstrate that: (1) the defendant made a false representation relating to some material past or existing fact; (2) when the representation was made, defendant knew or reasonably should have known that it was false; (3) defendant made the representation with the intention that the plaintiff act upon it; (4) the plaintiff did in fact reasonably act upon it; and (5) the plaintiff suffered injury. *Cofield v. Griffin*, 238 N.C. 377, 379, 78 S.E.2d 131, 133 (1953).

Plaintiff has identified "four affirmative acts of fraud" committed by defendant's employees which it alleges are sufficient to justify estopping defendant: (1) a 20 June 1997 representation by Smith to plaintiff that the parties had an agreement; (2) an oral acceptance of plaintiff's offer by Tanko when he had no authority to make such an acceptance; (3) a statement by Smith to Fred Slosman that the lease was being signed; and (4) a statement by one of defendant's employees to Benson Slosman that the lease was being signed in Germany and hand carried back to the United States. Based on our careful review of the record, we conclude these "affirmative acts" were merely statements made by defendant's employees during the negotiating process in anticipation of the lease being approved by officials in Germany. Plaintiff's evidence fails to show that the employees knew that the statements they made were false or that they made the statements with an intention to deceive plaintiff. Furthermore, the statements generally involved future occurrences, rather than past or existing facts. *See generally Home Electric Co. v. Hall and Underdown Heating and Air Cond. Co.*, 86 N.C. App. 540, 543, 358 S.E.2d 539, 541 (1987), *affirmed*, 322 N.C. 107, 366 S.E.2d 441 (1988). Therefore, we conclude the "affirmative acts" identified by plaintiff did not constitute material misrepresentations or fraud.

Plaintiff further contends that defendant should be estopped because defendant intentionally and fraudulently failed to disclose

three pertinent facts: (1) its internal approval process; (2) that it had no intention of agreeing to a five-year lease; and (3) that it had rejected the lease terms plaintiff outlined in its letter of 24 June 1997. However, plaintiff fails to cite any authority which supports the proposition that there would be a duty to disclose under the facts and circumstances of this case. Indeed, this Court has twice addressed similar situations and found that the lessor had no such duty to disclose. *See Computer Decisions*, 124 N.C. App. at 389, 477 S.E.2d at 265-66 (holding that where the two parties were sophisticated in negotiating commercial real estate transactions, the lessor did not have a duty to disclose to the lessee the fact that it was negotiating a lease with another party for the same premises); and *C.F.R. Foods, Inc. v. Randolph Development Co.*, 107 N.C. App. 584, 589, 421 S.E.2d 386, 389, *disc. rev. denied*, 333 N.C. 166, 424 S.E.2d 906 (1992) (holding a commercial vendor owed no duty to disclose to a commercial vendee the presence of a landfill containing organic materials where vendee had full opportunity to make pertinent inquiries and failed to do so).

Here, the evidence shows the Bensons were sophisticated businessmen, who were experienced with transactions involving commercial leases. Benson Slosman testified he had negotiated approximately one hundred commercial leases and that he was aware of the requirement that long-term leases be in writing. Fred Slosman also testified that, aside from B & F Slosman, he had extensive business dealings, including "some experience" with commercial leases and real estate contracts. As such, we find, under the circumstances of this case, that plaintiff has not shown that defendant intentionally or fraudulently failed to disclose to plaintiff its internal approval process, that it never intended to sign a five-year lease, or that it had rejected plaintiff's outlined lease terms. *See Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119, *disc. rev. denied*, 317 N.C. 703, 347 S.E.2d 41 (1986) (duty to disclose arises when parties are in a fiduciary relationship or in arms length negotiation and one of the parties has taken affirmative steps to conceal material facts or has knowledge of a latent defect of which the other party is both ignorant and unable to discover through reasonable diligence).

Finally, plaintiff argues that, under the theory of quasi-estoppel, it conferred upon defendant a benefit by making adjacent space in the plant available for defendant's immediate occupancy. Therefore, by accepting this benefit, defendant is estopped from raising the statute of frauds defense.

In support of its argument, plaintiff relies on our Supreme Court's decision in *Brooks v. Hackney*, 329 N.C. 166, 404 S.E.2d 854 (1991). However, *Brooks* recognized the applicability of quasi-estoppel in a context notably inapposite to the facts of this case. In *Brooks*, the parties had entered into a *written agreement* for the sale of real estate. Over the course of eight years, the plaintiff used the real estate and made monthly payments pursuant to the terms of the agreement. However, after a disagreement arose, the plaintiff demanded the return of the monthly payments he had made over the previous eight years, arguing that because the agreement did not clearly describe the real estate, it failed to satisfy the statute of frauds. Our Supreme Court agreed that the written agreement did not adequately describe the real estate but held that plaintiff was estopped from taking advantage of the faulty description. The Court stated: "It is well settled that 'a party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement.' " *Id.* at 173, 404 S.E.2d at 859, *(quoting Advertising, Inc. v. Harper*, 7 N.C. App. 501, 505, 172 S.E.2d 793, 795 (1970)).

In contrast, plaintiff, in this case, asserts that defendant, in occupying the entire plant, received benefits it would have received under a written lease. However, unlike *Brooks*, defendant did not execute a written agreement. Such a construction as plaintiff contends would conflict with the essential purpose of quasi-estoppel, which is to prevent a party from benefitting by taking two clearly inconsistent positions. *See Carolina Medicorp v. Bd. of Trustees of the State Medical Plan*, 118 N.C. App. 485, 492, 456 S.E.2d 116, 120 (1995). Here, defendant argues that the parties were only in the process of negotiating a lease for additional space. The fact that defendant occupied the additional space during the negotiation process and agreed to pay a monthly rent does not result in defendant's taking two inconsistent positions. *See Kent v. Humphries*, 303 N.C. 675, 679, 281 S.E.2d 43, 46 (1981) (holding when a tenant enters into possession under an invalid lease and tenders rent which is accepted by the landlord, a periodic tenancy is created and the period of the tenancy is determined by the interval between rental payments). Thus, we find no merit in plaintiff's quasi-estoppel argument.

We conclude the trial court properly determined that the "Negotiation Summary" did not satisfy the statute of frauds. Further, plaintiff has failed to present a *prima facie* case showing defendant should be estopped from raising the statute of frauds as an affirma-

tive defense. Therefore, we overrule plaintiff's assignments of error on these issues.

II. *Quantum Meruit*

[2] Next, plaintiff contends it presented sufficient evidence on its claim for *quantum meruit* to withstand a directed verdict.

"*Quantum meruit* operates as an equitable remedy based upon a quasi contract or a contract implied in law, such that a party may recover for the reasonable value of materials and services rendered in order to prevent unjust enrichment." *Data General Corp. v. County of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 248 (2001). Plaintiff asserts that it conferred upon defendant the benefit of "providing much needed, but already occupied, space" at a cost of $192,500. However, Benson Slosman admitted during cross-examination that by permitting defendant to occupy the entire plant after AWI vacated, plaintiff received from defendant rental payments approximating $201,000. Therefore, we conclude plaintiff has been compensated for any benefit it conferred upon defendant and find the trial court did not err in directing a verdict on its *quantum meruit* claim.

III. Unfair and Deceptive Business Practices

[3] Finally, plaintiff argues it presented sufficient evidence to withstand a directed verdict on its claim for unfair and deceptive business practices.

To prevail on an unfair and deceptive business practice claim, a plaintiff must show: (1) that defendant committed an unfair or deceptive act or practice, or an unfair method of competition; (2) in or affecting commerce; (3) which proximately causes actual injury to plaintiff. *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998). The determination of whether a particular act is unfair or deceptive is a question of law for the court. *Gray v. North Carolina Ins. Underwriting Ass'n*, 132 N.C. App. 63, 510 S.E.2d 396 (1999), *reversed on other grounds*, 352 N.C. 61, 529 S.E.2d 676 (2000). The essence of plaintiff's unfair and deceptive business practices claim is that defendant committed fraud and breached an alleged lease. Having determined that plaintiff has failed to make a *prima facie* case with respect to each of these claims, we likewise conclude plaintiff has not established a claim for unfair and deceptive business practices.

In sum, after reviewing the record in a light most favorable to plaintiff, we conclude plaintiff has not established a *prima facie* case

for breach of an alleged lease, *quantum meruit*, or unfair and deceptive business practices. Accordingly, we affirm the trial court's grant of a directed verdict for defendant on all of plaintiff's claims.

Affirmed.

Judges TYSON and SMITH concur.

JAMES R. STEVENSON, EMPLOYEE-PLAINTIFF-APPELLANT v. NOEL WILLIAMS MASONRY, INC., EMPLOYER-DEFENDANT-APPELLEE, AND KEY RISK MANAGEMENT SERVICES, INC., CARRIER-DEFENDANT-APPELLEE

No. COA00-860

(Filed 28 December 2001)

1. **Workers' Compensation— attorney fees—no unfounded litigiousness**

The Industrial Commission in a workers' compensation action did not abuse its discretion by denying plaintiff attorney's fees where plaintiff contended that defendants had engaged in unfounded litigiousness. The parties strongly contested whether a clincher agreement included reimbursement of plaintiff's out-of-pocket expenses and plaintiff refused defendants' tendered partial payment of plaintiff's out-of-pocket expenses. The Commission's decision to deny plaintiff attorney's fees was not arbitrary or manifestly unsupported by reason.

2. **Workers' Compensation— out-of-pocket expenses—not "unpaid medical expenses"**

"Unpaid medical expenses" under Workers' Compensation Rule 502(2)(b) and the terms of a clincher agreement did not provide reimbursement for previously paid out-of-pocket expenses.

3. **Workers' Compensation— attorney fees—appeal not frivolous**

A workers' compensation defendant was not entitled to attorney fees where defendant contended that plaintiff had pursued a frivolous appeal but plaintiff made good faith arguments.

Appeal by plaintiff from opinion and award entered 28 January 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 August 2001.

Cox, Gage, & Sasser, by Margaret B. DeVries, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Clayton M. Custer and Laura M. Wolfe, for defendants-appellees.

BRYANT, Judge.

This case arises from proceedings before the North Carolina Industrial Commission in which plaintiff James R. Stevenson alleged that he suffered injuries to his left shoulder, upper back and neck while operating a bulldozer on 6 November 1995. Defendant Noel Williams Masonry, Inc. (Williams) denied plaintiff's workers' compensation claim.

Nonetheless, plaintiff, defendant Williams and carrier-defendant Key Risk Management Services (Key Risk) participated in a mediated settlement conference on 29 July 1997, and entered into a clincher agreement on 14 August 1997. The parties agreed in the clincher agreement to settle plaintiff's workers' compensation claims for $11,000.00. In addition, Key Risk agreed to pay all related unpaid medical expenses through the date of the mediation pursuant to Workers' Comp. R. of N.C. Indus. Comm'n 502(2)(b).

The clincher agreement released defendants from additional liability and required them to pay $855.65 in undisputed medical expenses—$292.05 to Charlotte Neurosurgical Associates (CNA), $459.60 to Carolinas Medical Center (CMC), and $104.00 to Southeast Anesthesia Associates (SAA). In addition, plaintiff's employment relationship was severed in consideration of $1,000.00 pursuant to the mediated settlement agreement.

On 15 August 1997, after the clincher agreement was executed, plaintiff requested reimbursement for out-of-pocket expenses in addition to the $11,000.00 provided in the clincher agreement. These out-of-pocket expenses totaled $259.00—$40.00 for prescription drugs, $144.00 for travel expenses related to treatment, and $75.00 for chiropractic treatment. Defendants refused to pay the out-of-pocket expenses, arguing that these expenses did not constitute unpaid medical expenses as that term is referenced in the clincher agreement. In

the meantime, the Commission filed an approval of the clincher agreement on 4 September 1997.

In October 1997, plaintiff again requested defendants to reimburse him for the out-of-pocket expenses. By letter dated 11 November 1997, defendants informed plaintiff they would not pay these expenses. As of 11 November 1997, defendants had not paid the three undisputed medical expenses.

On 14 November 1997, plaintiff filed a motion for payment of outstanding medical expenses and a motion for attorney's fees, costs and sanctions. The executive secretary for the Commission filed an administrative order on 9 January 1998, which mandated that defendants pay all outstanding medical expenses pursuant to the terms of the clincher agreement within twenty days of the filing of the order. Defendants were also ordered to pay a 10% penalty for late payments pursuant to N.C.G.S. § 97-18(i). Attorney's fees, costs, and sanctions were not assessed in the administrative order. Defendants paid the $104.00 balance to SAA and the $292.05 balance to CNA on 5 February 1998 and 29 May 1998 respectively. However, the $459.60 balance to CMC remained unpaid.

Plaintiff submitted a Form 33 (Request that Claim be Assigned for Hearing) with a date of notice of 30 April 1998 to compel payment of outstanding medical expenses, and to seek attorney's fees, costs and sanctions. Defendants responded by submitting a Form 33R (Response to Request that Claim be Assigned for Hearing) which stated that the "[c]arrier has paid all 'unpaid' medical bills of which it is aware . . . ." Thereafter, defendants, "under protest", tendered a check to plaintiff for $184.00 for plaintiff's out-of-pocket expenses for prescription drugs and travel costs, but refused to pay plaintiff's $75.00 out-of-pocket chiropractor expense. Plaintiff chose not to cash the check and proceeded to trial before the deputy commissioner. Defendants paid the $459.60 balance to CMC on 8 October 1998, just prior to trial.

This matter was heard before Deputy Commissioner George T. Glenn, II on 21 October 1998. Deputy Commissioner Glenn ruled that defendants were required to reimburse plaintiff's out-of-pocket costs of $40.00 for prescription drugs and $144.00 for travel expenses. Such reimbursement, he held, fell within the scope of unpaid medical expenses. Deputy Commissioner Glenn denied reimbursement for the $75.00 chiropractor expense. He however, awarded plaintiff $7,296.19 in attorney's fees and a 10% penalty fee for defendants late payments.

Defendants appealed to the Full Commission, which reversed in part and affirmed in part. The Commission determined that the $259.00 in out-of-pocket expenses were not unpaid medical expenses within the meaning of the clincher agreement or Rule 502(2)(b). Furthermore, the Commission ruled that plaintiff was not entitled to an award of attorney's fees as "[n]either party demonstrated unfounded litigiousness in this matter". However, as a consequence of late payment, the Commission affirmed plaintiff's award of the 10% penalty. Defendants thereafter complied with the Commission's orders. Plaintiff appealed and defendant presented cross-assignments of error.

> When reviewing appeals from the Industrial Commission, the Court is limited in its inquiry to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the Commission's findings of fact justify its legal conclusions and decision. The Commission's findings of fact are conclusive on appeal if supported by competent evidence. This is so even if there is evidence which would support a finding to the contrary.

Sanderson v. Northeast Construction Co., 77 N.C. App. 117, 120-21, 334 S.E.2d 392, 394 (1985) (citations omitted). While we are bound by the Commission's findings of fact if they are supported by competent evidence, this Court reviews *de novo* the Commission's conclusions of law. *Grantham v. R. G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *rev. denied by*, 347 N.C. 671, 500 S.E.2d 86 (1998).

Plaintiff's assignments of error

I.

[1] Plaintiff first contends that he is entitled to attorney's fees because defendants engaged in unfounded litigiousness. We disagree.

It is well settled in North Carolina that, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C.G.S. § 97-88.1 (2000). The evident purpose of the statute is to deter stubborn, unfounded litigiousness. *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982). Whether to assess attorney's fees is in the discretion of

the Commission. *See Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 71, 526 S.E.2d 671, 677 (2000).

Review of the Commission's award or denial of attorney's fees is limited and will not be overturned absent an abuse of discretion. *See id.* An abuse of discretion arises when a decision is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Plaintiff alleges that defendants engaged in unfounded litigiousness by unreasonably delaying its payments on the undisputed claims, making a false statement on their Form 33R, and by filing harassing discovery.

As relates to payment of the undisputed claims, the record reveals that at the time of the hearing before the Deputy Commissioner, the only claims to be settled were the out-of-pocket expenses, for which the defendants denied liability. Just prior to the hearing, defendants had paid all undisputed claims. However, those undisputed claims were paid in February, May and October 1998—long after the twenty-day deadline established by the executive secretary in his January 1998 order.

As relates to defendants' Form 33R, the record reveals that after plaintiff filed a Form 33 request for hearing, defendants filed a Form 33R stating that the "[c]arrier has paid all 'unpaid' medical bills of which it is aware . . . ." It appears from the record that at least one undisputed bill—$459.60 to CMC—was outstanding when defendants filed their Form 33R. Since there is some question regarding whether defendants were aware of the outstanding balance to CMC when they filed their Form 33R, it cannot be determined whether the statement was made intentionally or through inadvertence.

As relates to plaintiff's claim regarding defendants filing harassing discovery, the record reveals that on 6 October 1998, defendants served a notice of deposition on plaintiff's counsel. Plaintiff's counsel had not answered interrogatories defendants served in June 1998. Defendants contend that the purpose of the deposition was to determine exactly what the parties agreed to pay, i.e., to seek clarification of the term "unpaid medical expenses" pursuant to the clincher agreement. The Deputy Commissioner, however, quashed the subpoena to depose plaintiff's counsel.

It is clear from the record that the parties strongly contested whether the terms of the clincher agreement included reimbursement of plaintiff's out-of-pocket expenses. Further, the record indicates that defendants tendered partial payment of plaintiff's out-of-pocket expenses in order to avoid litigation, but plaintiff refused this tender and proceeded to a hearing before the deputy commissioner. While this Court does not condone the delays in payment of the undisputed expenses, it appears that even if defendants had made timely payment for the undisputed expenses, litigation would have commenced regarding the out-of-pocket expenses.

Based on evidence in the record, it does not appear the Commission's decision to deny plaintiff attorney's fees was arbitrary or manifestly unsupported by reason. Therefore, we do not find the Full Commission abused its discretion in denying attorney's fees. Plaintiff was properly entitled, however, to the 10% penalty pursuant to N.C.G.S. § 97-18(i) for late payment of the undisputed medical expenses.

II.

[2] Plaintiff's final argument alleges the Full Commission erred in concluding his out-of-pocket expenses were not unpaid medical expenses within the meaning of Rule 502(2)(b) or the clincher agreement. We disagree.

The Full Commission's findings of fact state in pertinent part: "9. Plaintiff's out-of-pocket medical expenses were not 'unpaid' medical expenses within the meaning of the Clincher Agreement and Industrial Commission Rule 502(b) [sic], even though plaintiff had not been reimbursed for these out-of-pocket expenses. . . ." We note the abovementioned statement is actually a conclusion of law and not a finding of fact, therefore, this Court will review this conclusion *de novo*.

Workers' Comp. R. of N.C. Indus. Comm'n 502(2)(b) (2000) states:

> Where liability is denied, that the employer or carrier/administrator undertakes to pay all unpaid medical expenses to the date of the agreement. However, this requirement may be waived in the discretion of the Industrial Commission. When submitting an agreement for approval, the employee or employee's attorney, if any, shall advise the Commission in writing of the amount of the unpaid medical expenses.

Rule 502(2)(b) provides that where the employer or carrier denies liability for a claim, such payor is obligated to pay what the rule specifies: *unpaid* medical expenses. "Unpaid" means "not yet paid." *The American Heritage Dictionary* 1324 (2nd College ed. 1991). Since plaintiff had already paid for these medical expenses, they clearly do not fit the meaning of "not yet paid." The language of Rule 502(2)(b) does not distinguish between medical expenses unpaid by the employer or carrier versus those unpaid by another party. Therefore, in interpreting Rule 502(2)(b), we hold that plaintiff's unreimbursed out-of-pocket expenses do not qualify as unpaid medical expenses pursuant to that rule.

Plaintiff cites *Hansen v. Crystal Ford-Mercury, Inc.* for the proposition that unpaid medical expenses include reimbursable expenses pursuant to Rule 502(2)(b). 138 N.C. App. 369, 531 S.E.2d 867, *rev. dismissed by*, — N.C. —, 546 S.E.2d 130, *writ of supersedeas and motion for temporary stay denied by*, 353 N.C. 263, 546 S.E.2d 131 (2000), *rev. denied by*, 353 N.C. 263, 546 S.E.2d 94, *reconsideration denied by*, 353 N.C. 372, 547 S.E.2d 7 (2001). However, the issue in *Hansen* was whether an employee's health insurer had standing to intervene in a worker's compensation claim for reimbursement.[1] 138 N.C. App. at 374, 531 S.E.2d at 870. The *Hansen* Court did not specifically address what expenses were included as unpaid medical expenses under Rule 502(2)(b). *Hansen* is not dispositive on this issue, therefore, we cannot conclude that the Commission erred in concluding plaintiff's out-of-pocket expenses were not unpaid expenses under Rule 502(2)(b) based on *Hansen*.

In addition, the Commission concluded that the clincher agreement did not provide for reimbursement of plaintiff's out-of-pocket expenses as part of unpaid medical expenses covered in the agreement. The Commission noted that "[i]f the parties had intended that plaintiff himself would recover an amount in addition to the lump sum settlement, the agreement should have provided for payment of paid but non-reimbursed medical expenses as of the date of the agreement." We find no error in this conclusion.

We hold that unpaid medical expenses under Rule 502(2)(b) and the terms of the clincher agreement do not provide reimbursement for previously paid out-of-pocket medical expenses. This ruling does

1. *Hansen* was overturned by recent legislation which indicates that health insurers are not real parties in interest in proceedings or settlements under the Worker's Compensation Act. H.R. 1045, 144 Leg., Reg. Sess. (N.C. 2001).

not affect the Commission's discretion to waive the requirement of Rule 502(2)(b) that obligors pay all unpaid medical expenses through the date of the clincher agreement. Nor does this ruling affect the parties' ability to enter into agreements that the employer or carrier reimburse an employee's out-of-pocket medical expenses. In the instant case, however, we find that plaintiff's out-of-pocket medical expenses were mediated as included in the $11,000.00 lump sum payment to plaintiff.

Defendants' cross-assignment of error

[3] Having overruled plaintiff's assignments of error, it is necessary for this Court only to address defendants' first argument and corresponding assignment of error. Defendants contend they are entitled to attorney's fees because plaintiff has brought a frivolous appeal from the Full Commission's opinion and award. We disagree.

N.C. R. App. P. 34 (2000) provides in pertinent part:

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and warranted by existing law or good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

. . .

(b) A court of the appellate division may impose one or more of the following sanctions:

. . .

(2) monetary damages including, but not limited to,

. . .

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

. . . .

Having reviewed plaintiff's arguments, we do not find that plaintiff has pursued a frivolous appeal. Plaintiff has made good faith arguments concerning whether he was entitled to attorney's fees and reimbursement for out-of-pocket medical expenses pursuant to Rule 502(2)(b) and the terms of the clincher agreement. Therefore, we do not find defendant is entitled to attorney's fees on appeal.

Affirmed.

Judges GREENE and CAMPBELL concur.

WILLIAM MICHAEL BOYKIN, PLAINTIFF v. THOMAS RAY MORRISON, RUFUS AARON WILSON, JR. AND WILLIE PERRY, DEFENDANTS

No. COA01-80

(Filed 28 December 2001)

1. Insurance— automobile—uninsured motorist—motion for partial summary judgment—punitive damages

The trial court did not err in an action arising out of two automobile accidents by denying unnamed defendant insurance company's motion for partial summary judgment on the issue of punitive damages even though the insurance company contends that plaintiff's policy excludes punitive damages in its uninsured motorist coverage, because: (1) whether the insurance company's agreement with plaintiff provides for payment of punitive damages on behalf of the uninsured driver is irrelevant as to any issues at trial; and (2) although entitled, the insurance company did not file a declaratory judgment action under N.C.G.S. § 1-254 to determine the extent of its rights and obligations under its insurance agreement with plaintiff.

2. Trials— bifurcated—compensatory phase—evidence of punitive damages

The trial court did not err in an action arising out of two automobile accidents by admitting evidence of punitive damages, including the uninsured driver's impairment, in the compensatory phase of a bifurcated trial under N.C.G.S. § 1D-30 because unnamed defendant insurance company failed to meet its burden

to show prejudice or that a different result likely would have ensued.

3. Motor Vehicles— automobile accident—instruction on doctrine of insulating or intervening negligence

The trial court did not err in an action arising out of two automobile accidents by refusing to instruct the jury on the doctrine of insulating or intervening negligence, because: (1) the second accident was not sufficiently independent of, and unassociated with, the uninsured driver's initial negligence of colliding into plaintiff's car, to insulate the uninsured driver from liability; (2) the uninsured driver could reasonably foresee that the second driver would strike plaintiff's car after he disabled it in the middle of the street; and (3) the second driver's colliding into plaintiff's car was a foreseeable intervening act and was associated with the uninsured driver's initial negligence.

4. Costs— attorney fees—automobile accident

The trial court did not err in an action arising out of two automobile accidents by awarding attorney fees to plaintiff under N.C.G.S. § 6-21.1, because: (1) the main purpose of the statute is to provide relief for a person who sustains damages in an amount so small that it would not be economically feasible to bring suit if he would have to pay his attorney from the recovery; (2) including punitive damages to calculate the statute's applicability would reward a defendant's egregiously wrongful acts; and (3) the word "damages" as used in the statute applies only to the compensatory damage amounts when determining whether the judgment amount is equal to or less than $10,000.

Appeal by unnamed defendant from judgments entered 11 May 2000 by Judge Henry W. Hight and order awarding costs and attorney's fees entered 17 May 2000 in Wake County Superior Court. Heard in the Court of Appeals 18 October 2001.

E. Gregory Stott for plaintiff-appellee.

Smith and Heiskell, P.C., by Christopher N. Heiskell, for defendant-appellant.

TYSON, Judge.

Allstate Insurance Company ("Allstate"), as an unnamed defendant, appeals from judgments entered upon the verdicts of the jury

following bifurcated compensatory and punitive damage trials, order denying defendant's motion for partial summary judgment, order denying defendant's motion for judgment notwithstanding the verdict, and order awarding attorney's fees and costs to plaintiff. We find no prejudicial error.

I. Facts

William Michael Boykin ("plaintiff") was driving his car on 25 December 1997 at approximately 4:00 a.m. Thomas Ray Morrison ("Morrison") ran a red light and collided into plaintiff's car. Plaintiff exited his car, approached Morrison's vehicle, and observed him asleep and snoring. Plaintiff returned to his car to await police and ambulances dispatched to the scene. Approximately fifteen minutes later, Rufus Aaron Wilson, Jr. ("Wilson") drove his car into the intersection and collided with plaintiff's car which had remained in the intersection after the first collision. The second impact propelled plaintiff from his car onto the ground.

After the second collision, Henry Battle ("Battle") of the City-County Bureau of Investigation arrived at the scene to determine if Morrison had been driving while impaired. Battle's analysis revealed that Morrison's blood alcohol level was 0.0226. Morrison was subsequently convicted of driving while impaired.

Morrison was uninsured. Plaintiff submitted a claim to his insurance provider, Allstate, for his damages pursuant to the "uninsured motorist" provisions contained in his policy. Allstate denied the claim. Plaintiff filed a complaint on 8 April 1998 against Morrison, Wilson, and Willie Perry, the owner of the car Wilson was driving, alleging negligence and demanding damages.

On 8 May 1998, Allstate intervened pursuant to N.C. Gen. Stat. §20-279.21(f)(1) (1999) to provide a defense for Morrison in order to protect its interests. Allstate filed an answer, denying Morrison's negligence and asserting plaintiff's contributory negligence as an affirmative defense, motions to transfer and sever.

On 24 August 1998, plaintiff filed an amended complaint to demand punitive damages. Allstate answered and again denied Morrison's negligence and asserted plaintiff's contributory negligence.

On 30 December 1999, plaintiff settled his claims against Wilson and Perry during court ordered mediation. Plaintiff voluntarily dismissed his action against them. Plaintiff and Allstate did not reach a

settlement. On 6 January 2000, Allstate filed a lump sum offer of judgment of $4,001.00, which plaintiff rejected. The trial court denied Allstate's motion for partial summary judgment on the issue of liability for punitive damages on 23 February 2000.

On 7 March 2000, the trial court entered a pre-trial order. Two days later, Allstate filed a stipulation of facts, which acknowledged that Morrison's negligence proximately caused the collision with plaintiff, but reserved the right to contest the issue of whether Morrison's negligence proximately caused plaintiff's injuries.

A bifurcated trial was held on 13 March 2000 for compensatory and punitive damages. Allstate did not offer any evidence during the compensatory damage phase. The trial court denied plaintiff's and Allstate's motions for directed verdicts at the close of all the evidence.

The following day, the jury awarded plaintiff $10,000.00 in compensatory damages and $17,500.00 in punitive damages. Allstate filed a motion for judgment notwithstanding the verdict, which was denied. On 17 May 2000, the trial court awarded plaintiff $6,000.00 in attorney's fees and other costs in the amount of $759.42. Allstate appeals.

II. Issues

Allstate assigns error to the trial court's: (1) denying its motion for partial summary judgment on the issue of punitive damages, (2) admitting evidence of punitive damages in the compensatory damage phase of a bifurcated trial, (3) refusing to instruct the jury on the doctrine of insulating or intervening negligence, and (4) awarding attorney's fees to plaintiff.

III. Partial Summary Judgment

[1] Allstate argues that plaintiff's policy excludes punitive damages in its uninsured motorist coverage, and that the trial court should have granted its motion for summary judgment on the issue of punitive damages at trial.

Whether Allstate's agreement with plaintiff provides for payment of punitive damages on behalf of the uninsured Morrison is irrelevant as to any issues at trial. The issues before the trial court were whether Morrison's negligence proximately caused plaintiff's injuries, the extent of plaintiff's damages, and whether Morrison's actions were sufficient to warrant punitive damages. Although en-

titled, Allstate did not file a declaratory judgment action pursuant to N.C. Gen. Stat. § 1-254 (1931) to determine the extent of its rights and obligations under its insurance agreement with plaintiff. The trial court properly denied Allstate's motion for partial summary judgment. This assignment of error is overruled.

IV. Evidence of Punitive Damages

[2] Allstate assigns error in allowing evidence of Morrison's impairment, at the time of the collision with plaintiff, during the compensatory phase of the trial. The trial court granted Allstate's motion for a bifurcated trial, pursuant to N.C. Gen. Stat. § 1D-30 (1995). Allstate stipulated that Morrison's negligence was the proximate cause of the first collision. The only issue contested during the compensatory phase was whether defendant's negligence caused plaintiff's injuries. Allstate does not argue that prejudice resulted in the alleged error.

"Verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and that a different result likely would have ensued, with the burden being on the appellant to show this." *Perkins v. Langdon*, 237 N.C. 159, 178, 74 S.E.2d 634, 649 (1953) (citations omitted).

Presuming error, Allstate has not shown prejudice and we will not speculate whether such error was prejudicial. This assignment of error is overruled.

V. Insulating or Intervening Negligence

[3] Allstate contends it was entitled to a jury instruction on insulating or intervening negligence. The second collision occurred approximately fifteen minutes after Morrison collided into plaintiff's car. Allstate asserts that the evidence is conflicting regarding whether Morrison or Wilson caused plaintiff's injuries. Allstate argues that "[t]here is sufficient evidence, when viewed in the light most favorable to defendant . . . from which jurors might have reasonably inferred that Morrison's negligence had ended, resulting in no injury to plaintiff, and that Wilson's negligence, which occurred after the passing of ten to fifteen minutes, was the sole proximate cause of plaintiff's injuries." We disagree.

"The trial court must give the instructions requested, at least in substance, if they are proper and supported by evidence." *Haymore*

v. Thew Shovel Co., 116 N.C. App. 40, 49, 446 S.E.2d 865, 871 (1994) (citing *State v, Lynch*, 46 N.C. App. 608, 265 S.E.2d 491, *rev'd on other grounds*, 301 N.C. 479, 272 S.E.2d 349 (1980)).

The law of intervening negligence provides that under certain circumstances another sufficiently independent act, unassociated with defendant's initial negligence, may insulate defendant from liability. David A. Logan and Wayne A. Logan, *North Carolina Torts*, § 7.30 at 166 (1996). "The test is not to be found merely in the degree of negligence of the intervening agency, but in its character—whether it is of such an extraordinary nature as to be unforeseeable." *Rattely v. Powell*, 223 N.C. 134, 136, 25 S.E.2d 448, 450 (1943) (citations omitted).

> [W]here a horse is left unhitched in the street and unattended, and is maliciously frightened by a stranger and runs away: but for the intervening act, he would not have run away and the injury would not have occurred; yet it was negligence of the driver in the first instance which made the runaway possible.

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 236, 311 S.E.2d 559, 567 (1984) (citing with approval *Harton v. Telephone Co.*, 141 N.C. 455, 462-63, 54 S.E. 299, 302 (1906)).

Wilson's act was not sufficiently independent of, and unassociated with, Morrison's initial negligence of colliding into plaintiff's car, to insulate Morrison from liability. Morrison could reasonably foresee that Wilson would strike plaintiff's car after he disabled it in the middle of the street. Wilson's colliding into plaintiff's car was a foreseeable intervening act and was associated with Morrison's initial negligence. We hold that the requested instruction was not supported by the evidence. The trial court properly denied the request. This assignment of error is overruled.

VI. Attorney's Fees

[4] Allstate contends that it was error to award attorney's fees pursuant to G.S. § 6-21.1 arguing that "the 'judgment for recovery of damages' exceeds $10,000." This issue requires us to determine whether the phrase "judgment for recovery of damages" in G.S. § 6-21.1 contemplates combining both punitive and compensatory damage awards in calculating whether the "judgment for recovery of damages is ten thousand dollars ($10,000) or less . . . ." N.C. Gen. Stat. § 6-21 (1986).

"The general rule in this State is that, in the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding." *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972) (citations omitted).

G.S. § 6-21.1 is an exception to the general rule and allows the trial court to award reasonable attorney's fees in certain cases. *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 571, 551 S.E.2d 852, 856 (July 3, 2001) (citing *Hill v. Jones*, 26 N.C. App. 168, 169, 215 S.E.2d 168, 169, *cert denied*, 288 N.C. 240, 217 S.E.2d 664 (1975)). The 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 constitute 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 fees to be taxed as a part of the court costs.

N.C. Gen. Stat. § 6-21.1 (emphasis supplied).

Allstate contends that the "legislature used the term 'damages,' clearly aware of the existence of both compensatory damages and punitive damages. It also used the words 'in any personal injury or property damage suit,' which would encompass all of the damages recovered . . . ." Allstate cites no authority or reasoning in support of its contention. Allstate also argues that the "language of the Statute is clear and unambiguous, and as such requires no construction by this Court." We agree with Allstate that the language of the statute is clear. To assign Allstate's meaning to the statute, however, ignores: (1) the remedial nature of the statute, and (2) precedent that the definition of the term "damages," by itself, does not include punitive damages.

Our Supreme Court has held that G.S. § 6-21.1 is a remedial statute, and "being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." *Hicks v. Albertson*, 284 N.C.

236, 239, 200 S.E.2d 40, 42 (1973) (citing *Weston v. J. L. Roper Lumber Co.*, 160 N.C. 263, 75 S.E.2d 800 (1912); 50 Am. Jur., Statutes, § 303-05; 82 C.J.S. Statutes § 377). "The obvious purpose of N.C. Gen. Stat. § 6-21.1 is to provide relief for a person who *sustained injury* or *property damage* in an amount so small that, if he must pay counsel from his recovery, it is not economically feasible to *bring suit* on his claim." *Thorpe* at 571, 551 S.E.2d at 856. (emphasis supplied) (citing *Hicks* at 239, 200 S.E.2d at 42).

First, to construe the phrase "judgment for recovery of damages" to include punitive damages awards would, in the aggregate, decrease the number of cases to which the statute would apply. Precedent requires us to include all cases fairly falling within the statute's intended scope. This Court concludes that Allstate's construction unnecessarily restricts its application. *See e.g. West Through Farris v. Tilley*, 120 N.C. App. 145, 150, 461 S.E.2d 1, 3-4 (1995) (finding defendant's argument that the court's "judgment" herein must necessarily include medical expenses obtained by a non-party requires an unnecessarily restrictive application of G.S. § 6-21.1)

Second, including punitive damages to calculate the statute's applicability would reward a defendant's egregiously wrongful acts. A defendant who acts merely negligently and damages a plaintiff in the amount of $10,000.00 in compensatory damages may be required to pay plaintiff's attorney's fees. On the other hand, a defendant who acts egregiously and wrongfully and who damages a plaintiff in the exact amount of $10,000.00 in compensatory damages, and who is also punished by the jury with punitive damages of any dollar amount, could not be required to pay plaintiff's attorney's fees under the statute. The more culpable defendant obtains the benefit of not having to pay plaintiff's attorney's fees even though that defendant damaged the plaintiff to the same extent as the defendant who acted merely negligent. The only difference being the latter defendant's more egregious actions. The main purpose of G.S. § 6-21.1 is to provide relief for a person who sustains damages in an amount so small that, if he would have to pay his attorney from the recovery, it would not be economically feasible to bring suit, not to reward a defendant's willful and wanton conduct.

In addition to G.S. § 6-21.1 being remedial in nature, this Court has previously interpreted the word "damages" not to include punitive damages. In *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 100, 237 S.E.2d 341, 345 (1977), the defendants contended that the

word "damages" included compensatory and punitive damages. *Id.* This Court disagreed. We explained that:

> [t]he commonly accepted definition of the term 'damages' does not include punitive damages. . . . 'In its legal sense the word 'damages' is defined as meaning the compensation which the law will award for an injury done; a compensation, recompense, or satisfaction in money for a loss or injury sustained; and the most common meaning of the term is compensation for actual injury.' Punitive damages are not compensation for injuries sustained.

Id. (citations omitted).

We hold that the word "damages" as used in G.S. § 6-21.1 applies only to the compensatory damage amounts when determining whether the judgment amount is equal to or less than $10,000.

Here, the trial court did not segregate the attorney's fees awarded between G.S. §§ 6-21.1 or 6-21.5, or Rules 36 or 37 of the North Carolina Rules of Civil Procedure. In light of our holding it is unnecessary to consider, and we do not reach, Allstate's other arguments concerning G.S. § 6-21.5 or Rules 36 or 37.

We find no prejudicial error in the trial court's judgments and orders.

No prejudicial error.

Judges MARTIN and WALKER concur.

PHILLIP E. LOCH, PLAINTIFF v. ENTERTAINMENT PARTNERS, EMPLOYER; CNA INSURANCE COMPANIES, CARRIER; DEFENDANTS

No. COA00-1113

(Filed 28 December 2001)

1. Workers' Compensation— average weekly wage—sporadic employment

The Industrial Commission erred in its calculation of a workers' compensation plaintiff's average weekly wage where plaintiff was an actor whose employment was sporadic. The Commission was justified in resorting to an alternate method of determining

plaintiff's average weekly wage, but it is not clear which method the Commission used. N.C.G.S. § 97-2(5).

2. Workers' Compensation— overpayment of benefits—credit to employer

The Industrial Commission did not err by awarding a workers' compensation defendant a credit for overpayment of benefits where plaintiff was on notice that his benefits were subject to wage verification.

Appeal by plaintiff from an opinion and award entered 12 July 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 August 2001.

Kathleen Shannon Glancy and Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer for plaintiff-appellant.

Hedrick & Blackwell, L.L.P., by Sherman Lee Criner and Jerry L. Wilkins, Jr. for defendant-appellee.

TIMMONS-GOODSON, Judge.

Phillip E. Loch ("plaintiff") appeals an opinion and award of the North Carolina Industrial Commission ("the Full Commission") reducing his award of workers' compensation benefits. For the reasons set forth herein, we remand to the Full Commission for recalculation of plaintiff's average weekly wage in compliance with N.C. Gen. Stat. § 97-2(5) (1999).

Pertinent facts and procedural information include the following: Plaintiff began employment on an occasional basis with Entertainment Partners ("defendant") in 1990. On 21 September 1996, defendant employed plaintiff as an actor for a few days work. The same day, plaintiff slipped on a step outside of his trailer, causing him to aggravate a pre-existing knee injury. Plaintiff was diagnosed with an acute contusion and sprain of his right knee. Despite his injury, plaintiff continued to work for defendant on 4 October and 11 October 1996. On 11 November 1996, Dr. Sutton performed partial knee surgery on plaintiff's right knee. Plaintiff reached maximum medical improvement on 1 July 1997, and was assigned a permanent disability rating of fifteen percent (15%) to his right knee, with restrictions on climbing, stooping, squatting, and crawling. Plaintiff was paid temporary total disability benefits pursuant to a Form 60 Agreement at the maximum compensation rate of $492.00, subject to wage verification.

On 1 October 1997, defendant filed a claim with the Industrial Commission seeking to terminate or suspend payment of benefits because plaintiff had resumed working at an equal or higher wage. The parties agreed to submit the matter to the Deputy Commissioner, based on stipulated exhibits, for a determination of plaintiff's average weekly wage pursuant to N.C. Gen. Stat. § 97-2(5). After a hearing on the matter, Deputy Commissioner Phillip A. Holmes rendered an opinion and award on 28 August 1998, ruling, *inter alia*, that calculating plaintiff's average weekly wage under the first three calculations of N.C. Gen. Stat. § 97-2(5) results in an unfair and unjust calculation. The Deputy Commissioner concluded that plaintiff's average weekly wage must be calculated under the fourth method to ensure a fair and just result. The Deputy Commissioner calculated plaintiff's wages by dividing his highest earning over any fifty-two week period during his seven-year employment by fifty-two (52) weeks thus yielding an average weekly wage of $80.05 and a compensation rate of $53.37.

Plaintiff appealed this opinion and award to the Full Commission. The Full Commission rendered its opinion and award on 4 May 2000 with the following pertinent findings of fact and conclusions of law:

Findings of Fact

7. Carrier-defendant subsequently obtained plaintiff's wage records and a completed Form 22 Wage Chart. The Form 22 Wage Chart shows no earnings by plaintiff in 1996 for the months of January through August. The Form 22 Wage Chart reflected earnings of $594.00 in September 1996 and $1,188.00 in October 1996. For November 1995, the Form 22 Wage Chart shows earnings of $1,234.53. Accordingly, in the twelve months preceding the injury, plaintiff earned a total of $3,016.53 working for defendant-employer which equates to an average weekly wage of $58.01, and a weekly compensation rate of $38.67.

8. Plaintiff's payroll records show the following yearly incomes earned between 1990 and 1996 while working for defendant-employer: 1990-$1,138.00; 1991-$492.80; 1992-$4,162.50; 1993-$1,895.57; 1994-$893.34; 1995-$2,734.59; 1996-$1,818.70.

Conclusions of Law

2. Given the part-time and intermittent nature of plaintiff's work as an actor for the defendant-employer, calculation of plaintiff's average weekly wage under the first three calculations of N.C.

Gen. Stat. § 97-2(5) results in an unfair and unjust calculation which would not take into account the periods during which plaintiff did not work. Therefore, plaintiff's average weekly wage must be calculated under the fourth method under N.C. Gen. Stat. § 97-2(5) in order to ensure results which are fair and just to both employer and employee. *Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1996); *Barber v. Going West Transportation, Inc* [134 N.C. App. 428, 517 S.E.2d 914 (1999)].

3. The undersigned conclude as a matter of law that plaintiff's average weekly wage must be calculated by taking the total earnings for the 52 weeks preceding his disability and dividing that amount by 52. *Barber v. Going West Transportation, Inc.* [134 N.C. App. 428, 517 S.E.2d 914 (1999)]. Plaintiff's earnings from defendant-employer during the 52 weeks prior to his disability total $3,016.53, which equates to an average weekly wage of $58.01, yielding a compensation rate of $38.67. N.C. Gen. Stat. § 97-2(5).

The Commission further concluded that defendant was entitled to a credit towards future indemnity benefits. Plaintiff appeals.

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[1] On appeal, plaintiff assigns error to the Commission's computation of his average weekly wage. Specifically, plaintiff contends that the Commission erred by resorting to the "fourth method" of N.C. Gen. Stat. § 97-2(5) in calculating his average weekly wage. For the reasons discussed below, we agree.

First, we note that the role of this Court in reviewing an appeal from the Industrial Commission is limited to a determination of (1) whether the findings of fact are supported by competent evidence and (2) whether the conclusions of law are supported by the findings. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). Conclusions of law by the Industrial Commission are reviewable *de novo* by this Court. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

Under N.C. Gen. Stat. § 97-2(5) average weekly wage is defined in pertinent part as

earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by

> 52; but if the injured, employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly wage amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (1999).

It is clear from the language of the statute and prior holdings of this Court that N.C. Gen. Stat. § 97-2(5) establishes an order of preference and that the primary method is to calculate the total wages of the employee for the fifty-two weeks of the year prior to the date of the injury, divided by fifty-two. *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 128, 532 S.E.2d 583, 586 (2000). The statute includes a "catch-all" provision, to be used when warranted by "exceptional reasons." *Postell v. B&D Construction Co.*, 105 N.C. App. 1, 7, 411 S.E.2d 413, 416, *disc. review denied*, 331 N.C. 286, 417 S.E.2d 253 (1992). However, the final method set forth in N.C. Gen. Stat. § 97-2(5) may not be used unless there has been a finding that unjust results would occur by using the previous methods. *Wallace v. Music Shop*, 11 N.C. App. 328, 331, 181 S.E.2d 237, 239 (1971).

The primary intent of the N.C. Gen. Stat. § 97-2(5) is to make certain that the results reached are fair and just to both parties. *Liles v. Electric Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 795-96 (1956). In cal-

culating an employee's average weekly wage, the North Carolina Supreme Court has held that the average weekly wage should be based upon the injured employee's earning capacity. *Dereberry v. Pitt County Fire Marshall*, 318 N.C. 192, 197, 347 S.E.2d 814, 817 (1986). Therefore, the average weekly wage is determined by calculating " 'the amount which the injured employee would be earning were it not for the injury.' " *Id.* (quoting N.C. Gen. Stat. § 97-2(5)).

At the outset, we note that due to the sporadic nature of plaintiff's employment and the difficulty in making a precise calculation, the Commission was justified in resorting to an alternative method of determining his average weekly wage. Plaintiff worked for defendant for seven years but was assigned work only as it became available. In fact, the record reveals that work was not available in the acting field to plaintiff every week. In the fifty-two weeks prior to plaintiff's injury in 1996, plaintiff only worked a total of five days. In relying on *Joyner v. Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966), the Commission concluded that given the "part-time and intermittent" nature of plaintiff's employment, calculation under the first three methods of N.C. Gen. Stat. § 97-2(5) "results in an unfair and unjust calculation which would not take into account the periods which plaintiff did not work." Therefore, the Commission calculated plaintiff's average weekly wage under the "fourth method" of the statute.

Although N.C. Gen. Stat. § 97-2(5) does not numerically designate the methods for calculating average weekly wage, recent case law assigns numbers to the statutory methods for calculating average weekly wage with the fifth method being the "catch-all" provision. *See McAnich v. Buncombe County Schools*, 122 N.C. App. 679, 681, 471 S.E.2d 441, 443 (1996) (noting that the statute provides a "hierarchy" of five methods of computing the average weekly wage) *overruled on other grounds*, 347 N.C. 126, 489 S.E.2d 375 (1997); *Bond v. Foster Masonry Inc.*, 139 N.C. App. 123, 127, 532 S.E.2d 583, 585-86 (2000) (setting forth five methods of calculating average weekly wage). In light of recent case law, it is not clear which method the Commission employed in calculating plaintiff's average weekly wage.

On the one hand, the Commission concluded as follows:

> 2. Given the part-time and intermittent nature of plaintiff's work as an actor for the defendant-employer, calculation of plaintiff's average weekly wage under the first three methods of N.C. Gen. Stat. § 97-2(5) results in an unfair and unjust calculation which

> would not take into account the periods during which plaintiff did not work. Therefore, plaintiff's average weekly wage must be calculated under the fourth method under N.C. Gen. Stat. § 97-2(5) in order to ensure results which are fair and just to both employer and employee.

However, calculation under this method would require comparing plaintiff's work with an employee of the "same grade and character . . . in the same locality or community" as required by § 97-2(5). The record contained no findings regarding the wages or annual earnings of comparable part-time actors. There was also no finding of whether the work provided by defendant was seasonal or how often employment was offered to the actors during any portion of the year. Without the related findings, the Commission could not properly conclude that calculation under the fourth method would ensure fair results.

On the other hand, the opinion and award of the Commission suggests that it employed the final "catch-all" method of the statute by quoting the language "fair and just" in their conclusions. However, without any explanation, it calculated plaintiff's wages under the first method of the statute and justified this calculation under the "catch-all" provision of the statute. We note that this method of calculation is not permitted under N.C. Gen. Stat. § 97-2(5) in computing plaintiff's average weekly wage, because plaintiff worked less than fifty-two weeks prior to his injury. While there existed an "exceptional reason" to resort to the final "catch-all" method of the statute because of the part-time nature of plaintiff's employment, the Commission was not permitted to circumvent the statute when calculation under the first method was otherwise inappropriate. Accordingly, those portions of the Full Commission's opinion and award based on a calculation of plaintiff's average weekly wage at $58.01 are reversed and this matter is remanded for recalculation of plaintiff's average weekly wage.

[2] Plaintiff next contends that the Commission erred in concluding that defendant is entitled to a credit for overpayment of benefits. Plaintiff therefore contends that he is entitled to keep temporary total disability benefits that were paid to him in the amount of $492.00 from 24 October 1996 through 24 September 1997. We disagree.

The decision of whether to grant a credit is within the sound discretion of the Commission. Such decision to grant or deny a credit will not be disturbed on appeal in the absence of an abuse of discre-

tion. *Moretz v. Richards & Associates*, 74 N.C. App. 72, 75, 327 S.E.2d 290, 293 (1985), *aff'd as modified*, 316 N.C. 539, 342 S.E.2d 844 (1986). This Court has held that N.C. Gen. Stat. § 97-42 is the only statutory authority for allowing an employer in North Carolina any credit against workers' compensation payments due an injured employee. *Johnson v. IBM*, 97 N.C. App. 493, 389 S.E.2d 121, 122 (1990), *disc. review denied*, 327 N.C. 429, 395 S.E.2d 679 (1990). N.C. Gen. Stat. § 97-42 provides:

> Payments made by the employer to the injured employee during the period of his disability . . . which by the terms of this Article were both due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation.

N.C. Gen. Stat. § 97-42 (1999). The rationale behind the statute is to encourage voluntary payments by the employer during the time of the worker's disability. *See Gray v. Carolina Freight Carriers*, 105 N.C. App. 480, 484, 414 S.E.2d 102, 104 (1992). In *Foster v. Western-Electric Co.*, 320 N.C. 113, 115, 357 S.E.2d 670, 672 (1987), the North Carolina Supreme Court held that if defendant has not accepted plaintiff's injury as compensable under workers' compensation at the time the payments were made, or if there has not been a determination of compensability by the Industrial Commission, then defendant-employer should be awarded a credit. *See also, Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 576, 468 S.E.2d 396, 399 (1996).

In its opinion and award, the Commission made the following finding of fact:

> Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment. *Long v. Trantham*, 226 N.C. 510, 513, 39 S.E.2d 384, 387 (1946). It is based on the theory that "it would be against principles of equity and good conscience to permit a party against whom estoppel is asserted to avail himself of what . . . otherwise [might] be his undisputed legal rights." *Redevelopment Comm'n v. Hannaford*, 29 N.C. App. 1, 3, 222 S.E.2d 752, 754 (1976). Since plaintiff did not rely to his detriment on any action or representation made by defendants, equitable estoppel does not apply[.]

We hold that the record supports a finding that plaintiff was on notice that his benefits were subject to wage verification. Plaintiff sustained his injury on 21 September 1996 and defendant voluntarily began payments on 24 October 1996. From 24 October 1996 through 24 September 1997, weekly compensation benefits were paid to plaintiff by defendant subject to verification as documented on the Form 60 Agreement. Thus, we are unable to conclude that the Commission abused its discretion in awarding defendant a credit for any overpayment of benefits. This assignment of error is therefore overruled.

Accordingly, we hold that the average weekly wage computed by the Commission is not supported by the evidence and the matter must therefore be remanded for recalculation of plaintiff's average weekly wage and resulting credit toward overpayment of benefits. On remand the Commission shall take such additional evidence as necessary, specify the method employed, and make sufficient findings in order to support its opinion and award.

Affirmed in part, reversed in part, and remanded.

Chief JUDGE EAGLES and JUDGE THOMAS concur.

WINSTON-SALEM WRECKER ASSOCIATION, INC., HARVEY DAVIS D/B/A DAVIS GARAGE AND BODY SHOP, DEAN'S ROBINHOOD GULF, INC., FRITTS MOTOR COMPANY, INC., DAVID GRUBBS D/B/A PARKWAY TEXACO, ROBERT R. MATHIS D/B/A RAY'S PAINT & BODY SHOP AND WRECKER SERVICE, A.C. REYNOLDS, SR. D/B/A REYNOLDS GARAGE & USED PARTS, RONALD E. JONES D/B/A SOUTHSIDE GARAGE TOWING, SPAUGH MOTOR COMPANY, INC. AND STEVE VENABLE, INC., PLAINTIFFS V. RON BARKER, SHERIFF OF FORSYTH COUNTY, NORTH CAROLINA IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, JAMES HORN D/B/A HORN'S GARAGE AND WRECKER SERVICE AND/OR HORN'S GARAGE AND TOWING, JAMES HORN, INDIVIDUALLY, HORN'S GARAGE, INC., AND THE HARTFORD FIRE INSURANCE COMPANY, DEFENDANTS

No. COA01-67

(Filed 28 December 2001)

1. Costs— attorney fees—findings of fact

The trial court did not err in an unfair and deceptive trade practices and civil conspiracy action by allegedly failing to make findings of fact and conclusions of law to support its order awarding attorney fees to defendant sheriff under N.C.G.S. § 6-21.5,

because: (1) the trial court adopted the grounds for its award set forth in defendant's motion and in the billing statements attached to defense counsel's affidavit; and (2) a review of the order, motion, and affidavit along with its attachments provides sufficient findings of fact to support the award.

2. Costs— attorney fees—justiciable issue—survival from motion to dismiss

The trial court did not err in awarding attorney fees in an unfair and deceptive trade practices and civil conspiracy action by finding that there was a complete absence of a justiciable issue of either law or fact in plaintiffs' action, because: (1) the mere fact that plaintiffs' complaint survived a N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss is not determinative proof of justiciability; (2) the insurmountable defenses raised by defendants foreclosed any reasonable expectation of an affirmative recovery by plaintiffs; (3) the trial court entered summary judgment in favor of defendant, the Court of Appeals affirmed summary judgment, and the Supreme Court dismissed plaintiffs' appeal and denied the petition for discretionary review; and (4) plaintiffs' claims were brought in bad faith.

3. Costs— attorney fees—preparation and argument of motion to dismiss

The trial court did not err in an unfair and deceptive trade practices and civil conspiracy action by awarding attorney fees to defendant sheriff under N.C.G.S. § 6-21.5 for preparing to argue and arguing the N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss heard on 28 August 1998 even though the motion was denied, because the trial court properly concluded that plaintiffs failed to raise justiciable issues.

Appeal by plaintiffs from order entered 11 October 2000 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 26 November 2001.

White and Crumpler, by Dudley A. Witt, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Allan R. Gitter and Stacey M. Stone, for defendant-appellees.

EAGLES, Chief Judge.

Plaintiff Winston-Salem Wrecker Association, Inc. (Wrecker Association) coordinates vehicle towing, recovery, and storage

services in Forsyth County. The Wrecker Association negotiated a procedure with the Winston-Salem Police Department, North Carolina Highway Patrol, and the North Carolina Department of Transportation to allow any wrecker service operator, that complies with certain minimum requirements, to participate in the towing and storing of seized, abandoned, and wrecked automobiles. The Wrecker Association uses a rotating call procedure for its participating operators.

Plaintiffs, however, have not provided towing services to the Forsyth County Sheriff's Department because Sheriff Ron Barker (Sheriff Barker) has employed only the services of defendant James Horn d/b/a Horn's Garage and Wrecker Service (Horn) since 1990. Because of the arrangement between Sheriff Barker and Horn, plaintiffs have not provided any of the towing services required by the Forsyth County Sheriff's Department.

Plaintiffs filed a complaint on 4 May 1998 that asserted five causes of action: (1) Sheriff Barker, in his official capacity, violated plaintiffs' rights guaranteed by Article I, Section 34 of the North Carolina Constitution; (2) Horn engaged in unfair and deceptive trade practices; (3) Sheriff Barker, in his individual capacity, and Horn entered into a civil conspiracy creating a monopoly of the towing and storage business, damaging plaintiffs due to the unlawful agreement; (4) Sheriff Barker, in his official and individual capacities, violated plaintiffs' Fifth and Fourteenth Amendment constitutional rights; and (5) Sheriff Barker's conduct entitles plaintiffs to compensatory damages from Hartford Insurance, Sheriff Barker's surety.

On 2 June 1998, defendants filed an answer and a Rule 12(b)(6) motion to dismiss. The Honorable Russell G. Walker, Jr. denied defendants' motion on 26 August 1998. Plaintiffs amended their complaint on 3 September 1998. On 14 September 1998, defendants filed a motion for summary judgment and included supporting affidavits. Plaintiffs filed affidavits in opposition to defendants' motion. The Honorable L. Todd Burke granted defendants' motion for summary judgment on 28 October 1998.

Plaintiffs appealed to the North Carolina Court of Appeals and on 21 March 2000, in an unpublished opinion, this Court affirmed the trial court's order of summary judgment in favor of defendants. On 25 April 2000, plaintiffs filed a notice of appeal raising constitutional issues and also petitioned the Supreme Court of North Carolina for discretionary review. Our Supreme Court dismissed plaintiffs' notice

of appeal and denied plaintiffs' petition for discretionary review on 29 August 2000.

On 11 September 2000, defendants Hartford Insurance and Sheriff Barker filed a motion for an order in conformity. Additionally, Sheriff Barker moved for an award of attorney fees pursuant to N.C.G.S. § 6-21.5. On 11 October 2000, Judge Burke ordered the action dismissed with prejudice and awarded Sheriff Barker $17,390.37 in attorney's fees. Plaintiffs filed timely notice of appeal of the order granting the award of attorney's fees.

Plaintiffs raise three issues on appeal: (1) whether the trial court erred in failing to make findings of fact and conclusions of law to support its order awarding attorney's fees pursuant to N.C.G.S. § 6-21.5; (2) whether the trial court erred in finding that there was a complete absence of a justiciable issue of either law or fact in plaintiffs' action; and (3) whether the trial court erred in awarding as attorney's fees any sums representing fees incurred by the defendant for preparing to argue and arguing the Rule 12(b)(6) motion to dismiss that was denied on 26 August 1998 by Judge Russell G. Walker, Jr.

I.

North Carolina General Statute § 6-21.5 provides:

> In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

In granting Sheriff Barker's motion for award of attorney's fees, Judge Burke's order stated the following:

> [T]he Court being of the opinion that said motions should be granted in accordance with the provisions of G.S. § 6-21.5 upon the grounds raised in said motions and affidavit of Allan R. Gitter.
>
> [I]t is . . . ORDERED that attorney's fees in the amount of $17,390.37 be paid by the plaintiffs to attorney Allan R. Gitter, attorney for defendants Ron Barker and Hartford Fire Insurance Company.

[1] Plaintiffs argue that the award of attorney's fees cannot be sustained on appeal because Judge Burke failed to make findings of fact and conclusions of law as required by N.C.G.S. § 6-21.5. Plaintiffs contend that since Judge Walker denied defendants' Rule 12(b)(6) motion to dismiss and thereby determined that plaintiffs' complaint stated a claim upon which relief could be granted, it was incumbent upon Judge Burke, in entering an award of attorney's fees, to make findings of fact to support the award.

In the order, Judge Burke holds that attorney's fees "should be granted in accordance with the provisions of G.S. § 6-21.5 upon the grounds raised in said motions and affidavit of Allan R. Gitter." The grounds stated in defendant's motion for attorney's fees are as follows:

> NOW COMES defendant Ron Barker and . . . moves, pursuant to N.C.G.S. § 6-21.5 and N.C.G.S. § 75-16.1, for an award of a reasonable attorney's fee on the grounds that Superior Court Judge L. Todd Burke's entry of summary judgment against plaintiffs, having been affirmed by the North Carolina Court of Appeals on every single one of the plaintiffs' multiple grounds, and said opinion having been re-affirmed by the North Carolina Supreme Court's dismissal ex mero motu of plaintiffs' notice of appeal and dismissal of plaintiffs' petition for discretionary review, both dated August 24, 2000, clearly demonstrate that there was a complete absence of a justiciable issue of either law or fact raised by the losing party plaintiffs in their complaint, and that although the granting of summary judgment pursuant to Rule 56 is not in itself a sufficient reason for this court to award attorney's fees, such action by three (3) different courts (Superior, Court of Appeals, and Supreme Court) constitutes overwhelming evidence to support such an award.

In support of the motion for attorney's fees, defendant provided the trial court with the affidavit of defendants' attorney Allan R. Gitter.

The affidavit included forty-four pages of attorney billing statements indicating attorney's fees aggregating $17,390.37.

In *Mashburn v. First Investors Corp.*, 111 N.C. App. 398, 432 S.E.2d 869 (1993), plaintiff raised as an issue the trial court's failure to find facts as required by Rule 52 of the North Carolina Rules of Civil Procedure. This Court noted that the requirement that facts be specifically found is merely to provide a basis for appellate review. This Court reviewed the trial court's findings of fact, which were not specifically stated but were adopted from the parties' stipulations, and determined that the trial court's conclusion to award attorney's fees was adequately supported.

Here, in his order, Judge Burke adopted the grounds for an award of attorney's fees set forth in defendant's motion and in the billing statements attached to Allan R. Gitter's affidavit. Comprehensive review of the order, the motion, and the affidavit and its attachments provides sufficient findings of fact to support the award of attorney's fees. As a result, this assignment of error fails.

II.

[2] Plaintiffs next contend that the trial court erred in finding that there was a complete absence of a justiciable issue of either law or fact in plaintiffs' action. Plaintiffs' argue that Judge Walker's denial of defendants' motion to dismiss is prima facie evidence that the case raised justiciable issues.

The mere fact that plaintiffs' complaint survived a Rule 12(b)(6) motion to dismiss is not determinative proof of justiciability. The purpose of a Rule 12(b)(6) motion to dismiss is to test the legal sufficiency of the complaint. *Brown v. Friday*, 119 N.C. App. 753, 755, 460 S.E.2d 356, 358 (1995). Here, Judge Walker examined the complaint to determine whether it was sufficient to survive dismissal. The trial court presumed the allegations in the complaint to be true and determined that plaintiffs' allegations raised some actionable claim. Judge Walker did not examine additional pleadings.

In *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991), our Supreme Court considered the propriety of an award of attorney's fees. In that case the Court stated:

> [I]t is . . . possible that a pleading which, when read alone sets forth a justiciable controversy, may, when read with a responsive pleading, no longer present a justiciable controversy . . . . Had

> defendant failed to answer, the allegations in plaintiff's complaint would have been deemed admitted, and a default judgment would have been possible. *See* N.C.G.S. § 1A-1, Rules 8 and 55 (1990). Thus, until an answer was filed, plaintiff's complaint in this case did set forth a justiciable issue. However, when defendant's answer . . . was filed and served, it should have become apparent to plaintiff that . . . the complaint no longer contained a justiciable issue.

Id. at 258, 400 S.E.2d at 438. In deciding whether a party is entitled to attorney's fees under N.C.G.S. § 6-21.5, "the trial court is required to evaluate whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue." *Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438.

Here, defendants, in their answer, denied the existence of a contract evidencing a relationship between Sheriff Barker and Horn, and affirmatively pled the defense of sovereign immunity. Furthermore, defendants argued that the action against Sheriff Barker is barred by sovereign immunity because plaintiffs did not affirmatively plead that Sheriff Barker purchased liability insurance.

After learning of these defenses, plaintiffs persisted in pursuing the litigation by propounding discovery and seeking admissions. Defendants filed a motion for summary judgment on all claims. Judge Burke granted defendants' motion for summary judgment on 26 October 1998. The insurmountable defenses raised by defendants "foreclosed any reasonable expectation of an affirmative recovery by plaintiffs." *Id.* at 259, 400 S.E.2d at 438. The non-existence of a justiciable issue in plaintiffs' suit is further evinced by Judge Burke's entry of summary judgment, this Court's decision affirming summary judgment, and the Supreme Court's dismissal of plaintiffs' appeal and denial of the petition for discretionary review. Accordingly, Judge Burke acted reasonably in concluding that there was a complete absence of a justiciable issue.

Plaintiffs also contend that this case presents a good faith argument for the extension of law as set forth by our Supreme Court in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). *See* N.C.G.S. § 6-21.5 (1999). In *Corum*, our Supreme Court held that "when there is a clash between . . . constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum*, 330 N.C. at 786, 413 S.E.2d at 292. Here plaintiffs argued that

their rights under Article I, Section 19 of the North Carolina Constitution, as well as their Fifth and Fourteenth Amendment rights, had been violated.

Careful review of the record, however, demonstrates the frivolity of plaintiffs' claims. In their motion for attorney's fees, defendants specifically asked the trial court to take judicial notice of the fact that plaintiffs' lawsuit was commenced by plaintiffs on the eve of the primary election for Sheriff, in which Sheriff Barker was a candidate. This finding is evidence of plaintiffs' bad faith and supports the trial court's decision to award attorney's fees. Plaintiffs' contention that their claims were in good faith and based on existing law fails.

In light of our determination that Judge Burke did not err in concluding that plaintiffs failed to raise justiciable issues and that plaintiffs' claims were brought in bad faith, we hold that the trial court did not err in granting Sheriff Barker's motion for an award of attorney's fees.

III.

[3] Plaintiffs' final assignment of error on appeal is that the trial court erred in awarding attorney's fees for that portion incurred by Sheriff Barker in preparing to argue and arguing the motion to dismiss heard on 20 August 1998. Plaintiffs contend that because defendants' motion was denied, defendants are not entitled to attorney's fees incurred up to that point in time.

Because statutes awarding an attorney's fee to the prevailing party are in derogation of the common law, N.C.G.S. § 6-21.5 must be strictly construed. *Sunamerica*, 328 N.C. at 257, 400 S.E.2d at 437. Here, we have determined that the trial court was correct in concluding that plaintiffs' failed to raise justiciable issues. Judge Walker's determination that the complaint was facially valid does not equate to a finding of justiciability. Accordingly, we hold that the ultimate determination, made by the trial court and affirmed by this Court, that plaintiffs failed to raise any justiciable issue entitles defendant Sheriff Barker to the full amount of attorney's fees awarded by the court below.

Affirmed.

Judges MARTIN and BIGGS concur.

DEADWOOD, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

No. COA00-1489

(Filed 28 December 2001)

Taxation— privilege—gross receipts—live entertainment business—requirements of uniformity—rational basis

A de novo review reveals that defendant North Carolina Department of Revenue erred by assessing a gross receipts privilege tax against plaintiff corporation, who operates a live entertainment business that is the modern day equivalent of an opera house, from the period from 15 January 1994 through 28 February 1997 because even though plaintiff's payment of sales taxes provided no relief from taxation under N.C.G.S. § 105-37.1, the privilege tax violated the requirements of uniformity under N.C. Const., art. V, § 2 since there is no rational explanation for the differential treatment of opera houses which paid privilege taxes during the relevant taxing period versus movie theaters which paid no privilege taxes from July 1993 to 1 October 1998.

Appeal by petitioner from order entered 1 October 2000 by Judge William C. Griffin, Jr. in Superior Court, Martin County. Heard in the Court of Appeals 10 October 2001.

David J. Irvine, Jr., for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General, Kay Linn Miller Hobart, for the State.

WYNN, Judge.

Deadwood, Inc. challenges an assessment of privilege taxes by the North Carolina Department of Revenue for the taxing period of 1 January 1994 through 28 February 1997. Because we find that during the relevant taxing period the assessed privilege tax violated the requirements of uniformity, we reverse the Department of Revenue's decision to apply the privilege tax to Deadwood.

Deadwood operates a family entertainment facility in Beargrass, North Carolina. The facility includes an 18-hole miniature golf course, outdoor picnic area, live music on Friday and Saturday nights, video game room, playground, ice cream shop, gift shop, snack bar, restaurant and concert/dance hall. The owners and operators of

the facility, Ira Price and his son, Derek Price, designed, built and opened it in 1992.

Following an audit on 1 May 1997 of Deadwood's records for the period covering 1 January 1994 through 28 February 1997, the Department of Revenue assessed $11,947 for gross receipts tax, $1,619 for interest, and $5,974 as a penalty. In determining the gross receipt amount, the Department of Revenue used only the receipts from the admission price paid by patrons to see the live musical performances at Deadwood. Deadwood appealed to the Secretary of Revenue who sustained the tax and interest assessment but waived the penalty. Further appeal to the Tax Review Board and then to Superior Court resulted in affirmations of the agency decisions.

On appeal to us, although Deadwood contends that the administrative decision of the tax review board was arbitrary and capricious, we address *de novo* only the dispositive issues of whether the decision to assess a privilege tax on Deadwood was (1) contrary to statutory law or (2) violated Article V, Section 2 of the North Carolina Constitution. *See Dillingham v. N.C. Dept. of Hum. Serv.*, 132 N.C. App. 704, 513 S.E.2d 823 (1999).

The applicable statutory law during the relevant taxing period was set forth under N.C. Gen. Stat. § 105-37.1 (a) (1995) which provided in pertinent part,[1]

> Every person engaged in the business of giving, offering, or managing any form of entertainment or amusement not otherwise taxed or specifically exempted in this Article, for which an admission is charged, shall pay an annual license tax of fifty dollars ($50.00) for each room, hall, tent or other place where such admission charges are made.

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1. The 1998 amendment to N.C. Gen. Stat. § 105-37.1 provides in pertinent part:

> A privilege tax is imposed on the gross receipts of a person who is engaged in any of the following:
>
> . . .
>
> 2) Giving, offering, or managing a form of amusement or entertainment that is not taxed by another provision of this Article and for which an admission fee is charged.
>
> . . .
>
> (b) Rate and Payment.—The rate of the privilege tax is three percent (3%) of the gross receipts from the activities described in subsection (a) of this section.

> In addition to the license tax levied above, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of three percent (3%).

To interpret the language of a statute, the primary rule of construction is that the intent of the legislature controls. *See Colonial Pipeline Co. v. Clayton*, 275 N.C. 215, 226, 166 S.E.2d 671, 679 (1969). Thus, where the language of a statute is clear and unambiguous, judicial construction is not necessary and the statute's plain and definite meaning controls. *See id.* Moreover, "[w]hen issues of interpretation of statutes or regulations arise, the construction adopted by those who execute and administer them is entitled to consideration . . . However, our courts have always stopped short of ascribing controlling weight to such constructions." *Ace-Hi, Inc. v. Dept. of Transport.*, 70 N.C. App. 214, 219, 319 S.E.2d 294, 297 (1984).

In the subject case, since Deadwood offered a form of entertainment—live music acts for which an admission fee is charged—the plain language of Section 37.1 subjects its gross receipts from the admission fees to the privilege tax unless the musical entertainment was "otherwise taxed or specifically exempted in this Article." *See* N.C. Gen. Stat. § 105-37.1 (1995).

Indeed, Deadwood argues that because it paid sales tax it was "otherwise taxed." However, the plain language under Section 37.1 prepositionally qualifies the "otherwise taxed or specifically exempted" language with the phrase "in this Article." Since Section 37.1 falls under Article 2 and sales taxes are covered under Article 5, we hold that Deadwood's payment of sales taxes provides no relief from taxation under Section 37.1.

Next, Deadwood argues that the administrative decision of the Tax Review Board violated Article V, Section 2 of the North Carolina Constitution. Specifically, Deadwood contends that it is the victim of an unconstitutional classification for taxation. As with the first issue, our review is *de novo*. *See Dillingham*, *supra*.

Under our State Constitution,

> [t]he power of taxation shall be exercised in a just and equitable manner . . . *No class of property shall be taxed except by uniform rule*, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

N.C. Const., art. V, § 2 (1999) (emphasis added). The requirements of uniformity and equal protection are the same under both the state and federal constitutions. *See Leonard v. Maxwell*, 216 N.C. 89, 93, 3 S.E.2d 316, 319, *appeal dismissed*, 308 U.S. 516, 84 L. Ed. 439 (1939).

Under North Carolina tax law, opera houses and movie theaters were historically treated the same. *See* N.C. Gen. Stat. § 105-37 (1943).[2] Deadwood contends, and we agree, that its live entertainment business is the modern day equivalent of an opera house. *See Markham v. Southern Conservatory of Music,* 130 N.C. 276, 41 S.E. 531 (1902) (Our Supreme Court treated a concert hall as an opera house). However, in 1981, N.C. Gen. Stat. § 105-37 was amended to delete references to opera houses. This change made opera houses, but not movie theaters, subject to a gross receipts tax under N.C. Gen. Stat. § 105-37.1.[3] Deadwood argues, and again we agree, that there is no rational explanation for the differential treatment of opera houses which paid privilege taxes during the relevant taxing period, and movie theaters which paid no privilege taxes from July 1993 to 1 October 1998.[4] *See* N.C. Gen. Stat. §§ 105-37 and 105-37.1 (1995). Since Deadwood's live entertainment business is the modern day equivalent of an opera house, as was the classification given to the concert hall in *Markham v. Southern Conservatory of Music*, the rule of uniformity requires it to be treated like movie theaters unless the Department of Revenue can articulate a basis for the non-uniform treatment.

The power of the General Assembly to impose taxes is undoubted, and "the right of classification is referred largely to the

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2. N.C. Gen. Stat. § 105-37 (1943) provided that:

> Every person, firm, or corporation engaged in the business of operating a moving picture show of place where vaudeville exhibitions or performances are given or operating a theatre or opera house where public exhibitions or performances are given for compensation shall apply for and obtain in advance from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such state license for each room, hall or tent used . . . .

3. Enacted in 1947, N.C. Gen. Stat. § 105-37.1 made forms of entertainment "not otherwise taxed" subject to a gross receipts tax. N.C. Gen. Stat. § 105-37.1 provides in pertinent part:

> Every person, firm, or corporation engaged in the business of giving offering or managing any form of entertainment or amusement which is not otherwise taxed or specifically exempted in this Article, for which admission is charged, shall pay an annual license tax for each room, hall, tent, or other place where such admission charges are made, graduated according to population . . . .

4. On 1 October 1998, N.C. Gen. Stat. § 105-38.1 became effective and it imposed a one percent gross receipts tax on movie theaters.

legislative will, with the limitation that it must be reasonable and not arbitrary." *Belk Bros. Co. of Charlotte v. Maxwell*, 215 N.C. 10, 14, 200 S.E. 915, 917, *cert. denied*, 307 U. S. 644, 83 L. Ed. 1524 (1939). "In determining whether a purely economic regulation violates the Equal Protection Clause, the test generally applied is the rational basis standard." *In re Assessment of Additional North Carolina and Orange County Use Taxes Against Village Pub. Corp.*, 312 N.C. 211, 222, 322 S.E.2d 155, 162 (1984), *appeal dismissed*, 472 U.S. 1001, 86 L. Ed. 2d 71 (1985). A " '*mere* difference is not enough.' It must be relevant or pertinent as well as rational." *Leonard v. Maxwell*, 216 N.C. at 96, 3 S.E.2d at 321 (internal citations omitted).

It has been declared by our Supreme Court that the power to classify subjects of taxation carries with it the discretion to select them, and that a wide latitude is accorded taxing authorities, particularly in respect of occupation taxes, under the power conferred by Article V, § 3, of the Constitution. *See Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N.C. 307, 309, 59 S.E.2d 819, 821 (1950). "Equality within the class or for those of like station and condition is all that is required to meet the test of constitutionality. 'A tax on trades, etc., must be considered uniform when it is equal upon all persons belonging to the prescribed class upon which it is imposed.' " *Leonard v. Maxwell*, 216 N.C. at 94, 3 S.E.2d at 320 (internal citation omitted). "[W]ith reference to classification, it is uniform when it operates without distinction or discrimination upon all persons composing the described class." *Norfolk S. R.R. Co. v. Lacy*, 187 N.C. 615, 620, 122 S.E. 763, 766 (1924).

In levying a privilege tax, the General Assembly may set apart certain trades for the imposition of the tax and exclude others from its operation. *See Leonard v. Maxwell*, 216 N.C. at 93, 3 S.E.2d at 320. "Reasonable selection or classification of the subject for such taxation may be made by the General Assembly and different rates or different modes and methods of assessment applied to different classes." *Id.* at 94, 3 S.E.2d at 320.

Over sixty years ago, our Supreme Court provided guidance for deciding the issue in this case: Whether the non-uniform application of the privilege tax to movie theaters and entertainment facilities during the relevant period was unconstitutional. In *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E.2d 19 (1940), the Court stated that:

> The Legislature is not required to preamble or label its classifications or disclose the principles upon which they are made. It is

> sufficient if the Court, upon review, may find them supported by justifiable reasoning. In passing upon this the Court is not required to depend solely upon evidence or testimony bearing upon the fairness of the classification, if that should ever be required, but it is permitted to resort to common knowledge of the subjects under consideration, and publicly known conditions, economic or otherwise, which pertain to the particular subject of the classification.

217 N.C. at 620, 9 S.E.2d at 21. Thus, the Court held that first, the tax classification must be based on a reasonable distinction; and second, the tax must apply equally to all of those within the defined class. *See Snyder v. Maxwell,* 217 N.C. at 619, 9 S.E.2d at 20; *See also Hajoca Corp. v. Clayton*, 277 N.C. 560, 568, 178 S.E.2d 481, 486 (1971) ("License taxes must bear equally and uniformly upon all persons engaged in the same class of business or occupation or exercising the same privilege.").

In *Snyder*, our Supreme Court upheld a statute that formed a sub-classification which imposed a higher license tax on the privilege of operating vending machines that sold soft drinks than on vending machines that were in the same classification and sold different kinds of merchandise at the same price. The Court pointed out in support of the different tax treatment that vending machines that sold soft drinks were in a "unique place in the commercial world, both as to the volume of business, the certainty of sale in comparatively large volume and, therefore, the opportunity for gainful return attending the privilege of selling" them. *Snyder v. Maxwell*, 217 N.C. at 621, 9 S.E.2d at 22. In contrast, we can discern no "unique place in the commercial world" as to the volume of business or sales generated by Deadwood's live entertainment business and movie theaters.

In sum, before the 1981 statutory amendment, movie theaters, live performances, and opera houses shared the same statutory tax classification. *See* N.C. Gen. Stat. § 105-37 (1981). In light of *Snyder v. Maxwell*, we discern no rational justification for levying privilege taxes on live musical performances and not on movie theaters. Thus, because "[n]o class of property shall be taxed except by uniform rule," we hold that the gross receipts privilege tax assessment against Deadwood's live entertainment business during the period of 1 January 1994 through 28 February 1997 violated its constitutional rights. N.C. Const. art. V, § 2 (1999). Accordingly, the decision to

assess a privilege tax against Deadwood for the period of 15 January 1994 through 28 February 1997 is,

Reversed.

Judges McCULLOUGH and BRYANT concur.

LISA E. GAFFNEY STILWELL, PLAINTIFF v. AMANDA DANLEY GUST, DEFENDANT AND THIRD PARTY PLAINTIFF v. TIMOTHY G. STILWELL, THIRD PARTY DEFENDANT

No. COA00-1414

(Filed 28 December 2001)

1. Costs— attorney fees—taxed entirely to one party

The trial court did not abuse its discretion by taxing fees and costs entirely against the defendant in an automobile accident case where defendant contended that the matter proceeded to trial after her offer of judgment only because the third-party defendant (plaintiff's husband and the driver of the car in which she was injured) made no offer to settle. The trial court properly considered the required factors and made appropriate findings.

2. Contribution— amount subject to—fees and costs taxed to one party

The trial court did not abuse its discretion in its award of fees and costs in a negligence action where defendant contended that the amount subject to contribution must be the jury verdict plus costs and fees. Since the fees and costs were taxed explicitly to defendant, the portion of the verdict subject to contribution is the jury verdict for damages.

Appeal by defendant from judgment entered 1 September 2000 by Judge Beverly T. Beal in Gaston County Superior Court. Heard in the Court of Appeals 8 October 2001.

Law Offices of Michael A. DeMayo, L.L.P., by Frank F. Voler, for the plaintiff-appellee.

Morris York Williams Surles & Barringer, L.L.P., by R. Gregory Lewis, for the defendant-appellant.

Steven J. Colombo, P.A., by R. Michael Chandler, for the third party defendant-appellee.

EAGLES, Chief Judge.

After a jury trial, the trial court entered judgment awarding Lisa E. Gaffney Stilwell ("plaintiff") damages in the amount of $5,401.00 and attorneys' fees and costs in the amount of $10,853.75 in her civil negligence action against Amanda Danley Gust ("defendant"). The trial court ordered that defendant recover $2,700.50 in contribution from Timothy G. Stilwell, plaintiff's husband ("third-party defendant"). Defendant appeals. After careful consideration, we affirm.

On 9 February 1997, plaintiff was a passenger in an automobile operated by her husband, third-party defendant. Third-party defendant's vehicle collided with a vehicle operated by defendant. Plaintiff and her husband brought suit against defendant alleging negligence. Defendant counterclaimed and alleged that third-party defendant was negligent in the operation of his vehicle. Prior to trial, defendant settled with third-party defendant for his bodily injury claim and third-party defendant dismissed his claims against defendant. Due to defendant's claim for contribution, third-party defendant remained in this action. Defendant made an offer of judgment of $4,500.00 which plaintiff refused. The matter went to trial on 22 May 2000 in Gaston County Superior Court. The jury found both defendant and third-party defendant negligent and returned a verdict assessing damages in the amount of $5,401.00 for plaintiff.

After the trial, plaintiff moved to tax costs and attorneys' fees against defendant. The trial court ordered payment of $853.75 in costs and $10,000.00 in attorneys' fees to plaintiff. As to the contribution claim, the trial court ordered that defendant recover $2,700.50 (one-half of the damages awarded) from third-party defendant. Defendant appeals.

Defendant raises two issues on appeal: Whether the trial court erred in (1) taxing costs and attorneys' fees to defendant and (2) failing to enter judgment in favor of defendant for pro-rata contribution of the costs and attorneys' fees. After careful review, we affirm.

[1] Defendant contends that the trial court erred in awarding attorneys' fees and costs to plaintiff and taxing them entirely to defendant. Defendant argues that the trial court should have taxed one-half of plaintiff's costs and fees to defendant incurred before the offer of

judgment and all the post-offer of judgment costs and fees to the third-party defendant. Defendant contends that her offer of $4,500.00 was more than her pro-rata share of the amount for which plaintiff would have settled. The third-party defendant made no offer to settle with plaintiff before trial. Defendant argues that this refusal by the third-party defendant to make a settlement offer resulted in the matter proceeding to trial. Defendant contends that the costs and fees of trial were incurred as a result of the conduct of the third-party defendant, not defendant, and that it was inequitable to tax all the costs and fees to defendant. We are not persuaded.

Attorneys' fees generally are not recoverable by the successful party at trial as a part of court costs. *Washington v. Horton*, 132 N.C. App. 347, 349, 513 S.E.2d 331, 333 (1999). However, in personal injury or property damage actions where the judgment for recovery of damages is $10,000.00 or less, by statutory exception the presiding judge in his or her discretion may award attorneys' fees as part of costs. G.S. § 6-21.1 (1999); *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 571, 551 S.E.2d 852, 856 (2001).

The award of attorneys' fees under G.S. § 6-21.1 is within the discretion of the presiding judge. *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334.

> North Carolina case law is clear that to overturn the trial judge's determination, the defendant must show an abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Thorpe, 144 N.C. App. at 570, 551 S.E.2d at 855 (2001) (citations and quotations omitted). In awarding fees, the trial court's discretion is not unrestrained. *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334. In *Washington*, we noted that the trial court, in exercising its discretion, should consider 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). Even so, the trial court does not need to make detailed findings for each factor. *Tew v. West*, 143 N.C. App. 534, 537, 546 S.E.2d 183, 185 (2001). If the court awards attorneys' fees, it must make findings of fact to support the award. *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000). These findings must include the "time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989).

The trial court properly considered the appropriate factors enumerated in *Washington*. As for the first factor, the trial court found that defendant made offers to plaintiff as early as October 1999 and at the settlement conference two weeks prior to trial. The record shows that the complaint was filed on 2 September 1999 and the summons issued the same day. There is no evidence that defendant made any settlement offers prior to the commencement of this action.

In considering the second factor, the trial court found that the "jury award is more than any amount offered prior to trial" by defendant. "Judgment finally obtained" means the amount entered as final judgment modified by any adjustments. *Poole v. Miller*, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995), *reh'gs denied*, 342 N.C. 666, 467 S.E.2d 722 (1996). "[C]osts incurred after the offer of judgment but prior to the entry of judgment" should also be included with the jury verdict to determine the "judgment finally obtained." *Roberts v. Swain*, 353 N.C. 246, 250-51, 538 S.E.2d 566, 569 (2000). The trial court awarded $10,000.00 in attorneys' fees, to be included as costs, and $853.75 as costs to plaintiff. These figures added to the jury award of $5,401.00 clearly exceed defendant's Offer of Judgment of $4,500.00. Even excluding costs and fees, the jury award exceeded the Offer of Judgment.

As to the third factor, the court found that defendant and her insurance company "unjustly exercised its superior bargaining power by refusing to budge through and including trial from its initial and full valuation of Plaintiff's claims."

Factor four is not pertinent here since "[o]ur appellate courts have uniformly 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*, 132 N.C. App. at 350, 513 S.E.2d at 334. Here, the insurance company is not the defendant.

As to factor five, the trial court found that defendant and defendant's insurer filed a formal Offer of Judgment on or about 15 October 1999 for $4,500.00 and "at the May 4, 2000 settlement conference held two weeks before the trial of this matter, [defendant and defendant's insurer] refused to offer more than the amount of $4,500.00 to settle [this matter]."

Considering factor six, the trial court found that the highest settlement offer by defendant was $4,500.00 and the jury returned a verdict of $5,401.00. The trial court stated "[t]hat the jury award is more than any amount offered prior to trial by Defendant Gust and/or Allstate." The trial court reviewed the entire record including the affidavits, memorandum, cases and arguments of counsel.

The trial court also made the following finding as required by *Porterfield*:

> 15. That given the nature and complexity of this case, the time expended by counsel is reasonable . . . and is consistent with that which may have been expected by an attorney of similar experience and expertise in this geographic area, . . . compared with the services which might be expected from other law firms in this geographic area, the amount of $150.00 per hour for attorneys' time is reasonable.

The record contains a copy of the motion which includes as attachments the attorney's time sheets reflecting time spent on this matter and an affidavit from plaintiff's attorney that he devoted 68.5 billable hours to the case.

The trial court applied the factors set forth in *Washington* and made the appropriate findings as required by *Porterfield*. There is no evidence that the $10,000.00 in attorneys' fees is unreasonable. Nor is there any showing of abuse of discretion by the trial court in the award of fees.

Second, the trial court awarded plaintiff $853.75 in costs. This figure represents $375.00 for an expert witness fee, $400.00 for deposition costs, and $78.75 for filing and service fees.

"[C]osts which are not allowed as a matter of course under G.S. § 6-18 or § 6-19 . . . may be allowed in the discretion of the court under G.S. § 6-20 . . . ." *Estate of Smith v. Underwood*, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997). "The trial court's discretion to tax costs pursuant to

[G.S. § 6-20] is not reviewable on appeal absent an abuse of discretion." *Lewis v. Setty*, 140 N.C. App. 536, 538, 537 S.E.2d 505, 507 (2000). "While case law *has* found that deposition costs are allowable under section 6-20, it has in no way precluded the trial court from taxing other costs that may be 'reasonable and necessary.' " *Minton v. Lowe's Food Stores*, 121 N.C. App. 675, 680, 468 S.E.2d 513, 516, *disc. review denied*, 344 N.C. 438, 476 S.E.2d 119 (1996).

In assessing fees, the trial court properly considered *Washington* and *Porterfield*. In determining costs, the trial court considered the motions, affidavits, and arguments of counsel. Plaintiff sued defendant only. Moreover, when making the settlement offers, defendant never asserted that the $4,500.00 was to cover only its pro-rata share of the liability. At the hearing on the motion to allow attorneys' fees as costs, plaintiff indicated "she would [have] consider[ed] settling" for a sum around $6,000.00. Defendant never increased the amount of her offer. The original offer was $4,500.00 and it remained the top offer through the settlement conference two weeks before the trial. The awards taxing costs and fees to defendant are within the trial court's discretion and defendant has not shown an abuse of that discretion.

[2] In its second assignment of error, defendant contends that the trial court erred in failing to enter judgment in favor of defendant for pro-rata contribution. Defendant argues that the amount subject to contribution must be the jury verdict plus costs and fees. We are not persuaded.

Defendant relies on *Great West Casualty Co. v. Fletcher*, 56 N.C. App. 247, 287 S.E.2d 429 (1982) and *Roberts v. Swain*, 353 N.C. 246, 538 S.E.2d 566 (2000). In *Great West Casualty Co.*, this Court stated that "the pro rata share of each defendant is determined by dividing the amount of the judgment by the number of persons against whom it has been obtained." *Great West Casualty Co.*, 56 N.C. App. at 249, 287 S.E.2d at 431. *Roberts* provided that a "judgment finally obtained" is the final amount entered by the court as a judgment, including the jury verdict plus any applicable adjustments. *Roberts*, 353 N.C. at 249, 538 S.E.2d at 568 (quoting *Poole v. Miller*, 342 N.C. 349, 353, 464 S.E.2d 409, 411 (1995)). Attorneys' fees and court costs are included in determining "judgment finally obtained." *Id.* at 249, 538 S.E.2d at 568.

Defendant's reliance on these cases is misplaced. In *Great West Casualty Co.*, this Court was interpreting a Tennessee contribution

statute, not G.S. §§ 1B-1 to -6, the North Carolina contribution statute. The *Roberts* court was applying "judgment finally obtained" as used in Rule 68 of the North Carolina Rules of Civil Procedure. "Judgment finally obtained" was defined in *Poole*, which stated:

> Thus, we construe the legislature's choice of the phrase "judgment finally obtained" as indicative of the legislature's intent that it is the amount ultimately and *finally* obtained by the plaintiff from the court which serves as the measuring stick for purposes of Rule 68. For these reasons, we conclude 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.

Id. at 353, 464 S.E.2d at 411 (emphasis added). The Court explicitly limited the application of its definition of "judgment finally obtained" to Rule 68.

In its judgment, the trial court ordered "that Defendant and Third Party Plaintiff Amanda Danley Gust shall pay [plaintiff] the amount of $853.75 as part of Court costs" and "that the [plaintiff] shall have and recover from Defendant and Third Party Plaintiff Gust reasonable attorney fees in the amount of $10,000.00, as part of costs . . . ." We discern no abuse of discretion in the trial court's award to plaintiff of fees and costs. Since the fees and costs were taxed explicitly to defendant, the remaining portion of the judgment subject to contribution is the jury verdict for damages. In calculating the pro-rata shares, the trial court properly applied G.S. §§ 1B-1 to -6 to this figure to determine defendant's and third-party defendant's pro-rata share of $2,700.50.

Affirmed.

Judges HUDSON and CAMPBELL concur.

STATE OF NORTH CAROLINA v. ANGELA LOGNER

No. COA00-1262

(Filed 28 December 2001)

1. Arrest— warrantless—probable cause

An individual was placed under arrest by an officer prior to the search of defendant's vehicle, and the arrest was lawful because the circumstances leading up to the arrest were sufficient to warrant a prudent person to believe that the individual had committed an offense, where the officer first saw the individual in a second vehicle and observed what appeared to be drugs on the floor of that vehicle; the officer knew there were outstanding warrants for the arrest of the driver of the second vehicle; the individual tried to distract the officer to give her companion an opportunity to escape; the officer then saw the individual get into the back seat of defendant's vehicle, which atempted to leave the scene; the officer then removed the individual from defendant's vehicle and placed her in a marked patrol car; and the officer testified that she intended by these actions to place the individual under arrest.

2. Search and Seizure— automobile—drugs—motion to suppress—search incident to lawful arrest

The trial court did not err in a possession of cocaine and possession of drug paraphernalia case by denying defendant's motion to suppress all evidence obtained from a warrantless search of defendant's automobile after an individual was removed from the automobile, because the individual was an occupant of defendant's automobile and the search of that automobile was incident to her lawful arrest.

Appeal by defendant from judgment entered 13 May 1999 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 8 October 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Charles J. Murray, for the State.

H. Wood Vann, for defendant-appellant.

CAMPBELL, Judge.

Defendant appeals from a judgment sentencing her to prison for possession of cocaine, possession of drug paraphernalia, and for being a habitual felon. We affirm.

At approximately five o'clock on the morning of 29 May 1998, four Durham police officers were dispatched to a disturbance on Guthrie Avenue in Durham, North Carolina. Upon arrival, Officer Laura Clayton ("Officer Clayton") noticed two vehicles parked one behind the other. Timothy Gurley ("Gurley") was in the driver's seat and Pam Parker ("Parker") was in the front passenger's seat of one of the vehicles ("vehicle one"). Defendant was in the driver's seat and her cousin, Tracy Logner (who is not involved in this action), was in the front passenger's seat of the second vehicle ("vehicle two"). Officer Clayton shined her flashlight into vehicle one and saw a tan, rock-like substance on the floorboard, which she believed to be an illegal substance. Officer Clayton also immediately recognized Gurley and knew that there were outstanding warrants for his arrest.

Gurley and Parker were both asked to exit vehicle one while defendant and her cousin remained in vehicle two. After exiting vehicle one, Parker began yelling at Officer Clayton in an attempt to "distract" her. At that time, Gurley began fighting one of the officers before breaking away and running from the officer. As all the officers started chasing him, Officer Clayton realized that she had not secured the suspicious substance in vehicle one. When the officer turned around to retrieve the suspicious substance, she saw Parker get into the rear passenger seat of defendant's vehicle (vehicle two).

Defendant attempted to pull off in vehicle two, but Officer Clayton stopped the vehicle before it left the scene. She removed Parker from the back seat and took her to a marked patrol car. After securing Parker in the patrol car, Officer Clayton asked if she could search defendant's vehicle. Defendant refused to grant permission for the search. Nevertheless, Officer Clayton and another officer searched the passenger compartment of defendant's vehicle. The officers found a rock of crack cocaine and a black film canister with cocaine residue in the vehicle's back seat. They also found two crack pipes under the floor mats of both the driver's seat and front passenger's seat, as well as a filter used in crack pipes between the driver's seat and the driver's door.

Defendant was indicted on 29 May 1998 for possession of cocaine and possession of drug paraphernalia. Defendant was also indicted

for being a habitual felon because, prior to the present case, defendant had been convicted of attempted common law robbery on 6 November 1991 and possession of a controlled substance on both 5 November 1996 and 21 February 1997. She waived her *Miranda* rights and signed a statement admitting the cocaine and drug paraphernalia were hers, but stating that her cousin had no knowledge of what was in the vehicle.

On 14 January 1999, defendant filed a motion to suppress, accompanied by a supporting affidavit, all the evidence obtained during the search of her vehicle on 29 May 1998. Defendant argued that the search was illegal and in violation of her rights under both the United States and North Carolina Constitutions. (Defendant also filed a motion *in limine* on 11 February 1999 to prohibit the State from entering into evidence her signed admission statement, and defendant rejected a plea arrangement from the State on 18 February 1999.) The motion to suppress was later denied on 11 May 1999 after an evidentiary hearing before Judge Orlando F. Hudson ("Judge Hudson").

On 13 May 1999, Judge Hudson presided over defendant's trial in the Durham County Superior Court. A jury returned guilty verdicts on all charges, and defendant was sentenced to a prison term of 112 to 144 months. Defendant appeals this judgment.

New counsel was appointed to handle defendant's appeal of the guilty verdicts. The new counsel also filed a motion for appropriate relief on 18 May 1999 asking the court to set aside defendant's sentence and grant a new sentencing hearing because her previous counsel did not introduce testimonial evidence that would support the finding of mitigating factors. Judge Hudson heard this motion on 17 April 2000 and granted it. After a resentencing hearing, defendant's sentence was amended to a prison term of 80 to 105 months.

Defendant's numerous assignments of error all essentially argue that the trial court's verdict should be set aside and a new trial ordered because the court improperly denied defendant's motion to suppress all the evidence obtained from the unlawful search and seizure of defendant's vehicle after Parker was removed from the vehicle. "[T]he standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489,

498, 532 S.E.2d 496, 501 (2000) (citations omitted), *cert. denied*, *Brewington v. North Carolina*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001)). Thus, we must not disturb the trial court's conclusions if they are supported by the court's factual findings. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982).

Based on defendant's assigned errors, the major issue before this Court on appeal is whether the search and seizure was lawful. However, in order to address this issue we must determine: (I) whether Parker was lawfully arrested prior to the vehicle search and (II) whether she was an occupant of defendant's vehicle at the time of her arrest. We find that the trial court properly denied the motion to suppress because Parker was an occupant of defendant's vehicle and the search of that vehicle was incident to her arrest.

I.

[1] First, we address whether Parker was lawfully under arrest prior to the search of defendant's vehicle. "The test for determining whether an individual is in custody or under arrest is whether, under the totality of the circumstances, the 'suspect's freedom of action is curtailed to a degree associated with formal arrest.' " *Park v. Shiflett*, 250 F.3d 843, 850 (4th Cir. 2001) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440, 82 L. Ed. 2d 317, 335 (1984)). Our courts have further held that the subjective intent of the arresting officer can provide "some evidence that the action taken was an arrest—but in and of itself it is not controlling." *United States v. Perate*, 719 F.2d 706, 709 (4th Cir. 1983) (citing *Taylor v. Arizona*, 471 F.2d 848, 851 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130, 35 L. Ed. 2d 262 (1973)). Finally, in order to make a lawful arrest the officer must determine whether at the moment the arrest was made "the facts and circumstances within [the officer's] knowledge and of which [the officer] had reasonably trustworthy information [were] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145 (1964) (citations omitted).

In the case *sub judice*, the trial court had competent evidence to support its finding that Parker was placed under arrest by Officer Clayton prior to the search of defendant's vehicle. The evidence showed that Officer Clayton first saw Parker in vehicle one, which appeared to have drugs on the floorboard. Next, Parker tried to distract the officer to give Gurley an opportunity to escape. Officer

Clayton then saw Parker get into defendant's vehicle and attempt to leave the scene. The officer removed Parker and secured her in the back seat of a marked patrol car. Although she did not directly tell Parker she was being placed under arrest at that time, Officer Clayton testified that it was her intention, by these actions, to place Parker under arrest. Based on this evidence, including the subjective intent of the officer, the trial court properly made findings of fact which supported the conclusion that Parker was under arrest prior to the search and seizure. Furthermore, the arrest was lawful because the facts and circumstances leading up to the arrest were sufficient to warrant a prudent person to believe that Parker had committed an offense.

II.

[2] Second, we address whether the trial court had competent evidence to support its finding that Parker was an occupant of defendant's vehicle, thus allowing the vehicle to be searched incident to Parker's arrest. We hold that it did.

Generally, warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment of the United States Constitution. *See State v. Coplen*, 138 N.C. App. 48, 530 S.E.2d 313, *cert. denied*, 352 N.C. 677, 545 S.E.2d 438 (2000). However, a well-recognized exception to the warrant requirement is a search incident to a lawful arrest. *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685 (1969). Under this exception, if the search is incident to a lawful arrest, an officer may "conduct a warrantless search of the arrestee's person and the area within the arrestee's immediate control." *State v. Thomas*, 81 N.C. App. 200, 210, 343 S.E.2d 588, 594 (1986).

New York v. Belton, 453 U.S. 454, 69 L. Ed. 2d 768 (1981), extended a search incident to a lawful arrest to vehicles. In *Belton*, the United States Supreme Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460, 69 L. Ed. 2d at 775. It is now well established that a passenger compartment search may consist of "the entire interior of the vehicle, including the glove compartment, the console, or any other compartment, whether locked or unlocked, and all containers found within the interior." *State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994) (citing *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981)).

Our case law provides no clear definition of "occupant" with respect to a vehicle search incident to an arrest. However, of those jurisdictions that have defined "occupant," many have interpreted *Belton* to hold that an arrestee is an occupant of a vehicle if the police arrest or make initial contact with the defendant while the defendant is inside the vehicle. *See United States v. Strahan*, 984 F.2d 155 (6th Cir. 1993) (*Belton* applies only where officers initiate contact while defendant is in the vehicle); *Lewis v. United States*, 632 A.2d 383 (D.C. 1993) (*Belton* limited to situations where officers confront or at least initiate confrontation while defendant is occupying the vehicle). Some jurisdictions have further extended *Belton* to hold that one can be an occupant even if an officer does not arrest or make initial contact with the person while he or she is physically inside the vehicle. *See United States v. Schecter*, 717 F.2d 864 (3rd Cir. 1983) (*Belton* applied to intoxicated defendant stumbling about outside the vehicle); *State v. McLendon*, 490 So.2d 1308 (Fla. Dist. Ct. App. 1986) (extended *Belton* to justify a search where a driver was arrested twenty to thirty feet away from the vehicle).

Based on the facts in the present case, we find no need to consider those authorities that broadly interpret *Belton* because there is competent evidence to support the trial court's finding that Parker was physically inside defendant's vehicle. As stated earlier, the evidence showed that Officer Clayton saw Parker get into defendant's vehicle and attempt to leave the scene. The officer's removal of Parker from that vehicle and then placing her inside the patrol car signified her arrest. The subsequent search of defendant's vehicle was incident to Parker's arrest. Thus, the officers were lawfully entitled to conduct a warrantless search of defendant's vehicle and seize the cocaine and drug paraphernalia found within.

For the aforementioned reasons, we find that the trial court properly admitted evidence obtained from the lawful search and seizure of defendant's vehicle after Parker's arrest.

No error.

Chief Judge EAGLES and Judge HUDSON concur.

STATE OF NORTH CAROLINA v. TERESA ANN SAMS

No. COA01-110

(Filed 28 December 2001)

1. Drugs— conspiracy to sell—sufficiency of evidence

There was sufficient evidence that defendant had conspired to sell cocaine where defendant took an undercover officer to a motel room where two men talked exclusively with the officer and sold him cocaine. The facts support a reasonable inference that defendant knew the men and that she agreed to facilitate drug transactions by bringing them customers.

2. Drugs— sale of cocaine—acting in concert—sufficiency of evidence

The trial court did not err in submitting the charge of selling cocaine to the jury where defendant took an undercover officer to a motel room where two men talked exclusively with the officer and sold him cocaine. The evidence reasonably supported the conclusion that defendant acted in concert with others to sell the cocaine.

3. Drugs— conspiracy to sell—instructions—identity of person to whom cocaine sold

There was no plain error in a prosecution for selling and conspiring to sell cocaine where defendant contended that the court erred by not instructing the jury that it had to find that the cocaine sale was to a particular person. The indictment properly alleged that defendant sold a controlled substance to a named officer, all of the evidence dealt with one sale, and there was no dispute over the identity of the buyer. Defendant did not demonstrate how the inclusion of the buyer's name in the jury instructions would have resulted in a different verdict.

4. Drugs— mere presence—instruction not necessary

There was no plain error in a prosecution for selling and conspiring to sell cocaine where defendant contended that the court failed to instruct the jury on mere presence. Defendant took an undercover officer to a motel room, the motel room was opened when the man inside saw defendant, and the undercover officer was immediately recognized as the potential customer. The sale would never have occurred without defendant's assistance.

Appeal by defendant from judgment entered 24 March 2000 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 28 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jarvis John Edgerton, IV, and Assistant Appellate Defender Daniel R. Pollitt, for defendant appellant.

TIMMONS-GOODSON, Judge.

On 16 March 2000, a jury found Teresa Ann Sams ("defendant") guilty of selling and conspiring to sell cocaine during an undercover operation coordinated by the Asheville Police Department. At trial, Asheville police officer Danny Holden ("Officer Holden") testified that he was working undercover on the evening of 2 July 1999 with Officer Joe Palmer ("Officer Palmer"). Wearing "plain clothes" and driving an unmarked vehicle, Officer Holden drove "up and down the streets [of Asheville] looking for people" from whom he could purchase cocaine. Officer Palmer was concealed at the rear of the vehicle.

The officers first encountered defendant "on Church Street [where] she was flagging cars down, waving at people as they drove by." Officer Holden stopped the vehicle for defendant, who immediately climbed into the passenger-side seat. Officer Holden then asked defendant whether she could assist him in purchasing cocaine. In response, defendant directed Officer Holden to a local motel, assuring him that "there's someone in Room 114 that's [sic] always got some [cocaine for sale]."

Arriving at the motel, defendant offered to obtain the cocaine, but Officer Holden informed her that he preferred to make the purchase. Officer Holden then accompanied defendant to Room 114, where defendant knocked on the door. A man later identified as Leonard Leverette, Jr. ("Leverette"), drew back the window curtains of the room, and upon seeing defendant, opened the door and allowed them to enter. Leverette immediately turned to Officer Holden and asked him how much cocaine he wished to purchase. Officer Holden replied that he "wanted 30, referring to a $30 rock of crack cocaine." After making a telephone call, Leverette informed Officer Holden that "all they had was a 15," which Officer Holden agreed to purchase.

While waiting for a third party to deliver the cocaine, defendant reached into the front of her pants and retrieved a small plastic bottle. She then placed an item into the top of the bottle and, using the bottle as a pipe, lit and began smoking it. Officer Holden identified the odorous fumes arising from the bottle as crack cocaine smoke.

Shortly thereafter, a man later identified as Julius Wiley ("Wiley") arrived and immediately approached Officer Holden, who stated again that he wanted to purchase thirty dollars' worth of cocaine. Wiley then sold Officer Holden two rocks of crack cocaine for thirty dollars. Defendant stood approximately three or four feet away from Officer Holden during the transaction but did not interact with Wiley.

After acquiring the cocaine, Officer Holden left the room and returned to his vehicle. Defendant followed shortly thereafter and asked if Officer Holden would drive her back to Church Street. Defendant also requested to smoke some of the recently-purchased cocaine and inquired whether Officer Holden would like a "date." When Officer Holden informed defendant that he was not interested in either a date or in sharing the cocaine, defendant became "very angry" and accused him of "wasting [her] time" while she "could have been making a lot of money." Defendant left the vehicle after Officer Holden threatened to call law enforcement. Defendant presented no evidence at trial.

Following the jury's guilty verdict, defendant entered into a plea bargain whereby she agreed to plead guilty to cocaine possession and habitual felon status. On 24 March 2000, the trial court consolidated defendant's cases for judgment and sentenced her to one hundred fifty-five (155) months' maximum imprisonment. Defendant now appeals.

Defendant presents the following issues for review: whether the trial court erred in denying defendant's motions to dismiss and by inadequately instructing the jury. For the reasons stated herein, we find no error by the trial court.

[1] Defendant contends there was insufficient evidence that she conspired to sell or assisted in the sale of cocaine, and that the trial court therefore erred in denying her motion to dismiss the charges against her. 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. *See 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. *See State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986).

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. *See State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984). The existence of a conspiracy may be supported by circumstantial evidence. *See id.* Sale of cocaine, a controlled substance, is prohibited under the North Carolina Controlled Substances Act. *See* N.C. Gen. Stat. § 90-95(a)(1) (1999).

Giving the State the benefit of every reasonable inference in the instant case, as we must, we hold there was sufficient evidence from which a reasonable jury could find that defendant conspired with Wiley and Leverette to bring them customers for cocaine sales. The evidence showed that defendant "flagged down" Officer Holden and directed him to Room 114 at the motel, where, according to defendant, "someone . . . always [had] some [cocaine]." Defendant then offered to purchase the cocaine for Officer Holden. When Officer Holden and defendant reached Room 114, Leverette opened the door after seeing defendant. When defendant and Officer Holden entered the room, Leverette immediately directed his questions towards Officer Holden, rather than defendant. When Wiley arrived at the room, he also communicated solely with Officer Holden. Neither Leverette nor Wiley attempted to sell cocaine to defendant, even though she was obviously a consumer and thus, a potential client. As Officer Holden was a stranger to Leverette and Wiley, the jury could reasonably infer from their actions that they were acquainted with defendant, and that she had brought them drug customers in the past. Thus, Leverette and Wiley did not need to ask defendant's identity or Officer Holden's purpose in coming to Room 114. A reasonable jury could find that Leverette and Wiley understood that Officer Holden was the customer and acted accordingly. These facts support a reasonable inference that defendant knew Wiley and Leverette, and that

she agreed to facilitate drug transactions by bringing them customers. We therefore overrule defendant's first assignment of error.

[2] Defendant further argues that there was insufficient evidence that she sold cocaine or that she acted in concert with others to sell cocaine. Thus, defendant contends that the trial court erred in submitting the sale of cocaine case to the jury. We disagree.

To act in concert means to act in conjunction with another according to a common plan or purpose. *See State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). It is unnecessary to show that defendant committed "any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *Id.*

As stated *supra*, the evidence before the trial court, taken in the light most favorable to the State, reasonably supports the conclusion that defendant conspired with Wiley and Leverette to facilitate the sale of cocaine to Officer Holden. The evidence similarly supports the inference that defendant was acting in conjunction with Wiley and Leverette according to a common plan. We hold there was sufficient evidence from which a reasonable jury could conclude that defendant acted in concert with others to commit the crime of sale of cocaine. The trial court therefore did not err in submitting the charge of sale of cocaine to the jury, and we overrule defendant's second assignment of error.

[3] By her third assignment of error, defendant argues the trial court committed plain error by failing to instruct the jury on an essential element of the crimes charged against her. Specifically, defendant contends the trial court erred by failing to instruct the jury that they had to find, beyond a reasonable doubt, that the cocaine sale was to another person, namely Officer Holden.

Defendant acknowledges that she did not object to the trial court's instructions at trial and that therefore, appellate review on this issue is limited to plain error. *See* N.C.R. App. P. 10 (c)(4) (2001). Plain error occurs where the court's instructional error is so fundamental that it has "a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). Thus, in order to prevail on her claim, defendant must show that, absent the error, the jury probably would have reached a different result. *Id.*

Defendant has failed to make such a showing. Moreover, the indictment properly alleged that defendant "unlawfully, willfully and feloniously did sell to Officer W.D. Holden a controlled substance." All of the evidence presented at trial dealt with only one sale of cocaine. Further, there was never a dispute at trial over the identity of the buyer. The evidence presented showed that Officer Holden was the only possible buyer of the cocaine. Defendant has failed to demonstrate how, under these particular facts, the inclusion of the buyer's name in the jury instructions would have resulted in a different verdict. We therefore overrule defendant's third assignment of error.

[4] Defendant also argues the trial court committed plain error in failing to instruct the jury on the doctrine of "mere presence." Defendant contends that the evidence at trial showed that she was a mere bystander at the scene of the crime, and that the trial court should have instructed the jury accordingly.

When a party requests a jury instruction, the trial court is obligated to so instruct if the instruction is a correct statement of the law and the evidence supports it. *See State v. Rogers*, 121 N.C. App. 273, 281, 465 S.E.2d 77, 82 (1996), *cert. denied*, 347 N.C. 583, 502 S.E.2d 612 (1998). Defendant did not request an instruction on mere presence, however, nor was there evidence to support such an instruction. The evidence showed that defendant was much more than "merely present" at the scene of the crime, in that without defendant's assistance, the sale of cocaine to Officer Holden would have never taken place. Figuratively speaking, defendant was the key that opened Room 114 where the cocaine sale occurred. Defendant directed Officer Holden to the motel, then accompanied him to the room. Leverette opened the door to admit Officer Holden after seeing defendant, without requiring Officer Holden to provide identification or otherwise state the reason for his presence. Likewise, although Wiley did not know Officer Holden, he immediately recognized Officer Holden as the potential customer. Thus, defendant was not merely a passive bystander, but an active participant in the crime. We overrule defendant's final assignment of error.

In conclusion, we hold defendant received a fair trial, free from prejudicial error.

No error.

Judges HUDSON and TYSON concur.

WALTER LEE CLINE, D/B/A FAYETTEVILLE BAIL BONDING, PLAINTIFF v. CHARLIE T. McCULLEN, JR., DEFENDANT

No. COA00-1411

(Filed 28 December 2001)

Wrongful Interference— interference with business relations—collateral estoppel—res judicata—bail bondsman

The trial court did not err by granting defendant clerk of superior court's motion to dismiss plaintiff licensed bail bondsman's interference with business relations claim under N.C.G.S. § 1A-1, Rule 12(b)(6) based on defendant's actions in suspending the ability of plaintiff's licensed bail bond runner to write bonds in the pertinent county, because: (1) privity between plaintiff and his licensed bail bond runner means the doctrines of res judicata and collateral estoppel barred plaintiff's claim since the bond runner's prior lawsuit against defendant was for the lost profits of plaintiff; (2) even if plaintiff's actions were not barred by res judicata and collateral estoppel, there were no allegations that defendant harbored any ill-will towards plaintiff or the bond runner, or that defendant's actions were self-serving; and (3) defendant's actions were not a complete bar to plaintiff conducting business in that county since defendant only ordered suspension of plaintiff's bond runner until his criminal charges were resolved and plaintiff could have continued conducting his business in that county through the assistance of another agent.

Appeal by plaintiff from order filed 30 May 2000 by Judge Russell J. Lanier, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 8 October 2001.

Jack E. Carter, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General C. Norman Young, Jr., for defendant-appellee.

CAMPBELL, Judge.

Plaintiff appeals from an order dismissing his interference with business relations claim against defendant pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. We affirm.

Plaintiff is a licensed bail bondsman in North Carolina with his principal place of business in Cumberland County. Plaintiff also issues bail bonds in other North Carolina counties, including Sampson County. During all times relevant to this action, plaintiff conducted his business in Sampson County through Herbert S. Tindall ("Tindall"), a licensed bail bond runner, who had the authority to write bonds on behalf of plaintiff. Tindall was plaintiff's only bail bond runner in Sampson County.

In September of 1997, while in the employment of plaintiff, Tindall was charged with felony possession of cocaine and misdemeanor possession of drug paraphernalia. Upon learning of these charges, defendant, the elected Clerk of Superior Court for Sampson County, instructed the Sampson County Magistrate's Office to suspend Tindall's ability to write bonds in Sampson County until March of 1998 when the felony charges against him were dismissed and he pled guilty to the misdemeanor. Defendant believed that as the Clerk of Court, he was lawfully authorized to make this decision.

Tindall subsequently filed an action against defendant in his official capacity based on defendant's refusal to allow him to write bonds in Sampson County. The court dismissed Tindall's action on or about 4 May 1999.

Thereafter, plaintiff filed a complaint against defendant on 2 November 1999 alleging that "from September 9, 1997 until March 27, 1998 the Plaintiff was prevented from doing business in Sampson County, North Carolina and as a direct result of the actions of the Defendant, the Plaintiff was unable to use his agent to write bail bonds in Sampson County, North Carolina . . . ." The complaint further alleged that defendant's actions "were taken in his private capacity" with "reckless disregard for the rights of the Plaintiff and directly interfered with the Plaintiff's ability to conduct his business in Sampson County, North Carolina."

On 27 November 1999, defendant submitted a motion to dismiss plaintiff's action (accompanied by a supporting brief) pursuant to: (I) Rule 12(b)(1) because plaintiff failed to allege injury or damages sufficient to invoke the jurisdiction of the court; and (II) Rule 12(b)(6) for failure to state a claim upon which relief could be granted because plaintiff's action was barred by the doctrines of *res judicata* and collateral estoppel. On 30 May 2000, the trial court filed a written order granting both of defendant's motions by holding that plaintiff's suit was precluded because: (I) plaintiff was in privity with Tindall under

the doctrines of *res judicata* and collateral estoppel; and (II) defendant was entitled to both sovereign and quasi-judicial immunities because he was a judicial officer engaged in a governmental function. Plaintiff appeals this order.

Although the trial court granted defendant's Rule 12(b)(1) motion for lack of subject matter jurisdiction and Rule 12(b)(6) motion to dismiss, plaintiff argues only that the court erred in granting defendant's Rule 12(b)(6) motion. We disagree.

In reviewing a Rule 12(b)(6) motion, a court must determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 300, 435 S.E.2d 537, 541 (1993) (citation omitted), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994). The trial court may grant this motion if "there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim." *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 123, 401 S.E.2d 133, 135 (1991) (citation omitted). However, a claim should not be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Id.*

The central issue presented to this Court on appeal is whether privity existed between plaintiff and Tindall, his agent, which allowed the trial court to properly dismiss plaintiff's action based on the doctrines of *res judicata* and collateral estoppel. We conclude that there was privity between them.

The doctrines of *res judicata* and collateral estoppel are companion doctrines developed by the courts "for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). Under the doctrine of *res judicata*, sometimes referred to as "claim preclusion," "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). Under the doctrine of collateral estoppel, sometimes referred to as "issue preclusion," "parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully liti-

gated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (citations omitted).

"Like *res judicata*, collateral estoppel only applies if the prior action involved the same parties or those in *privity* with the parties and the same issues." *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93, 367 S.E.2d 335, 337 (1988) (citing *King*, 284 N.C. at 356, 200 S.E.2d at 805) (emphasis added).

> As this Court has recognized, the meaning of 'privity' for purposes of *res judicata* and collateral estoppel is somewhat elusive. Indeed, '[t]here is no definition of the word 'privity' which can be applied in all cases.' The prevailing definition that has emerged from our cases is that 'privity' for purposes of *res judicata* and collateral estoppel 'denotes a mutual or successive relationship to the same rights of property.'

State ex rel. Tucker v. Frinzi, 344 N.C. 411, 416-17, 474 S.E.2d 127, 130 (1996) (citations omitted).

In the case *sub judice*, Tindall was a bond runner for plaintiff and received a fifty percent commission on all bonds written by him in Sampson County. As a bond runner, Tindall "execute[ed] bonds on behalf of the licensed bondsman when the power of attorney has been duly recorded." N.C. Gen. Stat. § 58-71-1(9) (1999). Tindall's rights to his commission were granted to him based on the power of attorney he received from plaintiff. Therefore, in Tindall's earlier lawsuit against defendant, he was in essence suing for the lost profits of plaintiff from whom he derived his commission. This successive or mutual relationship in the same rights in property establishes that the interests of both Tindall and plaintiff are so intertwined that privity exists between them.

Additionally, privity also exists where one not actually a party to the previous action controlled the prior litigation and had a proprietary interest in the judgment or in the determination of a question of law or facts on the same subject matter. *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E.2d 492 (1957). In such a case, the one who was not a party to the prior action is bound by the previously litigated matters as if he had been a party to that action. *Id.* In its order, the trial court in this case found that plaintiff was aware of Tindall's earlier lawsuit because he had attended a law office meeting with Tindall and defendant's counsel to discuss Tindall's case. The court further found

that plaintiff was "actively involved in the discussions that took place in that meeting." Although there is insufficient evidence to show that plaintiff controlled the prior litigation between Tindall and defendant, the court's findings do establish that plaintiff had a substantial interest, which in light of the fifty-fifty sharing of commission, constituted a proprietary interest in the judgment. Thus, these findings can be used to support our earlier determination that plaintiff and Tindall were in privity.

However, even if plaintiff's actions were not barred by *res judicata* and collateral estoppel because he and Tindall were not in privity with one another, the trial court's dismissal of this action was still proper.

Article I, section 1 of North Carolina's State Constitution "creates a right to conduct a lawful business or to earn a livelihood that is 'fundamental' for purposes of state constitutional analysis." *Treants Enterprises, Inc. v. Onslow County*, 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987). In order "to maintain an action for interference with business relations in North Carolina, plaintiff[] must show that defendant[] 'acted with malice and for a reason not reasonably related to the protection of a legitimate business interest of [defendant].' " *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 439, 293 S.E.2d 901, 916 (1982) (quoting *Smith v. Ford Motor Co.*, 289 N.C. 71, 94, 221 S.E.2d 282, 296 (1976)). "Malice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen." Black's Law Dictionary with Pronunciations 956-57 (6th ed. 1990).

In the present case, plaintiff's complaint alleged that defendant had no authority to prevent plaintiff's agent from engaging in the bail bonding business in Sampson County because that authority rests solely with the Commissioner of Insurance. *See* N.C. Gen. Stat. § 58-71-80 (1999). It further alleged that defendant's actions were taken with reckless disregard of plaintiff's rights and directly interfered with plaintiff's ability to conduct business in Sampson County. However, there were no allegations that defendant harbored any ill will towards plaintiff or Tindall, or that his actions were self-serving. Additionally, defendant's actions were not a complete bar to plaintiff conducting business in Sampson County; defendant only ordered suspension of plaintiff's agent from writing bonds in Sampson County until his criminal charges were resolved. Plaintiff could have continued conducting his business in Sampson County through the as-

sistance of another agent. Thus, plaintiff's allegations fail to establish any malice or reckless disregard on the part of defendant.

Since the grounds for affirming the trial court's order can be supported by addressing only the Rule 12(b)(6) motion and this is the only motion against which plaintiff brought forth arguments, we need not address the Rule 12(b)(1) motion. Additionally, there are adequate grounds to affirm the order without addressing the other issues argued by plaintiff involving whether defendant was entitled to sovereign immunity and/or quasi-judicial immunity. Thus, for the aforementioned reasons, the trial court did not err in granting defendant's motion to dismiss plaintiff's claim.

Affirmed.

Chief Judge EAGLES and Judge HUDSON concur.

PAULINE H. PARDUE AND LYTLE C. PARDUE v. SANDRA STALEY DARNELL

No. COA00-1273

(Filed 28 December 2001)

Civil Procedure— voluntary dismissal after resting case— order of trial court required

The trial court did not err in an action arising out of an automobile accident by entering summary judgment in favor of defendant under N.C.G.S. § 1A-1, Rule 56(c) and by dismissing plaintiffs' civil negligence claim based on the original action being dismissed with prejudice, because: (1) plaintiffs did not specify whether they were moving for dismissal under N.C.G.S. § 1A-1, Rule 41(a)(1) or Rule 41(a)(2), and plaintiffs could only obtain a voluntary dismissal with leave to refile under Rule 41(a)(2) since they had already rested their case; and (2) even assuming arguendo that plaintiffs sought a voluntary dismissal under Rule 41(a)(2), the record failed to establish that the trial court ever granted such a motion.

Appeal by plaintiffs from order entered 25 September 2000 by Judge Judson D. DeRamus, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 13 September 2001.

Franklin Smith for plaintiff-appellants.

Willardson & Lipscomb, LLP, by Sigsbee Miller for defendant-appellee.

BIGGS, Judge.

Plaintiffs appeal from an order of summary judgment entered 25 September 2000, dismissing their civil negligence action against defendant. For the reasons that follow, we affirm.

Plaintiff, Pauline Pardue (Mrs. Pardue), and Sandra Darnell (defendant) were involved in a motor vehicle collision on 25 June 1996. Mrs. Pardue and her husband Lytle (plaintiffs) filed a civil negligence action on 5 March 1999, claiming that defendant's negligence had caused the accident, and seeking damages for Mrs. Pardue's injuries. The case came on for trial during the 15 May 2000 session of Superior Court. On 17 May 2000, at the close of plaintiffs' presentation of witnesses, plaintiffs offered into evidence a deposition and videotape, stating: "And with that we'll rest." The trial court then dismissed the jury, and entertained several defense motions. While counsel were presenting their arguments on one of defendant's motions, the trial court called them to the bench. Immediately following an unrecorded bench conference, plaintiffs' counsel announced that they would "move at this time to take a voluntary dismissal. We will refile it again." Shortly thereafter, the proceedings were ended. On 17 May 2000, plaintiffs signed a written "Notice of Voluntary Dismissal Without Prejudice" and, on 24 May 2000, plaintiffs filed a new action against defendant, again seeking damages and costs arising from the 25 June 1996 collision. In response, defendant filed a motion for summary judgment. Defendant argued that the dismissal that plaintiffs had taken during the earlier trial was a dismissal with prejudice, barring plaintiffs from refiling their case. On 25 September 2000, Judge Judson D. DeRamus, Jr., granted defendant's motion for summary judgment, and dismissed plaintiffs' suit against defendant. Plaintiffs appeal from this order.

Plaintiffs, in their sole assignment of error, contend that the trial court committed reversible error in granting defendant's motion for summary judgment.

N.C.R. Civ. P. 56(c) provides that summary judgment shall 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." Therefore, on appeal:

> [i]t is well established that the standard of review of the grant of a motion for 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.' (citations omitted).

Von Viczay v. Thoms, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001). Furthermore, "the evidence presented by the parties must be 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 (1998).

In the instant case, defendant's summary judgment motion was based on her argument that plaintiffs' original action had been dismissed with prejudice, precluding plaintiffs, as a matter of law, from refiling their case. We first examine whether there are genuine issues of material fact related to the dismissal of the original action. The record incorporates the pages of the transcript of the original trial that set forth how the motion to dismiss was presented by plaintiffs, as well as the trial court's response. Neither party has challenged the accuracy of the transcript; in fact, by its incorporation in the record on appeal to which the parties have agreed, we conclude that there is no dispute that it is the official record of the proceeding. Nor have the parties disputed the validity or accuracy of other relevant documents in the record, most importantly the Notice of Dismissal filed by the plaintiff in the original action. While the parties may disagree on whether these facts constitute a dismissal with leave to refile or a dismissal with prejudice, the facts themselves are not in dispute. Consequently, we conclude that "there is no genuine issue as to any material fact" surrounding the dismissal of the original action.

We turn next to our determination of whether defendant "is entitled to a judgment as a matter of law." The dismissal of civil actions is governed by N.C.G.S. § 1A-1, Rule 41, which provides in part as follows:

> Rule 41. Dismissal of actions:
>
> (a) Voluntary dismissal; effect thereof.

> (1) By Plaintiff[.] . . . [A]n action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case[.] . . .
>
> (2) By Order of Judge.—Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge[.] . . .

Thus, under Rule 41(a)(1), "a plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief." *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995). However, after resting his case, a plaintiff forfeits the absolute right to take a dismissal, *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971), and, in order to obtain a voluntary dismissal, the plaintiff must apply to the court under Rule 41(a)(2).

The operation of Rule 41 is "intended to prevent delays and harassment by plaintiff securing numerous dismissals without prejudice." *City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 282, 380 S.E.2d 163, 165 (1989), *aff'd*, 326 N.C. 360, 388 S.E.2d 768 (1990). The rule allows a plaintiff to dismiss and then refile his case only once, and only before resting his case. The crucial difference between Rule 41(a)(1) and Rule 41(a)(2) lies in the trial court's supervision and regulation of dismissals entered pursuant to Rule 41(a)(2). *Troy v. Tucker*, 126 N.C. App. 213, 216, 484 S.E.2d 98, 100 (1997) (after plaintiff rests, "it is for the trial court to decide" whether voluntary dismissal with leave to refile is permissible); *Moore v. Pate*, 112 N.C. App. 833, 836, 437 S.E.2d 1, 2 (1993), *disc. review denied*, 336 N.C. 73, 445 S.E.2d 35 (1994) (entry of a proper voluntary dismissal pursuant to Rule 41(a)(2) "requires an order of the trial court and a finding that justice so requires").

In the instant case, the record demonstrates that after concluding their presentation of witnesses, plaintiffs stated: "And with that we'll rest." We conclude that plaintiffs rested their case at that point. The jury was then dismissed, and the parties argued several motions before the trial court. While counsel were arguing an evidentiary motion, the court instructed counsel to approach the bench, and a discussion took place off the record. At the end of this unrecorded bench conference, the following occurred:

> [PLAINTIFF'S COUNSEL]: Your Honor, pursuant to Rule 41 of the North Carolina Rules of Civil Procedure we would move at this time to take a voluntary dismissal. We will refile it again.

THE COURT: You're doing it with leave?

[PLAINTIFF'S COUNSEL]: With leave to refile it.

THE COURT: All right. Nice to have met you. Nice to see you folks. Good luck to you. Nice to have met you Mr. Smith.

At that point the proceedings ended. Plaintiffs did not specify whether they were moving for dismissal under Rule 41(a)(1) or Rule 41(a)(2). However, because plaintiffs had already rested, they could only obtain a voluntary dismissal with leave to refile under Rule 41(a)(2).

The parties have analyzed in great detail the language in the exchange between plaintiffs and the trial court, in support of their arguments regarding whether the trial court effectively "granted" plaintiffs' "motion," notwithstanding the absence of a written order. Plaintiffs note their use of the word "move" for a dismissal, and point to the trial court's apparent agreement with the plaintiffs' plan to refile. Defendants argue that plaintiffs were clearly announcing their intention to take a unilateral action, and note the trial court's question—"You're doing it with leave?"—as evidence of this. However, we do not find it necessary to examine the nuances of the quoted exchange, for it is undisputed that (1) the trial court did not enter, expressly or in writing, an order granting a voluntary dismissal with leave to refile; (2) plaintiffs never explicitly applied to the trial court for such an order; and (3) plaintiffs themselves entered a "Notice of Voluntary Dismissal Without Prejudice" shortly after the first trial. We find that, even assuming *arguendo* that plaintiffs sought a voluntary dismissal under Rule 41(a)(2), this record fails to establish that the trial court ever granted such motion. Rather, the record shows that plaintiffs took a voluntary dismissal after resting.

The facts of the case *sub judice* are similar to those in *Moore v. Pate*, 112 N.C. App. 833, 437 S.E.2d 1 (1993), *disc. review denied*, 336 N.C. 73, 445 S.E.2d 35 (1994). In *Moore*, also an auto negligence suit, plaintiff took a "voluntary dismissal" after resting his case. The trial court dismissed the jury, and explained that "[u]nder civil rules and regulations, the party who brings a lawsuit is entitled to do just that if they wish to at any time and have within one year of that date to decide whether or not to refile the lawsuit." As in the case *sub judice*, the defendant did not object during the proceedings in court, but moved to dismiss when plaintiff attempted to refile the suit. This Court held that:

> The uncontroverted record reveals that plaintiff took his dismissal after he had rested his case, thus losing the ability to take a dismissal under Rule 41(a)(1)(i). . . . [S]ince plaintiff was unable to obtain a voluntary dismissal under Rule 41(a)(1), the only other means by which plaintiff could have taken his dismissal was under Rule 41(a)(2) which requires an order of the trial court and a finding that justice so requires. . . . Again there is no evidence that plaintiff took this avenue. Thus, plaintiff is left in the unenviable position of arguing that he should be allowed to take [a voluntary] dismissal without prejudice, when he has failed to follow any of the statutory options. It is clear from our review of the record that plaintiff was seeking a dismissal under Rule 41(a)(1)(i). . . . However, given the late stage in the trial at which plaintiff sought his dismissal, a dismissal under Rule 41(a)(1)(i) was not available to him, regardless of the trial court's erroneous statements to the contrary.

Moore, 112 N.C. App. at 836, 437 S.E.2d at 2. We find the reasoning in *Moore* instructive in the present case. Plaintiffs in the case *sub judice* lacked the authority to file a voluntary dismissal under Rule 41(a)(1) after resting. Additionally, plaintiffs failed to apply to the trial court for a voluntary dismissal under Rule 41(a)(2). We conclude that the dismissal taken by plaintiffs was a voluntary dismissal with prejudice, barring them from refiling suit against defendant. We further conclude, therefore, that defendant was "entitled to a judgment as a matter of law." Accordingly, we affirm the trial court's grant of summary judgment to defendant.

Affirmed.

Judges MARTIN and McCULLOUGH concur.

IN RE: FORECLOSURE OF DEED OF TRUST FROM RALPH O. WEBBER AND WIFE, NANCY A. WEBBER, RECORDED IN BOOK 169, PAGE 819, CHOWAN COUNTY PUBLIC REGISTRY

No. COA01-66

(Filed 28 December 2001)

Mortgages— foreclosure—application of proceeds—authority of trustee

A judgment from superior court and an order from the clerk of superior court resolving a dispute over a trustee's application of the proceeds of a foreclosure sale were vacated where the trustee paid $102,587.50 for the removal of the mortgagors' personal property and $9,619.68 in attorney fees. The payments in dispute fall under N.C.G.S. § 45-21.31(a) and are in the sole province of the trustee; neither the clerk nor the superior court had statutory authority to review the trustee's proposed application of the proceeds of the foreclosure sale or to allow, disallow, or modify the amount of such proposed payments. A party wishing to challenge payments made pursuant to the statute may do so in a separate proceeding against the trustee for a breach of fiduciary duty once the payments have been made, and a trustee seeking guidance may institute a declaratory judgment action.

Appeal by mortgagors and substitute trustee from judgment entered 6 October 2000 by Judge G. K. Butterfield in Chowan County Superior Court. Heard in the Court of Appeals 16 October 2001.

Trimpi, Nash & Harman, L.L.P., by John G. Trimpi, for mortgagor-appellant/appellee Ralph O. Webber.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr. and Lars P. Simonsen, for substitute trustee-appellant/appellee William W. Pritchett, Jr.

Irvine Law Firm, PC, by David J. Irvine, Jr. and Stephanie B. Irvine, for mortgagor-appellant/appellee Nancy A. Webber.

HUNTER, Judge.

This case involves a dispute over a trustee's proposed application of the proceeds of a foreclosure sale. William W. Pritchett, Jr. ("the trustee") sought pre-approval from the clerk of superior court of cer-

tain costs, expenses, and obligations associated with the foreclosure sale of certain property. Ralph O. Webber and his wife Nancy A. Webber (together "the mortgagors"), owners of the property prior to the sale, raised objections to certain of these proposed payments before the clerk of superior court. The clerk of superior court held a hearing and entered an order, the parties appealed from the clerk's order, and the superior court addressed the merits of the dispute and entered judgment. We hold that neither the clerk of superior court, nor the superior court on appeal, had statutory authority to approve, disapprove, or modify these proposed payments, or to rule on whether the trustee breached his fiduciary duties, and we therefore vacate the judgment of the superior court and the order of the clerk of superior court.

We begin with a brief synopsis of the pertinent facts and procedural history. On 11 March 1988, the mortgagors executed a deed of trust upon a parcel of land located in Chowan County, North Carolina, in favor of The Federal Land Bank of Columbia. The deed of trust was subsequently assigned to AgFirst Farm Credit Bank ("the mortgagee"). At some point in time, the mortgagors defaulted on the promissary note secured by the deed of trust, thereby triggering a right to foreclose on the part of the mortgagee. In September of 1998, Mr. Pritchett, a licensed attorney in North Carolina, was appointed as the substitute trustee. Prior to the final foreclosure sale, which occurred on 2 June 1999, Perley Andrew Thomas contacted the trustee and conditioned his willingness to bid upon the trustee's assurance that the trustee would be responsible for removing Mr. Webber and his personalty from the property if Mr. Thomas became the high bidder. The trustee agreed to this condition and, after numerous upset bids, Mr. Thomas became the high bidder.

The property was conveyed to Mr. Thomas on 2 September 1999. At that time Mr. Webber still had not removed himself or his personalty from the property. Mr. Webber ultimately removed himself from the property but left a significant amount of personalty on the premises, including horses, dogs, cats, inoperable vehicles, over 200 scrap tires, batteries, barrels, oil tanks, lumber, cans of paint, furnishings, books, and clothing. The trustee hired Thurman Price, a private contractor, to remove Mr. Webber's personalty. Mr. Price removed the personalty over the next three weeks, employing between ten and fifteen workers, a front-end loader, an excavator, and a bulldozer. Mr. Price billed the trustee for 526 hours of labor and the use of the machinery for a total of $102,587.50. Mr. Price also

removed and temporarily stored twenty-nine horses, and charged $33,860.00 for storing, feeding and care for the horses.

In October of 1999, the trustee made an "interim payment" of $50,000.00 to Mr. Price. Later that month, prior to making any other payments from the proceeds of the sale, the trustee filed a proposed "Final Report and Account of Foreclosure Sale," seeking pre-approval by the clerk of superior court of the payments he intended to make, including: $102,587.50 for the removal of Mr. Webber's personalty from the property by Mr. Price; approximately $8,000.00 for the care of approximately thirty horses removed from the property; and $12,000.00 in legal fees. The clerk held a hearing on the matter, and entered an order on 24 November 1999 approving all expenses except (1) the attorney's fees, which were reduced to $9,000.00, and (2) the fees for the removal of Mr. Webber's personalty, which were disallowed. The trustee, Mr. Webber, and Mrs. Webber appealed from this order to the superior court.

Following a hearing on 14 March 2000, the superior court entered an order containing findings of fact and conclusions of law, including: that the court had jurisdiction to hear the appeal and to conduct a hearing *de novo* on the merits; that the clerk did not exceed his authority in approving certain expenses and disallowing others; that the trustee did not breach his fiduciary duty by promising Mr. Thomas that he would remove Mr. Webber and his personalty from the property, or by hiring Mr. Price to remove the personalty; that the expenses of $102,587.50 for removal of the personalty and $33,860.00 for storage and care of the horses should be approved; and that the attorney's fees should be increased from $9,000.00 to $9,619.68. From this order, the mortgagors and the trustee appeal.

The proper procedure for the application of the proceeds of a foreclosure sale is set forth in Chapter 45, Article 2A of our General Statutes and is divided into two stages. At the first stage, pursuant to subsection (a) of N.C. Gen. Stat. § 45-21.31, the proceeds "shall be applied by the person making the sale" to satisfy certain costs, expenses, and other obligations. N.C. Gen. Stat. § 45-21.31(a) (1999). During this stage: (1) the proceeds of the sale are first applied to any "[c]osts and expenses of the sale, including the trustee's commission . . . and a reasonable auctioneer's fee"; (2) the proceeds are next applied to certain taxes on the property which are due and unpaid; (3) the proceeds are next applied to certain special assessments against the property sold; and (4) the proceeds are next applied to "[t]he obligation secured by the mortgage, deed of trust or condi-

tional sale contract" (including any attorney's fees provided for by such instrument). *Id.*; *see In re Foreclosure of Ferrell Brothers Farms,* 118 N.C. App. 458, 460-61, 455 S.E.2d 676, 677-78 (1995).

At the second stage, pursuant to subsection (b) of N.C. Gen. Stat. § 45-21.31, "[a]ny surplus remaining after the application of the proceeds of the sale as set out in subsection (a) shall be paid to the person or persons entitled thereto, if the person who made the sale knows who is entitled thereto." N.C. Gen. Stat. § 45-21.31(b). If the person who made the sale is in doubt as to who is entitled to the surplus, or if there are adverse claims asserted as to the surplus, "the surplus shall be paid to the clerk of the superior court," which payment discharges the person who made the sale from liability. N.C. Gen. Stat. § 45-21.31(b) and (c). Finally, after the sale is completed and all payments are made, the trustee is required to file a final report and account with the clerk of the superior court of the county where the sale is held, and the clerk is required to "audit the account and record it." N.C. Gen. Stat. § 45-21.33(b) (1999). In conducting this audit, the clerk is only authorized to determine whether the entries in the report reflect the actual receipts and disbursements made by the trustee. *Ferrell Brothers*, 118 N.C. App. at 461, 455 S.E.2d at 678.

This Court has explained that the application of the proceeds of the sale, made pursuant to subsection (a) of N.C. Gen. Stat. § 45-21.31, are "within the sole province of the trustee," and that the trustee is not required to receive pre-approval from the clerk of superior court, or the superior court, regarding the application of the proceeds. *Id.* Moreover, we have held that, within the context of a foreclosure proceeding pursuant to Chapter 45, Article 2A, the legislature has not provided any means for a party to contest payments made by a trustee pursuant to subsection (a), and that disputes regarding such payments are not issues properly before the clerk of superior court or the superior court as part of a foreclosure proceeding. *Id.* at 460, 455 S.E.2d at 677 (holding that a junior mortgagee's challenge as to the amount of the trustee's commission and attorney's fees, made pursuant to subsection (a) of N.C. Gen. Stat. § 45-21.31, was not properly before superior court in foreclosure proceeding). By contrast, a dispute as to who is entitled to the *surplus* of the proceeds, *after* the proceeds have been applied as required by subsection (a) of N.C. Gen. Stat. § 45-21.31, is an issue that may be heard by the clerk of superior court or the superior court within the context of a foreclosure proceeding. *See* N.C. Gen. Stat. § 45-21.32 (1999) (any person who claims that they are entitled to some portion of the sur-

plus may institute a special proceeding before the clerk of the superior court and, if any answer is filed raising issues of fact as to the ownership of the surplus, the proceeding is transferred to the superior court for trial).

In the present case, there are two categories of payments in dispute: (1) the trustee's attorney's fees of $9,619.68, resulting from time spent on the foreclosure sale by the trustee and the attorneys in his firm; and (2) the expenses charged by Mr. Price for the removal of Mr. Webber's personalty from the property, and for the care and storage of Mr. Webber's horses. Both of these categories of payments fall within the costs, expenses, and other obligations listed in subsection (a) of N.C. Gen. Stat. § 45-21.31. In *Merrit v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988), our Supreme Court described the nature of the costs, expenses, and other obligations listed in items (1), (2) and (3) of subsection (a) of N.C. Gen. Stat. § 45-21.31:

> Payment of the costs and expenses required by N.C.G.S. § 45-21.31(a) is not the obligation of the purchase money debtor whose deed of trust is being foreclosed. Nor is it, strictly speaking, the obligation of the buyer at the foreclosure sale. Instead, these statutory costs and expenses, including the trustee's commission, are simply obligations arising from the foreclosure sale which must be paid by the trustee before the remainder of the proceeds may be distributed.

Id. at 336, 372 S.E.2d at 563. Because the payments in dispute here fall under subsection (a), they are "within the sole province of the trustee." *Ferrell Brothers*, 118 N.C. App. at 461, 455 S.E.2d at 678. Moreover, neither the clerk of superior court nor the superior court had statutory authority under Chapter 45, Article 2A, to review the trustee's proposed application of the proceeds of the foreclosure sale, or to allow, disallow, or modify the amount of such proposed payments, or to rule on whether the trustee had breached his fiduciary duties.

We suggest that the proper procedure, as contemplated by Chapter 45, Article 2A, was for the trustee to have: (1) made all payments pursuant to subsection (a) of N.C. Gen. Stat. § 45-21.31 as he deemed proper in his discretion; (2) either paid the surplus to the persons entitled thereto, or paid the surplus to the clerk if there were any dispute as to who was entitled thereto, pursuant to N.C. Gen. Stat. § 45-21.31(b); and (3) filed a final report and account with the clerk pursuant to N.C. Gen. Stat. § 45-21.33. We note that a party wish-

ing to challenge payments made pursuant to N.C. Gen. Stat. § 45-21.31(a) may do so in a separate proceeding against the trustee for a breach of fiduciary duty once such payments have been made. *See Sloop v. London*, 27 N.C. App. 516, 219 S.E.2d 502 (1975) (action for wrongful foreclosure alleging, in part, breach of fiduciary duty by trustee). We also note that, presumably, a trustee seeking guidance as to the application of the proceeds of a foreclosure sale may institute a declaratory judgment action, provided the prerequisites for such an action (including an actual controversy between the parties) are satisfied. The judgment of the superior court, and the order of the clerk of superior court, are vacated.

Vacated.

Judges GREENE and THOMAS concur.

BRENDA GAIL BRADLEY, INDIVIDUALLY, AND AS ADMINISTRATRIX FOR THE ESTATE OF HARVEY LEE BRADLEY, SR.; AND SONYA ANNETTE BRADLEY, PLAINTIFFS V. HIDDEN VALLEY TRANSPORTATION, INC., DEFENDANT

No. COA01-150

(Filed 28 December 2001)

1. Motor Vehicles— returning truck after work hours— not within scope of employment—respondeat superior inapplicable

The driver of a truck was not acting within the scope of his employment at the time of an accident, and the driver's employer was not liable for damages under the doctrine of respondeat superior, where the driver was an hourly employee who had clocked out and was not being paid when the accident occured as he was returning the truck to the owner's home.

2. Collateral Estoppel and Res Judicata— vicarious liability—not previously determined

Defendant's vicarious liability for an automobile accident was not previously determined in a related case when the defendant in this case was added as a party and defendant's insurer's motion for summary judgment was denied. The amendment allowing defendant into the action did not decide the issue of whether

defendant was vicariously liable and the issue of vicarious liability was not necessary for the summary judgment determination in the prior case.

Judge HUDSON dissenting.

Appeal by plaintiffs from judgment entered on 9 November 2000 by Judge Robert P. Johnston in Burke County Superior Court. Heard in the Court of Appeals 28 November 2001.

Kuehnert & Bellas, PLLC, by Daniel A. Kuehnert, for plaintiffs-appellants.

Roberts & Stevens, P.A., by Gary Bruce, for defendant-appellee.

TYSON, Judge.

Brenda Gail Bradley and Sonya Annette Bradley (individually "Sonya," collectively "plaintiffs") appeal an order granting Hidden Valley Transportation, Inc.'s (in this action "defendant," in previous actions "Hidden Valley") motion for summary judgment. We affirm the trial court's order.

I. Facts

On 18 September 1995 at approximately 7:00 p.m., Gary Dale Price ("Price"), an employee of defendant, was driving a truck owned by Sherry Lee's (president of defendant, "Mrs. Lee") husband, Edwin Aaron Lee ("Mr. Lee"). It collided into the side of a pickup truck driven by Tracy L. Brackett ("Brackett"), causing it to careen into Harvey Lee Bradley's (deceased husband of plaintiff, "Mr. Bradley") car, killing him, and injuring Sonya, who was a passenger in the car. Price was charged with failing to yield the right-of-way.

Plaintiffs filed a complaint against Price, Mr. Lee, Mrs. Lee, Brackett, and Gary William Brackett on 5 December 1996. Plaintiffs amended their complaint naming Hidden Valley as an additional defendant. Plaintiffs settled their claims with all parties except for Hidden Valley. The trial court later dismissed Hidden Valley without prejudice. On 24 February 2000, plaintiffs re-filed against defendant. The parties agreed that discovery from the previous action, as well as discovery from a related case of *John Deere Ins. Co. v. Bradley, et al.*, 98 CVS 825, ("*John Deere*"), would be utilized in the new action. Defendant's motion for summary judgment was granted on 9 November 2000. Plaintiffs appeal.

II. Issue

Plaintiffs assign as error the trial court's granting of defendant's motion for summary judgment because (1) genuine issues of material fact exist, and/or (2) the doctrine of collateral estoppel previously established defendant's vicarious liability.

A. Genuine Issues of Material Fact

[1] Plaintiffs contend that whether Price was acting within the scope of his employment at the time of the accident is a disputed issue of material fact precluding summary judgment. They argue that the "commuting rule" should not apply because Price was "about his master's business when he was returning his master's property." Alternatively, plaintiffs argue that there is a disputed issue of fact with respect to whether defendant had an interest in the truck Price was driving. We disagree.

We review a grant of summary judgment with a two-part analysis: "(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 — (October 9, 2001).

The burden of proof rests with the movant to show that summary judgment is appropriate. *Development Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980). We review the record in the light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

"If an employee is negligent while acting in the course of employment and such negligence is the proximate cause of injury to another, the employer is liable in damages under the doctrine of respondeat superior . . . ." *Reich v. Price*, 110 N.C. App. 255, 261, 429 S.E.2d 372, 376 (1993) (quoting *Johnson v. Lamb*, 273 N.C. 701, 707, 161 S.E.2d 131, 137 (1968)). "[A]ccidents occurring while an employee is commuting to or from work do not arise out of or occur in the course of the employee's duties of employment." *Wright v. Wake County Public Schools*, 103 N.C. App. 282, 283-84, 405 S.E.2d 228, 229 (1991) (citing *Barham v. Food World*, 300 N.C. 329, 266 S.E.2d 676, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980)).

Plaintiffs argue that the jury could conclude that the following facts may prove that Price was within the scope of his employment

when the collision occurred: (1) Mrs. Lee's personal residence doubled as the corporate headquarters because certain corporate records were stored there, (2) that the truck Price was driving was "used at various times by numerous employees of defendant," (3) the truck had a personalized front license plate frame with defendant's name, (4) the truck was used for defendant's business that day, (5) the truck may have contained defendant's bank statements and Mrs. Lee's pocketbook, and (6) that defendant had an ownership interest in the truck.

All of this evidence taken in the light most favorable to plaintiffs fails to raise a reasonable inference that Price was acting within the scope of his employment at the time of the collision. Price was an hourly employee who had clocked out for the day and was not being paid when he was returning Mr. Lee's truck to his house at 7:00 p.m. We conclude that Price was performing a purely personal obligation at the time of the accident. This assignment of error is overruled.

IV. Collateral Estoppel

[2] Plaintiffs argue that defendant's vicarious liability was previously judicially decided when the trial court in the *John Deere* case: (1) granted plaintiffs' motion to amend its complaint to add Hidden Valley as a defendant, and (2) denied John Deere Insurance Company's ("John Deere"), Hidden Valley's insurer, motion for summary judgment. Plaintiffs contend that those rulings preclude summary judgment in favor of defendant in this action. We disagree.

It is true that "[c]ollateral estoppel can serve as the basis for summary judgment." *Murakami v. Wilmington Star News, Inc.*, 137 N.C. App. 357, 359, 528 S.E.2d 68, 69 (2000) (citing *Beckwith v. Llewellyn*, 326 N.C. 569, 573, 391 S.E.2d 189, 191, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 168 (1990)).

" 'Collateral estoppel precludes relitigation of an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding.' " *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268, 488 S.E.2d 838, 840 (1997) (quoting *In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995) (citations omitted)).

> The requirements for the identity of issues to which collateral estoppel may be applied have been established by this Court as follows: (1) the issues must be the same as those involved in the

> prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citation omitted). "The party opposing issue preclusion has the burden 'to show that there was no full and fair opportunity' to litigate the issues in the first case." *Miller Bldg. Corp. v. NBBJ North Carolina, Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998) (quotation omitted).

Here, defendant has the burden of showing that the issue of vicarious liability has never been judicially decided. Defendant has met its burden.

With respect to Hidden Valley being added to the previous *John Deere* action, defendant notes that the trial court added Hidden Valley based on Rule 15(a) of the North Carolina Rules of Civil Procedure. Nothing in the record indicates that the trial court determined the issue of Hidden Valley's vicarious liability prior to, during, or after adding it into that action. Trial courts freely allow amendments to ensure that final decisions are based on the merits of a case and not avoided because of a technicality. *Mangum v. Surles*, 281 N.C. 91, 187 S.E.2d 697 (1972). The amendment allowed Hidden Valley into the plaintiffs' action; it did not decide the issue of whether Hidden Valley was vicariously liable.

Finally, despite plaintiffs' arguments to the contrary, denial of summary judgment for John Deere in the *John Deere* action did not decide the issue of Hidden Valley's vicarious liability. That issue was unnecessary for the summary judgment determination in *John Deere*. If John Deere would have been able to prove that: (1) Price was not a named insured, (2) Mr. Lee's truck was not a covered auto, or (3) notice of the accident was not given by Hidden Valley, summary judgment would have been appropriate. In the order denying John Deere's motion for summary judgment, the trial court concluded that "there are genuine issues of material fact . . . ." This decision did not reach, let alone decide, the issue of whether Hidden Valley was vicariously liable. We conclude defendant met its burden and demonstrated that the issue of defendant's vicarious liability has not previously been judicially determined to warrant the doctrine of issue preclusion. This assignment of error is overruled. Viewing the evidence in the

light most favorable to plaintiffs, we hold that there are no disputed issues of material fact and defendant is entitled to judgment as a matter of law.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge HUDSON dissents.

HUDSON, Judge, dissenting.

Taken in the light most favorable to the plaintiffs, I conclude that the evidence forecasts a genuine issue of material fact as to whether the driver, Price, was engaged in the defendant's business at the time of the collision. For example, Ms. Sherry Lee, the defendant's then-president, testified that she was "aware that he [Price] was needing to drive the truck home in order to finish the business that he had in Hickory," and that she had approved and authorized him to do so. This passage, among others, raises a possible inference that Price was going about the defendant's business at the time of the collision. Accordingly, I would reverse the Order granting summary judgment, and remand this case for trial. Therefore, I respectfully dissent.

NANCY DOWLESS AND PURLIE DOWLESS, PLAINTIFFS v. KROGER COMPANY AND OHIO WESLEYAN UNIVERSITY, DEFENDANTS

No. COA01-158

(Filed 28 December 2001)

1. Premises Liability— injury in parking lot of grocery store—tenant of building—summary judgment

The trial court did not err in a negligence and loss of consortium case, arising out of plaintiff's injury sustained when the left front wheel of her shopping cart full of groceries fell into a hole in the asphalt of the parking lot, by granting summary judgment in favor of defendant Kroger Company which leased the building but not the parking lot, because: (1) plaintiff cannot establish under these circumstances that defendant owed a legal duty of care to plaintiff once she left the store and entered the parking

lot; and (2) the lease contract provides that defendant Ohio Wesleyan University, owner of both the parking lot and building, is responsible for maintaining the common area in good repair and for maintaining the structure and exterior of the premises including all paved areas.

2. Premises Liability— injury in parking lot of grocery store—owner of parking lot—summary judgment

The trial court erred in a negligence and loss of consortium case, arising out of plaintiff's injury sustained when the left front wheel of her shopping cart full of groceries fell into a hole in the asphalt of the parking lot, by granting summary judgment in favor of defendant Ohio Wesleyan University which owned the building and parking lot, because: (1) the facts do not establish as a matter of law that the hole in the asphalt would have been obvious to a person employing reasonable care; and (2) the question is not whether a reasonably prudent person would have seen the hazard had he looked, but whether a person using ordinary care for his own safety under similar circumstances would have looked down at the ground where the hazard existed.

Appeal by plaintiffs from an order entered 27 November 2000 by Judge W. Russell Duke, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 29 November 2001.

Cooper, Davis & Cooper, by James M. Cooper, for plaintiff-appellants.

Young Moore and Henderson, P.A., by Brian O. Beverly, for defendant-appellee Kroger Company.

Cranfill, Sumner & Hartzog, L.L.P., by Leigh Ann Smith and Jaye E. Bingham, for defendant-appellee Ohio Wesleyan University.

HUNTER, Judge.

Nancy Dowless ("Dowless") and her husband Purlie Dowless (together "plaintiffs") appeal from the trial court's grant of summary judgment in favor of defendants Kroger Company ("Kroger") and Ohio Wesleyan University ("Ohio Wesleyan"). We affirm summary judgment as to Kroger, but reverse and remand as to Ohio Wesleyan.

The evidence before the trial court on defendants' motion for summary judgment tended to establish the following facts. Dowless

sustained an injury to her shoulder while pushing a shopping cart full of groceries toward her car in a parking lot outside of a Kroger supermarket in Fayetteville, North Carolina. Her injury was sustained when the left front wheel of her shopping cart fell into a hole in the asphalt of the parking lot, causing her shopping cart to tip. Dowless attempted to catch the shopping cart and thereby tore the rotator cuff in her left shoulder.

Plaintiffs filed suit against Ohio Wesleyan and Kroger seeking damages based upon claims of negligence and loss of consortium. Ohio Wesleyan is the owner of both the building that houses the supermarket, and the parking lot outside of the supermarket. Kroger leases the building from Ohio Wesleyan, but not the parking lot. Upon defendants' motion, the trial court granted summary judgment in favor of both defendants. Plaintiffs appeal.

[1] A party is entitled to 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 [the] party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). Specifically, a defendant is entitled to summary judgment in a negligence case if it can show either the non-existence of an essential element of the plaintiff's claim or that the plaintiff has no evidence of an essential element of her claim. *See Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). Kroger contends, and we agree, that summary judgment was properly granted as to Kroger because plaintiffs cannot establish under these circumstances that Kroger owed a legal duty of care to plaintiff once she left the store and entered the parking lot. In a premises liability case, it must be shown that the defendant owed a duty of care to the plaintiff. *See Hedrick v. Akers*, 244 N.C. 274, 275, 93 S.E.2d 160, 161 (1956). Here, Dowless alleges that her injury occurred in the parking lot as a result of the condition of the parking lot asphalt. It is undisputed that Ohio Wesleyan owns both the parking lot and the building, and that Kroger leases only the building from Ohio Wesleyan and not the parking lot. Further, pursuant to the lease contract, Ohio Wesleyan is responsible for maintaining the "Common Area, in good repair" and for maintaining "the structure and exterior of the premises, including . . . all paved areas." Plaintiffs' allegations, together with the undisputed facts, reveal the non-existence of an essential element of plaintiffs' claim against Kroger—namely, that Kroger owed a duty of care to Dowless to maintain the parking lot in a safe condition. *See id.* ("[a] tenant is

not responsible for injuries due to a defective sidewalk in front of a building under lease from the owner where the owner exercises control"). Therefore, we affirm summary judgment as to Kroger.

[2] However, as to Ohio Wesleyan, we believe summary judgment was improperly granted. Plaintiffs allege that Ohio Wesleyan owed a duty of reasonable care to Dowless as a lawful visitor on the premises, that Ohio Wesleyan breached this duty of care, and that the breach proximately and foreseeably caused the injury to Dowless. Ohio Wesleyan contends that it did not breach its duty of care to Dowless, and that, in the alternative, Dowless was contributorily negligent.

It is clear that Ohio Wesleyan, as the owner of the parking lot, owed to all lawful visitors "a duty to maintain the premises in a condition reasonably safe for the contemplated use and a duty to warn of hidden dangers known to or discoverable by [Ohio Wesleyan]." *Branks v. Kern*, 320 N.C. 621, 624, 359 S.E.2d 780, 782 (1987). It is also well-established that there is no duty to warn a lawful visitor of "a hazard obvious to any ordinarily intelligent person using [her] eyes in an ordinary manner, or one of which the plaintiff had equal or superior knowledge." *Id.* In some cases, as in *Branks*, this latter principle is stated in terms of negating the existence of a defendant's duty to warn. In other cases, it is stated that if a hazard was known to the plaintiff, or should have been obvious under the circumstances, the plaintiff may not recover as a result of her own contributory negligence. *See, e.g., Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981) (stating that the issue of contributory negligence in such cases is "whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the [ground]"). Whether construed in terms of negating a defendant's duty to warn, or in terms of establishing a plaintiff's contributory negligence, it is clear that a plaintiff may not recover in a negligence action where the hazard in question should have been obvious to a person using reasonable care under the circumstances. In cases involving this issue,

> the facts must be viewed *in their totality* to determine if there are factors which make the existence of a defect . . . , in light of the surrounding conditions, a breach of the defendant's duty and less than "obvious" to the plaintiff. Such factors may include the nature of the defect . . . , the lighting at the time of the accident, and whether any other reasonably foreseeable conditions existed

> which might have distracted the attention of one walking [in the area in question].

Pulley v. Rex Hospital, 326 N.C. 701, 706, 392 S.E.2d 380, 384 (1990).

Ohio Wesleyan contends that it was entitled to summary judgment because the evidence establishes as a matter of law that the hole in the asphalt was an obvious hazard. In support of this contention, Ohio Wesleyan points to the following undisputed facts: Dowless had shopped at this particular Kroger many times a week for approximately twenty years; it was sunny and clear at the time of the incident; Dowless acknowledged in her deposition that at the time of the incident she was looking straight ahead rather than down at the ground, and that if she had looked down, there is no reason that she would not have seen the hazard.

These facts do not establish as a matter of law that the hole in the asphalt would have been obvious to a person employing reasonable care. "The question is not whether a reasonably prudent person would have seen the [hazard] 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 [ground where the hazard existed]." *Norwood*, 303 N.C. at 468, 279 S.E.2d at 563; *see also Walker v. Randolph County*, 251 N.C. 805, 810, 112 S.E.2d 551, 554 (1960) (the question is whether there existed "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").

In her affidavit Dowless averred: that she exited Kroger with a full shopping cart; that she proceeded to cross the parking lot to return to her car; that her car was parked in an area of the parking lot in which she had never before parked; that in order to reach her car she had to cross through an intersection of parking lot traffic lanes; that, at the time, there were vehicles traveling in all directions requiring her attention; that after she crossed through the intersection of traffic she turned her cart toward her car; that as she turned her cart, or after completing the turn, the shopping cart began to turn over to its left as a result of the fact that a wheel of the shopping cart had fallen into a hole in the asphalt; and that she then injured her left shoulder while trying to prevent the cart from turning over. Dowless further stated in her affidavit that she did not see the hole because her view of the ground was obscured by the merchandise in her shop-

ping cart, and because her attention was focused on the heavy traffic in the parking lot in order to ensure that she would reach her car safely.

Plaintiffs' forecast of evidence was sufficient to create a triable jury issue as to whether the hole in the asphalt would have been obvious to a person using ordinary care for her own safety under similar circumstances. We, therefore, reverse the trial court's grant of summary judgment as to Ohio Wesleyan and remand for further proceedings.

Affirmed in part, and reversed and remanded in part.

Judges McGEE and BRYANT concur.

LORRAINE K. DOYLE, PLAINTIFF v. ASHEVILLE ORTHOPAEDIC ASSOCIATES, P.A., DEFENDANT

No. COA01-159

(Filed 28 December 2001)

Employer and Employee— employment contract—termination provision—constructive discharge

The trial court erred in a breach of contract action by allowing recovery for plaintiff doctor for constructive discharge from employment based on the termination provision of plaintiff's employment contract, because: (1) the jury found that neither party breached the employment contract, and the evidence does not show that defendant employer deliberately made plaintiff's working conditions intolerable; (2) plaintiff does not allege in her complaint that she was constructively terminated based on intolerable working conditions, nor does she set forth any instances that would support stating that she was terminated based on intolerable working conditions; and (3) there is no evidence that the alleged conditions were deliberately created in an attempt to force plaintiff to terminate her employment.

Appeal by defendant from judgment entered 11 April 2000 and order entered 11 May 2000 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 5 December 2001.

Adams Hendon Carson Crow & Saenger, P.A., by George W. Saenger and Joy Gragg, for plaintiff-appellee.

McGuire, Wood & Bissette, P.A., by Joseph P. McGuire, for defendant-appellant.

WYNN, Judge.

In this appeal Asheville Orthopaedic Associates, P.A., argues that the trial court erred in submitting issues to the jury and allowing recovery to Dr. Lorraine K. Doyle for constructive discharge from employment. Asheville Orthopaedics correctly points out that North Carolina has not explicitly recognized constructive discharge in the context of employment as an independent basis for recovery. Indeed, in *Wagoner v. Elkin City Schools' Board of Education* this Court held:

> Assuming that plaintiff was wrongfully constructively discharged, she is nonetheless not entitled to assert the tort of wrongful discharge because the tort of wrongful discharge arises only in the context of employees at will. *See Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989); *Sides*, 74 N.C. App. 331, 328 S.E.2d 818. Breach of contract is the proper claim for a wrongful discharged employee who is employed for a definite term or an employee subject to discharge only for "just cause."

113 N.C. App. 579, 588, 440 S.E.2d 119, 125, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994).

However, Dr. Doyle responds that she did not claim damages arising under the independent action of constructive discharge based on a violation of public policy which applies to employees at will. Rather, Dr. Doyle asserts that her claim arises under her employment contract with Asheville Orthopaedic. She points out that her employment contract provided for damages to be paid to her in the event that Asheville Orthopaedic terminated her involuntarily. She alleges that despite the fact that she resigned from her employment, her resignation was procured by Asheville Orthopaedic's conduct which amounted to constructive discharge.

Dr. Doyle is a board certified orthopaedic surgeon, who after signing an employment contract with Asheville Orthopaedics started working on 3 October 1988. The employment contract provided that Dr. Doyle would receive basic compensation in the amount of $80,000 during her first contract year, the same basic compensation of $80,000 plus one-half of her productivity during her second contract year, and compensation based on her productivity during her third and subsequent contract years, with her compensation based on productivity to "be calculated in the same manner as is applicable to all other physician employees of the Employer."

Regarding termination, the employment contract under paragraph 12 a. provided that:

> The Employee may terminate this Contract only after having given a preliminary written notice to terminate twelve (12) months before the effective termination date, followed by a final written resignation six (6) months before said termination date. Subject to paragraph 12 c., the Employer may terminate this Contract only after having given written notice at least six (6) months before the effective termination date. The Employer will not terminate this Agreement unless such action has been approved by a majority vote of all members of the Board of Directors who are then actively practicing medicine for the Employer.

The Contract of Employment further provided that:

> Upon termination pursuant to paragraph 12 a., Employee shall be paid only: (i) the Basic Benefits set forth herein, reduced by 1/25 for each year of service with the Employer less than twenty-five (25) years; and (ii) his Basic Compensation without any further Productivity Compensation.

At a meeting on 11 October 1995, the Board of Directors for Asheville Orthopaedics considered Dr. Doyle's deficit, how she could repay that deficit and the viability of her continuing in the practice. After the meeting, Linda Stein Murphy, the business manager, informed Dr. Doyle that the Board of Directors had decided that it could not go on paying someone who was not producing. Later that same day, Ms. Murphy met with two of the partner doctors, who decided that Dr. Doyle would not receive a paycheck or disability payment; Medical Mutual would be called about the cost of tail coverage for Dr. Doyle, which is the amount required to be paid to cover a doc-

tor who leaves a practice in the event that any claims arise subsequent to the doctor's departure; Dr. Doyle should cancel some of her vacation and not attend a professional meeting in February; and the credit card limit for all of the physicians would be reduced from $5,000 to $500.

The next day, Ms. Murphy met with Dr. Doyle and told her that she would not receive any pay. After discussing with Ms. Murphy whether there would be a problem if she left at the end of December, Dr. Doyle sent a letter dated 30 November 1995 stating that she intended to withdraw from the partnership and her last day would be 31 December 1995.

Following a trial, the jury considered and decided on the following issues:

1. Did the defendant breach the employment agreement?

   ANSWER: NO

2. What answer of damages is the plaintiff entitled to recover from the defendant?

   ANSWER: _____

3. Did the defendant constructively terminate the employment of the plaintiff?

   ANSWER: YES

4. What amount of damages, if any is the plaintiff entitled to recover from the defendant?

   ANSWER: $14,752

5. Did the plaintiff breach the employment contract?

   ANSWER: NO

6. What amount of damages is the defendant entitled to recover from the plaintiff?

   ANSWER: _____

Accordingly, the trial court entered judgment on the jury's finding of constructive discharge in the amount of $14,447.30, plus prejudgment interest from 1 January 1996 and court costs.

On appeal, Dr. Doyle disavows that she seeks relief under a claim of constructive discharge in violation of public policy which arises

only in the context of employees at will. She asserts instead that her claim of constructive discharge arose in the context of deciding whether she was entitled to termination payments under the contract. We recognize the viability of her claim in the context of interpreting whether constructive termination by her employer triggered the termination payment provision of the employment contract.

In general, evidence establishing constructive discharge "must demonstrate that the employer deliberately made working conditions intolerable and thereby forced [the plaintiff] to quit." *Graham v. Hardee's Food System, Inc.*, 121 N.C. App. 382, 385, 465 S.E.2d 558 (1996) (citing *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936, 944 (4th Cir. 1992)). "Deliberateness exists only if the actions complained of 'were intended by the employer as an effort to force the employee to quit.' " *Id.* (Citations omitted).

In this case, the jury found that neither Asheville Orthopaedics nor Dr. Doyle breached the employment contract. Thus, to show that her employer constructively discharged her and thereby triggered the payment provision of the employment contract, Dr. Doyle must point to evidence, other than that showing a breach of contract, which demonstrates that Asheville Orthopaedics deliberately made her working conditions intolerable.

The record shows that Dr. Doyle's evidence of constructive discharge consisted of her allegations that she received limited referrals of hand patients from Asheville Orthopaedics' other physicians. However, the record also shows that Dr. Doyle did receive some hand patient referrals and was offered to serve as back-up on call. Dr. Doyle also points to Asheville Orthopaedics' adoption of a different compensation formula in November 1994 which allocated overhead in a detrimental impact on her income. However, this change occurred during a period when Asheville Orthopaedics experienced a financial crunch and considered ways to hold costs down and encourage production. Additionally, Dr. Doyle, a board member, voted on the modified compensation formula. Also, the record shows that Asheville Orthopaedics approved Dr. Doyle as a shareholder and in later years elected her to serve in various offices including secretary, treasurer and vice-president. This evidence falls short of showing that Asheville Orthopaedics deliberately made Dr. Doyle's working conditions intolerable.

Moreover, we note that in her Complaint, Dr. Doyle does not allege that she was constructively terminated because of intolerable

working conditions nor does she set forth any instances that would support stating that she was terminated because of intolerable working conditions.

After a careful review of the record, we can find no evidence that the alleged conditions were deliberately created in an attempt to force Dr. Doyle to terminate her employment. In the absence of facts, other than those showing a breach of contract, to support Dr. Doyle's claim for payment under the termination provision of her employment contract that she was constructively discharged, we must reverse the judgment.

Reversed.

Judges WALKER and THOMAS concur.

VERNON HUFFMAN, PLAINTIFF v. JOSEPH T. INGLEFIELD, M.D., DEFENDANT

No. COA00-1101

(Filed 28 December 2001)

1. **Medical Malpractice— affidavit concerning standard of care—motion to strike**

The trial court did not err in a medical malpractice case by denying plaintiff patient's motion to strike defendant doctor's affidavit stating that he was familiar with the standards of practice among physicians with training and experience similar to his own and that his treatment of plaintiff conformed in all respects to the accepted standards of practice in his community, because: (1) there is no mention of this motion to strike being denied in the trial court's order of 27 June 2000 or in any other order included in the record; (2) plaintiff failed to properly preserve this assignment for appeal, N.C. R. App. P. 10(b); and (3) even though defendant's affidavit did not meet the scheduling order deadline for disclosing medical experts, denying plaintiff's motion to strike this affidavit would not have been error since it would not have precluded defendant from testifying on his own behalf.

2. Medical Malpractice— affidavit concerning standard of care—medical expert required—summary judgment

The trial court did not err in a medical malpractice case by granting defendant's motion for summary judgment under N.C.G.S. § 1A-1, Rule 56, because: (1) defendant met his initial burden by establishing that plaintiff could not provide a medical expert to support an essential element of his claim; and (2) plaintiff attempted to use only his own affidavit to forecast evidence showing medical malpractice, and the Court of Appeals has previously held that the applicable standard of care in medical malpractice cases must be established by other practitioners in the particular field of practice or by other expert witnesses equally familiar and competent to testify as to that limited field of practice.

Appeal by plaintiff from order entered 27 June 2000 by Judge Richard D. Boner in Burke County Superior Court. Heard in the Court of Appeals 21 August 2001.

C. Gary Triggs, P.A., by C. Gary Triggs, for plaintiff-appellant.

Bell, Davis, & Pitt, P.A., by Joseph T. Carruthers and Jon L. Spargur, Jr., for defendant-appellee.

CAMPBELL, Judge.

Plaintiff appeals from an order denying his motion to strike defendant's affidavit and granting defendant's motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. We affirm.

In February of 1991, defendant undertook the care and treatment of plaintiff. Plaintiff was under defendant's care until at least June of 1995. During that time, defendant prescribed various medications to plaintiff to assist plaintiff with allergies and related conditions.

On 17 June 1999, plaintiff filed a complaint in the Superior Court of Burke County alleging that defendant committed medical malpractice by failing to inform plaintiff of potential side effects of medication prescribed to him by defendant. Plaintiff also alleged:

> That prior to the filing of this complaint, the Plaintiff has retained services of a qualified medical expert who upon information and belief will be qualified to testify under the rules of Civil Procedures. The expert possesses the same or similar skills or

> training as that of the Defendant who has reviewed this information and has determined an opinion that the course of care provided by the Defendant does in fact deviate from the standard of care thus constitutes malpractice as required by the North Carolina General Statutes.

Defendant timely filed an answer denying all allegations in the complaint.

On 11 October 1999, defendant filed a motion to compel discovery and for sanctions on the grounds that plaintiff had either failed to answer discovery requests or obtain an extension of time in which to answer the requests. After a hearing on defendant's motion, Judge Jesse B. Caldwell ("Judge Caldwell") entered an order on 18 November 1999 ordering plaintiff to answer outstanding discovery within thirty days. In addition, Judge Caldwell entered a separate scheduling order with consent of the parties and pursuant to Rule 26 of the Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 26(f1) (1999) (requiring the court to establish an appropriate schedule for designating expert witnesses in a medical malpractice action). This order stated, in part, that:

> 1. Plaintiffs shall designate all expert witnesses whom they expect to call at trial and shall answer all pending North Carolina Rules of Civil Procedure interrogatories and requests for production on or before December 15, 1999.
>
> . . . .
>
> 3. Defendants shall designate all expert witnesses whom they expect to call at trial and shall answer all pending North Carolina Rules of Civil Procedure 26(b)(4) interrogatories on or before March 15, 2000.
>
> . . . .
>
> 8. Expert witnesses not designated and made available for deposition as required by this Order shall not be permitted to testify at trial.

As a result of plaintiff's failure to designate any experts, defendant filed a motion to dismiss or, in the alternative, for sanctions based on plaintiff's failure to comply with both the 18 November 2000 order and the scheduling order. This motion came on for hearing before Judge Jerry Cash Martin ("Judge Martin"). Although by then plaintiff had answered outstanding discovery, which included the designation

of a medical expert, Judge Martin entered an order on 28 March 2000 striking the expert and ordering that plaintiff be precluded from offering the testimony of this expert.

Defendant then filed a motion for summary judgment. Attached to this motion was defendant's own affidavit stating that he was familiar with the standards of practice among physicians with training and experience similar to his own and that his treatment of plaintiff conformed in all respects to the accepted standards of practice in his community. Plaintiff responded by filing a motion to strike defendant's affidavit on the grounds that defendant had not designated himself as an expert by the deadline set in Judge Caldwell's scheduling order. In addition, plaintiff filed his own affidavit stating that defendant failed to warn him of potentially dangerous side effects, asserting that he had consulted with numerous physicians about the standard of care applicable to physicians in his community and that defendant had deviated from this standard of care (all as more particularly outlined in the affidavit).

Defendant's motion for summary judgment was heard by Judge Richard D. Boner ("Judge Boner"). After hearing arguments and having reviewed the file and the affidavits of both parties, Judge Boner entered an order granting summary judgment in favor of defendant on 27 June 2000. Plaintiff appeals from this order.

Plaintiff brings forth two assignments of error. For the following reasons, we affirm the trial court's order.

[1] By his first assignment of error, plaintiff contends that prejudicial error was committed when the trial court denied his motion to strike defendant's affidavit. However, there is no mention of this motion to strike being denied in Judge Boner's order of 27 June 2000 nor in any other order included in the record. Since plaintiff failed to properly preserve this assignment for appeal, it is dismissed. *See* N.C. R. App. P. 10(b) (2001). Nevertheless, we note that even though defendant's affidavit did not meet the scheduling order deadline for disclosing medical experts, denying plaintiff's motion to strike this affidavit would not have been error because it would not have precluded defendant from testifying on his own behalf. *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(4) cmt. (1999) (stating that: "[T]he subsection does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit.").

[2] In his second assignment of error, plaintiff contends that the trial court erred in granting defendant's motion for summary judgment. We disagree.

In a medical malpractice action, plaintiff must "demonstrate by the testimony of a qualified expert that the treatment administered by the defendant was in negligent violation of the accepted standard of medical care in the community and that defendant's treatment proximately caused the injury." *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978) (citation omitted). To support his motion for summary judgment, defendant has the initial burden of showing either that plaintiff cannot produce evidence to support an essential element of his claim, an essential element of plaintiff's claim does not exist, or plaintiff cannot provide an affirmative defense that would save his claim. *See Evans v. Appert*, 91 N.C. App. 362, 372 S.E.2d 94 (1988). Once this initial burden is met, plaintiff must then produce a forecast of evidence showing the existence of a genuine issue of material fact with respect to the issues raised by the movant. *Rorrer v. Cooke*, 313 N.C. 338, 350, 329 S.E.2d 355, 363 (1985).

In the present case, Judge Caldwell had entered both an order compelling plaintiff to provide outstanding discovery to defendant, and a discovery scheduling order requiring plaintiff to produce the names of all expert witnesses he planned to call at trial by 15 December 1999. Plaintiff did not comply. Judge Martin then entered an order striking plaintiff's subsequently designated expert. Plaintiff did not appeal this order. Thus, defendant met his initial burden by establishing that plaintiff could not provide a medical expert to support an essential element of his claim.

Plaintiff attempted to use only his own affidavit to forecast evidence showing medical malpractice. The affidavit asserted that defendant deviated from the required standard of care by failing to inform plaintiff of the potential side effects of prescribed medication. Plaintiff argues that this affidavit creates a genuine issue of material fact because there is a discrepancy between his position and defendant's. However, this Court has held that in medical malpractice cases the applicable "standard of care must be established by other practitioners in the particular field of practice . . . or by other expert witnesses equally familiar and competent to testify as to that limited field of practice." *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 625, 504 S.E.2d 102, 108 (1998) (citing *Lowery v. Newton*, 52 N.C. App. 234, 239, 278 S.E.2d 566, 571 (1981)). Plaintiff, a lay person

and not a medical expert, simply cannot establish the applicable standard of care in this case on his own.

Accordingly, for the aforementioned reasons, the trial court properly granted defendant's motion for summary judgment.

Affirmed.

Judges GREENE and BRYANT concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. FLOYD WAYNE HARRELL

No. COA01-152

(Filed 28 December 2001)

Insurance— damaged farm equipment—umpire's decision—award of policy limits and equipment

An appraisal umpire's award to the insured of both the policy limits and flood damaged farm machinery did not exceed the umpire's powers where the machines are specialty machines, the umpire was unable to determine a cash value, and repair estimates exceeded the policy limits. The contractual appraisal provisions were properly followed, the umpire's reasoning was logical, and plaintiff was unable to show a violation of N.C.G.S. § 1-567.13.

Appeal by plaintiff from judgment entered 26 September 2000 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 28 November 2001.

Baker, Jenkins & Jones, by Roger A. Askew, Kevin N. Lewis and Ronald G. Baker for plaintiff-appellant.

Bridgers, Horton, Rountree & Boyette, by Charles S. Rountree for defendant-appellee.

THOMAS, Judge.

Plaintiff, North Carolina Farm Bureau Mutual Insurance Company, appeals from an order denying its motion to vacate an umpire's award and granting defendant's motion for summary

judgment. The dispute concerns the valuation of farm equipment and an award by an umpire appointed in accordance with an insurance policy.

Plaintiff sets forth one assignment of error. For the reasons discussed herein, we affirm the trial court.

The facts are as follows: Defendant, Floyd Wayne Harrell, operates a farm in Edgecombe County, North Carolina. In September 1999, floods from Hurricanes Dennis and Floyd severely damaged much of his farming equipment, including a 1997 Amadas eight-row peanut combine and a 1997 Amadas eight-row peanut header. Both machines were insured by plaintiff, with limits of $148,500 and $16,500, respectively.

Defendant filed a claim and, on 8 November 1999, plaintiff informed defendant that its appraisal estimate to repair the combine was $15,021.41. Defendant disputed the estimate and, as provided in the insurance policy, requested an appraisal in writing. Each party selected an appraiser and they all concurred in the selection of Donald Beacham (Beacham) to serve as umpire. The two appraisers met with Beacham and presented evidence on 22 May 2000. Based on the evidence, the umpire found that repairs would exceed the policy limits and awarded defendant $148,500 for the combine and $16,500 for the header and stated defendant could keep the damaged machinery.

Plaintiff followed with a complaint and motion to vacate the umpire's award, alleging the award was in violation of the insurance policy and that the umpire acted outside the scope of his authority, in violation of N.C. Gen. Stat. § 1-567.13. Plaintiff then filed motions for judgment on the pleadings and summary judgment. The trial court, on 26 September 2000, denied the motions and granted summary judgment in favor of defendant. Plaintiff appeals the order.

By plaintiff's sole assignment of error, it argues the trial court erred by denying plaintiff's motions and by granting summary judgment for defendant. We disagree.

A motion for judgment on the pleadings is proper only when all material allegations of fact are admitted and only questions of law remain. *Garrett v. Winfree*, 120 N.C. App. 689, 463 S.E.2d 411 (1995). 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 ma-

terial 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). An umpire's arbitration is governed by N.C. Gen. Stat. § 1-567.13, which provides that a "court shall vacate an award where . . . [t]he arbitrators exceeded their powers." N.C. Gen. Stat. § 1-567.13(a)(3) (1999).

Plaintiff contends the umpire exceeded his powers by awarding defendant both the replacement cost and the damaged machinery. An arbitrator exceeds his powers when he arbitrates additional claims and matters not properly before him. *Id.* Here, we are concerned with an insurance policy claim for property damage that was properly before the arbitrator. We note plaintiff is not contesting the value of loss assigned by the umpire. Plaintiff is contesting the monetary award to defendant in addition to the machinery.

The policy provides, in pertinent part:

> **Our Options—We may:**
>
> 1. pay the loss in money; or
>
> 2. repair, replace or rebuild the property. We must give you notice of our intent to do so within 30 days after we have received a satisfactory proof of loss.
>
> 3. take all or part of the damaged property at the agreed or appraised value. *Property paid for or replaced by us becomes ours.*

(Emphasis added).

However, this Court has held that "[i]f the contractual *appraisal provisions* are followed, an appraisal award is presumed valid and is binding absent evidence of fraud, duress, or other impeaching circumstances." *Enzor v. North Carolina Farm Bureau Mut. Ins. Co.*, 123 N.C. App. 544, 545-46, 473 S.E.2d 638, 639 (1996) (emphasis added). The contractual appraisal provision in the instant policy is:

> If you and we do not agree as to the value of the property or the amount of the loss, you and we will each select a competent appraiser within 20 days *after receiving a written request from* the other. The two appraisers will select an umpire. . . . The written agreement of any two of these three will be binding and set the amount of loss.

The contractual *appraisal provisions* were properly followed. The umpire acted within the scope of his authority and appropriately val-

ued the loss. Therefore, plaintiff must show fraud, duress, or other impeaching circumstances to invalidate the umpire's award.

While there is no allegation of fraud or duress, plaintiff contends there was an "impeaching circumstance" in that the umpire considered the amount of insurance coverage and awarded the salvage to defendant. We note arbitrators are not required to articulate reasons for their award. *Howell v. Wilson*, 136 N.C. App. 827, 526 S.E.2d 194, *rev. denied*, 352 N.C. 148, 544 S.E.2d 224 (2000). However, when an arbitrator chooses to explain the award in an accompanying letter, that explanatory letter becomes part of the award for purposes of appellate review. *Id.* Here, the umpire, in his final decision, stated, *inter alia*:

> After studying both estimates carefully, . . . I feel the best way to restore the machine back to the condition it ws [sic] before the flood damage and for it to have the life expectancy it had before the flood damage was for Amadas to take the machine back to their shop and repair it per estimate . . . . These machines are specialty machines. Thre [sic] are not many in this area, there have not been any traded in this area to my knowledge and I have not seen any resold on farm sales. They are not listed in the Official Farm Equipment Guide Book, therefore an official cash value has not been established to base this machine on. Given the fact the insurance agent had sold [defendant] coverage of $148,500.00 on the machine and $16,500.00 on the header, I assume he feels the machine is worth a total of $165,000.00. That is what [defendant] has paid a premium on.
>
> Considering these facts I made my decision to award [defendant] $148,500.00 for the Combine and $16,500.00 for the header totaling $165,000.00. This amount will almost cover the estimated cost of repair by Amadas. The Machine remains the property of [defendant]. He can have the machine repaired or do what he wishes. If the cost of repair is grreater [sic] than the estimate or this settlement, it becomes the responsibility of [defendant].

Because plaintiff is unable to show a violation of N.C. Gen. Stat. § 1-567.13 or impeaching circumstances, we reject his argument and affirm the trial court.

The umpire's reasoning is logical, based on defendant's option to repair his farming equipment. In *Enzor*, this Court stated that the policy appraisal procedure of this same plaintiff (N.C. Farm Bureau

Mutual Insurance Company) was "analogous to an arbitration proceeding. In arbitration, 'errors of law or fact . . . are insufficient to invalidate an award fairly and honestly made." *Enzor*, 123 N.C. App. at 546, 473 S.E.2d at 639-40 (citations omitted). In *Turner v. Nicholson Properties, Inc.*, 80 N.C. App. 208, 341 S.E.2d 42, *cert. denied*, 317 N.C. 714, 347 S.E.2d 457 (1986), this Court held that an arbitrator who errs as a matter of law, exceeding his powers, is not subject to the vacating of his award because such an erroneous decision of a matter submitted to arbitration is insufficient to invalidate an award fairly and honestly made. Moreover, our Supreme Court has held that:

> "[a]n award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration instead of ending would tend to increase litigation."

Cyclone Roofing Co., Inc. v. LaFave Co., 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) (quoting *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 414-15, 255 S.E.2d 414, 419-20 (1979). We hold that the instant award was fairly and honestly made and, accordingly, affirm the trial court.

AFFIRMED.

Judges WYNN and WALKER concur.

CHRISTOPHER HOWARD OLIVE, PETITIONER v. JANICE FAULKNER, COMMISSIONER OF THE STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA00-781

(Filed 28 December 2001)

Motor Vehicles— driver's license—suspension—driving with revoked Virginia license but valid North Carolina license

The superior court erred by enjoining DMV from revoking petitioner's driver's license for an out-of-state conviction of driv-

ing while his license was revoked where petitioner was a truck driver with licenses in North Carolina and Virginia, his Virginia license was suspended for failure to pay costs associated with a Virginia case, he was subsequently convicted in Virginia of driving with a suspended license, Virginia notified the North Carolina DMV of the conviction, DMV notified petitioner that his North Carolina license would be suspended for twelve months for commission of an offense in another state that would be grounds for suspension in North Carolina, petitioner paid the Virginia fine and his Virginia license was reinstated, and DMV sustained the continued suspension of petitioner's North Carolina license. North Carolina does not allow reinstatement merely upon payment of outstanding fees, and the superior court must affirm the suspension if the license is subject to suspension in fact and in law.

Judge WYNN dissenting.

Appeal by respondent from order entered 10 April 2000 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 17 October 2001.

No brief filed for petitioner Christopher Howard Olive.

Attorney General Michael F. Easley, by Associate Attorney General Kimberly P. Hunt, for respondent.

BRYANT, Judge.

This appeal arises out of the trial court's reversal of the North Carolina Department of Transportation Division of Motor Vehicles [DMV] hearing officer's determination that suspension of petitioner's license was proper.

Petitioner, Christopher Howard Olive, is a long-distance truck driver who resides in North Carolina and holds driver's licenses in North Carolina and Virginia. His Virginia license was suspended for failure to pay costs associated with a Virginia case. A few months later, he was charged with and convicted of driving while license suspended in Virginia. The State of Virginia notified DMV of the conviction. DMV notified petitioner that his North Carolina license would be suspended for twelve months pursuant to N.C.G.S. § 20-16(a)(7), which allows North Carolina to suspend or revoke a driver's license upon commission of an offense in another state that would be grounds for suspension in North Carolina. N.C.G.S. § 20-16(a)(7)

(1999). Petitioner then paid the Virginia fine for driving with a suspended license, and Virginia reinstated his license. DMV, however, continued to pursue the suspension.

Petitioner requested a hearing with a DMV hearing officer, who sustained the suspension despite evidence of the reinstatement of petitioner's Virginia license. Petitioner filed a petition for a preliminary injunction and a temporary restraining order. The petition was granted. Petitioner requested a de novo hearing in the Superior Court of Johnston County. The Superior Court ruled that DMV abused its discretion in suspending petitioner's license. DMV appeals.

We note at the outset that DMV raised two issues in the assignments of error in the record on appeal that it did not discuss in its brief. Assignments of error not argued in the appellant's brief are deemed abandoned. N.C. R. App. P. 28(b)(5). In DMV's remaining assignment of error, DMV argues that the trial court erred in enjoining DMV from revoking petitioner's driver's license for an out-of-state conviction of driving while license revoked. We agree and vacate the trial court's order.

DMV has the exclusive power to issue, suspend or revoke a driver's license. *Smith v. Walsh*, 34 N.C. App. 287, 289, 238 S.E.2d 157, 159 (1977). The petitioner has the right to have the Superior Court review DMV's actions de novo. *Smith*, 34 N.C. App. at 287, 238 S.E.2d at 157. "On appeal and hearing *de novo* in superior court, that court is not vested with discretionary authority. It makes judicial review of the facts, and if it finds that the license of petitioner is in fact and in law subject to suspension or revocation the order of the Department must be affirmed, otherwise not." *In re Donelly*, 260 N.C. 375, 381, 132 S.E.2d 904, 908 (1963); *Smith v. Walsh*, 34 N.C. App. 287, 238 S.E.2d 157 (1977) (holding that superior court did not have discretionary power to revoke DMV suspension of motorist's driving privilege). When reviewing the trial court's decision, the Court of Appeals first determines whether the trial court applied the correct scope of review, then determines whether the court did so properly. *Id.*

In this case, petitioner was convicted in Virginia of driving with a suspended license. N.C.G.S. § 20-16 provides that DMV may suspend a person's license upon a showing that the person committed an offense in another state that would be grounds for suspension in this State. N.C.G.S. § 20-16(a)(7) (1999). A problem arises because in Virginia, after a conviction of driving with a suspended license, a license may be reinstated upon payment of outstanding fees. North

Carolina law does not allow reinstatement merely upon payment of outstanding fees. Therefore, the issue we address is whether, under North Carolina law, the Superior Court may enjoin DMV from suspending the license of a driver whose license is suspended in another state but later reinstated in that state. We conclude that it may not.

Although there are no North Carolina cases directly on point, we look to the statutes for guidance. Section 20-16 clearly and unambiguously gives DMV the discretionary authority to suspend or revoke the license of a driver who has *committed* an offense in another state if the offense would be grounds for suspension in North Carolina. N.C.G.S. § 20-16(a)(7) (1999). N.C.G.S. § 20-28 authorizes DMV to revoke the license of anyone convicted of driving while license revoked. N.C.G.S. § 20-28 (1999). Revocation and suspension are used synonymously. N.C.G.S. § 20-4.01(36) (1999). When construing statutes, our courts have stated, " 'Where the language of a statute is clear and unambiguous . . . the courts must construe the statute using its plain meaning.' " *Springer-Eubank Co. v. Four County Elec. Membership Corp.*, 142 N.C. App. 496, 499, 543 S.E.2d 197, 200 (2001) (alteration in original) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted)). By statute, DMV had discretionary authority to suspend petitioner's license. By mandate, the Superior Court upon review de novo must affirm the suspension if the license is subject to suspension in fact and in law. Because petitioner was *convicted* in Virginia, we do not see how the trial court could enjoin DMV without exercising its discretion. Had petitioner only been charged but not convicted in Virginia, the outcome might be different. However, we decline to entertain this issue at this time. Because the Superior Court lacked discretionary authority, we must vacate its order.

Vacated.

Judge McCULLOUGH concurs.

Judge WYNN dissents with a separate opinion.

WYNN, Judge dissenting,

I agree with Superior Court Judge Knox Jenkins' rationale for finding that suspension of the petitioner's driver license under N.C. Gen. Stat. § 20-16(a)(7) was improper. That statute permits DMV to suspend or revoke a driver's license upon commission of an offense

in another state that would be grounds for suspension in North Carolina. The petitioner in this case was convicted in the State of Virginia for driving while his Virginia license was expired; his North Carolina license was in tact. As long as a driver possesses a valid driver's license, it is not an offense in the State of North Carolina to drive in this State while under a suspension of license in another state.

Apparently, the General Assembly recognized that there may be some offenses in another state that would not be grounds for suspension in North Carolina. While it is tempting to say that the offense in this case was driving while license suspended; in fact, the offense was driving in the State of Virginia while his *Virginia license* was suspended.[1] That is not an offense in North Carolina, particularly for this truck driver who had a valid North Carolina license.

STATE OF NORTH CAROLINA v. BRADLEY MONTE BROOKS

No. COA01-586

(Filed 28 December 2001)

1. Juveniles— first-degree murder—transfer to superior court

The trial court did not err by concluding the juvenile court's determination that the juvenile petition alleging first-degree murder and the decision to transfer the case to superior court after finding probable cause without a transfer hearing were proper, because: (1) the petition adequately charged the offense in a clear and concise manner and informed the juvenile of the charge against him so he could adequately prepare a defense; (2) if the juvenile needed further clarification on the charge, he could have filed a motion for a bill of particulars under N.C.G.S. § 15A-925; and (3) N.C.G.S. § 7B-2200 requires the district court to transfer the case to superior court upon a finding of probable cause in a Class A felony.

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1. If the defendant had been convicted in Virginia for driving without a license at all, then I would agree with the majority that the offense would be one that would be grounds for suspension in North Carolina.

2. Sentencing— aggravated range—clerical error

Although the trial court did not err by sentencing defendant in the aggravated range for second-degree murder, the trial court's order is remanded for correction of a clerical error in the determination section of the Findings of Aggravating and Mitigating Factors form to reflect its conclusion that the aggravating factor outweighed the mitigating factors.

Appeal by defendant from judgment entered 10 January 2001 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 24 December 2001.

Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for the State.

Brian Michael Aus for defendant-appellant.

THOMAS, Judge.

Defendant, Bradley Monte Brooks (Brooks), pled guilty to second-degree murder and was sentenced to 165 to 207 months in the North Carolina Department of Corrections. He appeals, arguing two assignments of error.

A juvenile petition alleged that Brooks was "a delinquent juvenile as defined by GS 7B-1501(7) in that in Durham County and on or about Wednesday, January 5, 2000 at approximately 1:32 pm, the above named juvenile unlawfully, willfully, and feloniously with malice and aforethought did kill Vondell Ellerbee. In violation of GS 14-17 Murder." Brooks did not become sixteen years old until 20 January 2000 and therefore, under N.C. Gen. Stat. § 7B-1601(a), original jurisdiction was properly in juvenile court.

At a probable cause hearing on 7 March 2000, the juvenile court found probable cause to believe Brooks committed first-degree murder. The juvenile court then, without holding a transfer hearing under N.C. Gen. Stat. § 7B-2203 (where parties would have the opportunity to present evidence), ordered that the case be transferred to superior court. Brooks appealed the transfer order to superior court. Under section 7B-2603, review by the superior court is only on the record, however, with the standard being abuse of discretion. The superior court does not have jurisdiction to review the findings as to probable cause. N.C. Gen. Stat. § 7B-2603 (1999).

The grand jury indicted Brooks on a charge of first-degree murder on 20 March 2000. The superior court heard and denied Brooks's appeal from the transfer decision on 10 January 2001, approximately ten months after oral notice of appeal was given. Brooks also made a written request for hearing on the appeal on 13 June 2000 and attached a transcript of the 7 March 2000 hearing.

Pursuant to a plea agreement, Brooks then pled guilty to second-degree murder. The trial court found one factor in aggravation and three factors in mitigation. After finding in open court that the aggravating factor outweighed the mitigating factors, the trial court imposed an aggravated sentence of 165 to 207 months imprisonment. While the sentence imposed in the written judgment entered by the trial court conforms with the sentence imposed in open court, the judgment indicates the trial court found that the mitigating factors outweighed the aggravating factor and that a mitigated sentence was justified.

[1] By his first assignment of error, Brooks argues the trial court erred by finding no error in the juvenile court's determination that the juvenile petition alleged first-degree murder and in the decision to transfer the case to superior court without a transfer hearing.

After a finding of probable cause, upon proper motion to transfer, the juvenile court is mandated to hold a transfer hearing *unless* transfer is required. N.C. Gen. Stat. § 7B-2202(e) (1999). Transfer is required if the juvenile was thirteen or older at the time the juvenile allegedly committed the offense, probable cause is found, and the alleged offense constitutes a Class A felony. N.C. Gen. Stat. § 7B-2200 (1999). Here, Brooks was fifteen at the time of the alleged offense and the juvenile court found probable cause. Brooks, however, argues that the petition did not allege a Class A felony, and therefore the district court was required to conduct a transfer hearing prior to a transfer. We disagree.

This Court has held that a juvenile petition properly alleged first-degree murder and satisfied the requirements of N.C. Gen. Stat. § 7A-560 (repealed effective 1 July 1999; now N.C. Gen. Stat. § 7B-1802 (1999)) with the following language:

> That the juvenile is a delinquent as defined by G.S. 7A-517(12) in that in Durham County and on or about December 30, 1997 the above named juvenile unlawfully, willfully and feloniously did

> of malice aforethought kill and murder Tracy Price G.S. 14-17 [Sic].

In re K.R.B., 134 N.C. App. 328, 331-32, 517 S.E.2d 200, 202, *appeal dismissed and review denied*, 351 N.C. 187, 541 S.E.2d 713 (1999). Here, the juvenile petition alleged the following:

> That the juvenile is a delinquent juvenile as defined by GS 7B-1501(7) in that in Durham County and on or about Wednesday, January 5, 2000 at approximately 1:32 pm, the above named juvenile unlawfully, willfully, and feloniously with malice and aforethought did kill Vondell Ellerbee. In violation of GS 14-17 Murder.

Given the substantial similarity of the language here to the petition at issue in *In re K.R.B.*, the petition in this matter, as in *In re K.R.B.*, "adequately charged the offense in a clear and concise manner and informed juvenile of the charge against him so he could adequately prepare a defense. If juvenile needed further clarification on the charge, he could have filed a motion for a bill of particulars pursuant to North Carolina General Statutes section 15A-925 (1997)." *Id.* The petition properly alleged first-degree murder and satisfied the requirements of N.C. Gen. Stat. § 7B-1802.

First-degree murder is a Class A felony. N.C. Gen. Stat. § 14-17 (1999). Again, "[i]f 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." N.C. Gen. Stat. § 7B-2200 (emphasis added). Under that circumstance, N.C. Gen. Stat. § 7B-2203 is not applicable. Because N.C. Gen. Stat. § 7B-2200 requires the district court to transfer the case to superior court upon a finding of probable cause in a Class A felony, the superior court properly denied Brooks's appeal from that transfer decision. *See* N.C. Gen. Stat. § 7B-2603 (a) (1999). This assignment of error is therefore overruled.

[2] By his second assignment of error, Brooks argues the trial court erred by sentencing him in the aggravated range of punishment. He argues the judgment contains no findings of factors in aggravation or mitigation, and he further asserts the form containing the findings of aggravating and mitigating factors makes no indication of whether there were aggravating factors. Brooks also notes that although the trial court indicated on the form that the factors in mitigation out-

weighed the factors in aggravation, it imposed a sentence in the aggravated range.

We note that the record before this Court indicates that the judgment does contain findings of factors in aggravation and mitigation. In addition, the Findings of Aggravating and Mitigating Factors form does contain one aggravating factor, that "[t]he defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." Brooks's assertions as to the absence of the aforementioned findings are therefore without merit. Our review of the transcript clearly shows the trial court found in open court that the aggravating factor outweighed the mitigating factors and imposed a sentence in the aggravated range for this B2 felony at Brooks's prior record level of I. *See* N.C. Gen. Stat. § 15A-1340.17(c) (1999). The trial court's written judgment contains the same terms of imprisonment.

We therefore remand this matter to the trial court for correction of the clerical error in the determination section of the Findings of Aggravating and Mitigating Factors form to reflect its conclusion that the aggravating factor outweighed the mitigating factors.

NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges WYNN and BRYANT concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. KELLY DOUGLAS AND JERRY FOGLEMAN, DEFENDANTS

No. COA01-52

(Filed 28 December 2001)

1. Abatement— declaratory judgment—no insurance coverage as a matter of law—judgment in second action affirmed

The trial court correctly granted judgment on the pleadings for plaintiff in a declaratory judgment action in Wake County where defendant had filed an action seeking adjudication of the same issues three and one-half hours earlier in Carteret County. Plaintiff's policy, as a matter of law, excludes coverage for defendant's injuries and the pleadings filed in Wake County would

as a matter of law yield the same result at either venue. Although it ran contrary to the general rule of abatement, the court's ruling nonetheless served the notions of judicial economy upon which the abatement doctrine was founded.

2. Insurance— homeowners—personal liability—secret videotaping—intentional act—exclusion from coverage

A homeowners insurance policy which excluded coverage for any injury "which is intended by or which may reasonably be expected to result from the intentional acts or omissions or ciminal acts or omissions" of the insured did not provide coverage for intentional infliction of emotional distress and intentional invasion of privacy arising from the insured's secret videotaping of a female in the bathroom of the insured's home because the insured's intentional act of secretly videotaping occupants of this bathroom was sufficiently certain to cause injury that the insured should have reasonably expected such injury to occur.

Appeal by defendant Kelly Douglas from judgment entered 18 October 2000 by Judge Abraham Penn Jones in Superior Court, Wake County. Heard in the Court of Appeals 17 October 2001.

Bailey & Dixon, L.L.P., by Gary S. Parsons and A. John Hoomani, for plaintiff.

Harrison, North, Cooke & Landreth, by A. Wayland Cooke, and Bennett, Beswick, McConkey & Marquardt, L.L.P., by George W. Beswick, for defendant-appellant Kelly Douglas.

WYNN, Judge.

Kelly Douglas appeals from the entry of judgment on the pleadings favoring Nationwide Mutual Insurance Company. We affirm.

The underlying facts show that while Kelly Douglas stayed at a home owned by Jerry Fogleman and insured by Nationwide Insurance, Fogleman secretly videotaped her in the bathroom. Following Fogleman's conviction under the secret peeping statute, N.C. Gen. Stat. § 14-202 (1999), Douglas brought a civil action against him alleging intentional infliction of emotional distress and invasion of privacy (98 CVS 386). Nationwide Insurance defended Fogleman under a reservation of rights, and a jury awarded Douglas compensatory damages in the amount of $33,000.00 and punitive damages in the amount of $50,000.00.

On 30 December 1999, Nationwide Insurance brought a declaratory judgment action in Superior Court, Wake County, seeking relief from any obligation to indemnify Fogleman on the judgment against him. Subsequently, Superior Court Judge A. Leon Stanback, Jr., ordered a change of venue to Carteret County. On 20 June 2000, Nationwide Insurance voluntarily dismissed that action without prejudice under N.C. Gen. Stat. § 1A-1, Rule 41 (1999).

Three days later at 12:54 p.m., Douglas filed a declaratory judgment action in Superior Court, Carteret County seeking an adjudication on the same issues under the action previously dismissed by Nationwide Insurance. About three and one-half hours later, Nationwide Insurance refiled its declaratory judgment action in Superior Court, Wake County.

Notwithstanding notice of the pending action in Carteret County, Superior Court Judge Abraham Penn Jones entered judgment in the Wake County action (1) denying Douglas's motion to dismiss based on the pending action in Carteret County, (2) denying Douglas's alternative motion for change of venue to Carteret County, and (3) granting Nationwide Insurance's Rule 12(c) motion for judgment on the pleadings. We uphold the trial court's judgment.

[1] Douglas argues that the trial court should have dismissed Nationwide Insurance's action in Wake County because she had filed an action about three and one-half hours earlier in Carteret County (00 CVS 726). "Under the law of this state, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action." *Eways v. Governor's Island*, 326 N.C. 552, 558, 391 S.E.2d 182, 185 (1990) (citing *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 72 S.E.2d 860 (1952); *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952)). *See State ex rel. Onslow County v. Mercer*, 128 N.C. App. 371, 496 S.E.2d 585 (1998). Douglas's motion to dismiss presents essentially the same questions as the outmoded plea of abatement, and was properly raised in her responsive pleading. *See Brooks v. Brooks*, 107 N.C. App. 44, 47, 418 S.E.2d 534, 536 (1992) ("[a] plea in abatement based on a prior pending action . . . is a preliminary motion of the type enumerated in Rule 12(b)(2)-(5) and the time for filing such motion is governed by that rule"); *Lehrer v. Manufacturing Co.*, 13 N.C. App. 412, 185 S.E.2d 727 (1972).

However, in *Mercer*, this Court recognized that the plea of abatement doctrine serves the purpose of avoiding a subsequent action

which is "wholly unnecessary and therefore, in the interest of judicial economy, should be subject to a plea in abatement." 128 N.C. App. at 375, 496 S.E.2d at 587. In this matter, in light of our recent decision in *N.C. Farm Bureau Mut. Ins. Co. v. Allen*, 146 N.C. App. 539, 553 S.E.2d 420 (2001), judgment on the pleadings in favor of Nationwide Insurance would be warranted regardless of whether we allow the Wake County judgment to stand or remand this matter on the basis of the plea of abatement doctrine to be decided in Carteret County. Remanding this matter for abatement of the Wake County action in deference to the Carteret County action would therefore offend the purpose behind the abatement doctrine. Thus, in the interest of judicial economy, we discern no reason to make a technical application of the plea of abatement doctrine to this case since the result under *Allen* would be the same in either county.

[2] In *Allen*, this Court construed an exclusionary provision substantially the same as the language at issue in the instant case. In that case, the homeowner's insurance policy excluded personal liability and medical payments coverage for bodily injury "which is expected or intended by the insured." *Id.* at 541, 553 S.E.2d at 421. Similarly, in the case at bar, Nationwide Insurance's policy excludes insurance coverage for any injury "[w]hich is intended by or which may reasonably be expected to result from the intentional acts or omissions or criminal acts or omissions of" the insured. As in *Allen*, the question before us is whether, as a matter of law, the injuries suffered by Douglas were intended or may reasonably have been expected by Fogleman, such that coverage for those injuries is barred under Nationwide Insurance's policy. We conclude that the policy, as a matter of law, excludes coverage for Douglas's injuries, as Fogleman's intentional act of concealing a video camera in his bathroom and filming its occupants was sufficiently certain to cause injury that Fogleman should have reasonably expected such injury to occur.[1] *See Allen*, 146 N.C. App. at 546, 553 S.E.2d at 424.

In light of this Court's decision in *Allen*, the pleadings in the matter filed in Wake County being the same as those filed in Carteret County would as a matter of law yield the same result at either venue: judgment in favor of Nationwide Insurance. Thus, we conclude that the trial court's failure to abate the action in Wake County in favor of

1. Notably, in the underlying civil case (98 CVS 386) that gave rise to the compensatory and punitive damages for which Nationwide Insurance is being asked to indemnify Fogleman, a jury found Fogleman liable to Douglas for *intentional* infliction of emotional distress and *intentional* invasion of privacy.

the prior filed action in Carteret County, although it ran contrary to the general rule of abatement, nonetheless served the hoary notions of judicial economy upon which the abatement doctrine is founded by effectively avoiding a multiplicity of actions, excess delay and duplicitous costs. *See Mercer*, 128 N.C. App. at 375, 496 S.E.2d at 587.

The trial court's 18 October 2000 judgment on the pleadings for plaintiff is therefore,

Affirmed.

Judges McCULLOUGH and BRYANT concur.

KENNETH J. JOHNSON, PLAINTIFF v. DALLAS M. PEARCE, DEFENDANT

No. COA01-47

(Filed 28 December 2001)

Criminal Conversation— post-separation conduct—divorce and alienation of affections distinguished

The trial court did not err by concluding that a criminal conversation claim may be based solely on post-separation conduct. The 1995 amendments to N.C.G.S. § 50-16.1A(3) dealt with divorce and alimony and do not concern criminal conversation, and *Pharr v. Beck* dealt solely with alienation of affections.

Appeal by defendant from judgment entered 6 October 2000 by Judge James C. Spencer in Wake County Superior Court. Heard in the Court of Appeals 5 November 2001.

H. Wood Vann for the plaintiff-appellee.

Smith Debnam Narron Wyche Story & Myers, LLP, by John W. Narron and Nina G. Kilbride; Daughtry, Woodard, Lawrence & Starling, LLP, by Stephen C. Woodard, Jr.; Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Wiley P. Wooten; Morgenstern & Donuomo, P.L.L.C., by Barbara R. Morgenstern; James, McElroy & Diehl, P.A., by William K. Diehl, Jr.; Reid, Lewis, Deese, Nance & Person, by Renny W. Deese; Davis & Harwell, by Joslin Davis; and Sally Burnett Sharp, for the defendant-appellant.

EAGLES, Chief Judge.

Dallas M. Pearce ("defendant") appeals from the trial court's judgment awarding Kenneth J. Johnson ("plaintiff") $3,000.00 for defendant's criminal conversation with plaintiff's wife. The sole issue on appeal is whether the trial court erred in granting plaintiff's motion for directed verdict and finding that post-separation conduct may be the basis for a criminal conversation claim. After careful review, we hold that a criminal conversation claim may be based solely on post-separation conduct.

At trial, the evidence tended to show that plaintiff married Rhonda Mitchell on 14 September 1991. In 1994, the couple began to have marital difficulties. In December 1996, Ms. Mitchell began telephoning defendant, a member of her church. The two soon became close friends. On 14 July 1997, plaintiff discovered that Ms. Mitchell was regularly calling defendant, and he confronted Ms. Mitchell. An argument ensued, and the next day, 15 July 1997, Ms. Mitchell left the marital home. Ms. Mitchell and defendant began dating in December 1997. The two did not engage in sexual intercourse until January 1998, approximately five months after plaintiff and Ms. Mitchell separated.

On 1 June 1998, plaintiff filed a complaint against defendant alleging alienation of affections and criminal conversation. A non-jury trial was held during the 11 September 2000 Civil Session of Wake County Superior Court, the Honorable James C. Spencer presiding. At the close of all evidence, plaintiff made a motion for a directed verdict on the issue of criminal conversation, and the trial court granted the motion. Thereafter, Judge Spencer entered judgment concluding that defendant did not alienate the affections of Ms. Mitchell, that defendant did commit criminal conversation with plaintiff's wife, and that plaintiff was entitled to recover $3,000.00 in damages from defendant. Defendant appeals.

"Criminal conversation is adultery. The cause of action is based on the violation of the fundamental right to exclusive sexual intercourse between spouses." *Scott v. Kiker*, 59 N.C. App. 458, 461, 297 S.E.2d 142, 145 (1982). "[T]he gravamen of the cause of action . . . is the defilement of plaintiff's wife by the defendant." *Chestnut v. Sutton*, 207 N.C. 256, 257, 176 S.E. 743, 743 (1934). The elements of the tort "are the actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the

coverture." *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996).

Our Supreme Court, and this Court following its lead, have made it abundantly clear that " '[t]he mere fact of separation will not bar an action for criminal conversation occurring during separation.' " *Bryant v. Carrier*, 214 N.C. 191, 195, 198 S.E. 619, 621 (1938) (quoting 30 C.J. 1156); *see also Brown*, 124 N.C. App. at 380, 477 S.E.2d at 237; *Cannon v. Miller*, 71 N.C. App. 460, 465, 322 S.E.2d 780, 785 (1984), *vacated by*, 313 N.C. 324, 327 S.E.2d 888 (1985). Here, the evidence showed that defendant and plaintiff's wife engaged in sexual intercourse during the coverture. Thus, the facts conclusively establish defendant's criminal conversation with plaintiff's wife.

On appeal, defendant contends that a 1995 amendment to Chapter 50 (Divorce and Alimony) of our General Statutes supports a holding that post-separation conduct is not actionable as criminal conversation. We disagree.

In 1995, the General Assembly amended G.S. § 50-16.1A(3) and redefined "marital misconduct" as including only those "acts that occur during the marriage and prior to or on the date of separation." *See* 1995 N.C. Sess. Laws ch. 319, § 2. Consequently, our divorce and alimony statutes currently permit only 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." G.S. § 50-16.3A(b)(1). Nevertheless, these 1995 amendments deal strictly with the law as it applies to divorce and alimony. These amendments do not concern, nor do they even refer to, the tort of criminal conversation. Accordingly, we hold that post-separation conduct is sufficient to establish a claim for criminal conversation.

We are aware that this Court recently relied on the 1995 amendments to G.S. §§ 50-16.1A(3) and 50-16.3A(b)(1) in holding that "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." *Pharr v. Beck*, 147 N.C. App. 268, 273, 554 S.E.2d 851, 855. However, since *Pharr* dealt solely with alienation of affections, we are not bound by that panel's *dicta* stating that "the same principles would apply in a criminal conversation case." *Id.* at 273 n.4, 554 S.E.2d at 855.

We note that this is a controversial area in the legislative arena. However, our Supreme Court has made it clear that the tort of criminal conversation exists in our State. *See Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888. Only our General Assembly and Supreme Court have the authority to abrogate or modify a common law tort. *See State v. Lane*, 115 N.C. App. 25, 30, 444 S.E.2d 233, 237 (1994) ("[i]t is the province of our legislature to change the accepted common law in this state"); *see also State v. Freeman*, 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981) ("[a]bsent a legislative declaration, [the Supreme] Court possesses the authority to alter judicially created common law when it deems it necessary in light of experience and reason").

Until the legislature or Supreme Court acts to modify the tort of criminal conversation, we are bound by decisions of our Supreme Court and prior panels of this Court recognizing that the mere fact of separation does not bar a claim for criminal conversation occurring during the separation. *See Bryant*, 214 N.C. at 195, 198 S.E. at 621; *Brown*, 124 N.C. App. at 380, 477 S.E.2d at 237; *Cannon*, 71 N.C. App. at 465, 322 S.E.2d at 785; *see also Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996) ("[i]t is elementary that this Court is bound by holdings of the Supreme Court"); *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"). Accordingly, we hold that the trial court did not err in concluding that a criminal conversation claim may be based solely on post-separation conduct.

Affirmed.

Judges BIGGS and SMITH concur.

STATE OF NORTH CAROLINA v. ANTONIO HICKS

No. COA01-256

(Filed 28 December 2001)

Probation and Parole— revocation—after expiration of probation period

The trial court erred by revoking defendant's probation where defendant received an eighteen-month probation on 18 February 1998; his probation was scheduled to expire on 18 August 1999; and the violation report was signed on 23 July 1999 but not filed until 18 September 2000, thirteen months after the probation period expired. For a court to retain jurisdiction over a probationer after the period of probation has expired, the plain language of N.C.G.S. § 15A-1344(f)(1) requires the State to file a written motion with the clerk indicating the State's intent to conduct a revocation hearing before the period of probation expires.

Appeal by defendant from judgment entered 10 October 2000 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 November 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Judith R. Bullock, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

EAGLES, Chief Judge.

On 18 February 1998, defendant Antonio Hicks pled guilty to four counts of embezzlement. Judge Raymond A. Warren suspended defendant's six to eight month term of imprisonment and placed defendant on supervised probation for a period of eighteen months.

On 23 July 1999, Probation Officer Teneika Clifton (Officer Clifton) signed and dated a Violation Report alleging that defendant failed to pay monetary conditions of probation, that he missed scheduled office appointments on four occasions, and that he had absconded from supervision. The Violation Report and Order for Arrest were file-stamped on 18 September 2000. At the 10 October 2000 revocation hearing, defendant, appearing pro se, denied the allegations contained in the Violation Report.

At the hearing, the State's evidence tended to show that Probation Officer Roxanne Prampong (Officer Prampong) inherited defendant's case from another officer on 3 April 2000. At that time, defendant was alleged to be an absconder. Defendant's file indicated that defendant missed office appointments on 4 May 1999, 1 June 1999, 17 June 1999, and 22 June 1999. The previous probation officer made a home visit on 1 July 1999, left a note on the door, but had no contact with defendant. Officer Prampong also determined that as to the monetary conditions of his probation, defendant was $360.00 in arrears.

Defendant testified that he met with Officer Clifton in April 1999. Defendant testified that Officer Clifton told him that he only had $120.00 left to pay, and then it would be over because he would have met all of his obligations of the judgment. The same day, defendant went to bookkeeping and paid that money. After he did so, defendant assumed his probation was over. He continued to reside with his wife and children at the same location. He testified that he did not abscond and that if he had known that he needed to pay more money, he would have done so.

After hearing testimony, Judge Beal found that the alleged violations were true and willful. Judge Beal revoked defendant's probationary sentence and activated the sentence of six to eight months incarceration. Defendant appeals.

On appeal, defendant contends that the trial court erred in revoking defendant's probation. Defendant argues (1) that the trial court lacked jurisdiction over the subject matter of the hearing where the period of probation had expired before the time of the hearing and (2) that the evidence was insufficient to support the trial court's finding of fact that defendant wilfully and without lawful excuse violated the conditions of his probation.

A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute. In *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980), Justice Huskins wrote:

> When a sentence has been suspended and defendant placed on probation on certain named conditions, the court may, *at any time during the period of probation*, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect. G.S. 15A-1344(d) (Supp. 1979). (Citations omitted.) But the State may

not do so *after the expiration of the period of probation* except as provided in G.S. 15A-1344(f). (Citations omitted.)

North Carolina General Statute section 15A-1344(f) provides that once the period of probation has ended, the court may revoke probation only if:

(1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and

(2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

Here, defendant received an eighteen-month period of probation that began on 18 February 1998. Defendant's probation was scheduled to expire on 18 August 1999. The date written by the probation officer on the Violation Report indicates that the officer signed the report on 23 July 1999. The file-stamp on the report, however, indicates that it was not filed with the clerk until 18 September 2000, thirteen months after defendant's probation period expired. To properly revoke defendant's probation after 18 August 1999, the State would have had to file a written motion with the clerk before the expiration of the probation period indicating the State's intent to conduct a revocation hearing. This did not occur.

For a court to retain jurisdiction over a probationer after the period of probation has expired, the plain language of N.C.G.S. § 15A-1344(f)(1) requires the State to "[file] a written motion with the clerk indicating [the State's] intent to conduct a revocation hearing" before the period of probation expires. Here, the State failed to file defendant's Violation Report before defendant's probation period had expired.

Because the State's failure to comply with the plain language of N.C.G.S. § 15A-1344(f)(1) is dispositive, we decline to address the additional arguments presented by defendant's counsel and hold that the probation revocation proceeding should have been dismissed. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)). Accordingly, the judgment appealed from is arrested and defendant discharged.

Judgment arrested.

Judges MARTIN and BIGGS concur.

CRAIG WASHINGTON, PLAINTIFF v. SHARON WASHINGTON, DEFENDANT

No. COA01-250

(Filed 28 December 2001)

Appeal and Error— appealability—divorce from bed and board—child custody deferred—interlocutory order

A defendant's appeal from a judgment granting a divorce from bed and board is dismissed as an appeal from an interlocutory order, because: (1) although orders granting divorce from bed and board are final orders, the language in this order explicitly provides that the issue of child custody was deferred until the parties have had the opportunity to participate in mediation; (2) this order is not a final judicial determination of all the claims raised in the pleadings; and (3) the trial court did not certify this order for appeal, and defendant has not argued that delay would affect a substantial right.

Appeal by defendant from judgment entered 4 August 2000 by Judge Jane V. Harper in Mecklenburg County District Court. Heard in the Court of Appeals 5 December 2001.

No brief filed for plaintiff-appellee.

Marnite Shuford, for defendant-appellant.

TYSON, Judge.

Sharon Washington ("defendant") appeals from an order granting Craig Washington ("plaintiff") a divorce from bed and board. We dismiss the appeal as interlocutory.

I. Facts

Plaintiff and defendant were married on 28 May 1988. Two minor children were born of the marriage.

On 23 January 2000, plaintiff filed a complaint against defendant for divorce from bed and board on multiple grounds, child custody, and child support. Defendant answered and counterclaimed for divorce from bed and board, post-separation support, alimony, child custody, and child support. The trial court heard the case on 20 July 2000.

On 3 August 2000, the trial court granted plaintiff's claim for divorce from bed and board based on indignities he suffered as a result of defendant's spendthrift behavior, and dismissed plaintiff's other grounds for divorce from bed and board. The trial court also granted defendant's claim for divorce from bed and board based upon constructive abandonment and dismissed defendant's other grounds for divorce from bed and board. Plaintiff's and defendant's remaining issues concerning child custody, child support, alimony, and post separation support were not resolved in the order. Defendant only appeals from the trial court's grant of divorce from bed and board for plaintiff.

Defendant assigns as error the trial court's failure to grant her motion to dismiss arguing that the findings of fact do not support its conclusions of law, and that the conclusions of law do not entitle plaintiff to a divorce from bed and board. We do not reach defendant's contentions. The order she appeals from is interlocutory.

We note at the outset that neither party addressed the issue of defendant's right of appeal. "If an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question *of appealability has not been raised by the parties themselves.*" *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 201, 240 S.E.2d 338, 340 (1978) (citations omitted) (emphasis supplied).

A judgment or order is "either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, 54(a) (1967). "A final judgment is one which disposes of the case as to all the parties, leaving nothing to be judicially determined between them in the trial court . . . . An interlocutory order . . . 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. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted).

The general rule is that "there is no right to appeal from an interlocutory order." *Mills Pointe Homeowner's Assoc., Inc. v. Whitmire*,

146 N.C. App. 297, 298, 551 S.E.2d 924, 926 (September 18, 2001) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994)); *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999). There are two exceptions: (1) a " 'final judgment as to one or more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal," *Jeffreys*, at 379, 444 S.E.2d at 253 (quoting N.C. R. Civ. P. 54(b); *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993)), and (2) when delay would irreparably affect a substantial right. *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998) (citations omitted).

Our Court has held that a divorce from bed and board pursuant to N.C. Gen. Stat. § 50-7 (1985) is a final order. *Kale v. Kale*, 25 N.C. App. 99, 101-02, 212 S.E.2d 234, 236, *cert. denied*, 287 N.C. 259, 214 S.E.2d 431 (1975). At bar, the parties raised numerous additional issues at trial regarding custody and support matters. Although orders granting divorce from bed and board are final orders, the language in this order explicitly provides that "[t]he issue of custody was deferred until the parties have had the opportunity to participate in mediation." This order is not a final judicial determination of all the claims raised in the pleadings. The trial court did not certify this order for appeal, and defendant has not argued that delay would affect a substantial right. We dismiss defendant's appeal.

Appeal dismissed.

Judges TIMMONS-GOODSON and HUDSON concur.

MMR HOLDINGS, LLC AND TOWN & COUNTRY FORD, INCORPORATED, PETITIONERS v. CITY OF CHARLOTTE AND THE CHARLOTTE ZONING BOARD OF ADJUSTMENT, RESPONDENTS

No. COA01-185

(Filed 28 December 2001)

Laches— municipal sign ordinance—failure to show prejudice

The trial court did not err by concluding that respondent city is not precluded by the affirmative defense of laches from enforcing its sign ordinance against petitioner car dealership, because:

(1) there were no assurances by city officials that the signs would not violate the ordinance; (2) petitioner did not spend any money relying on assurances from city officials; and (3) the evidence fails to show a resulting prejudice based on the city's delay in enforcing the ordinance.

Appeal by petitioners from judgment entered 29 November 2000 by Judge L. Oliver Noble in Superior Court, Mecklenburg County. Heard in the Court of Appeals 5 December 2001.

James, McElroy & Diehl, P.A., by Richard B. Fennell, for petitioners-appellants.

David M. Smith, Senior Assistant City Attorney, for respondents-appellees.

WYNN, Judge.

In *Abernathy v. Town of Boone Board of Adjustment*, 109 N.C. App. 459, 427 S.E.2d 875 (1993), this Court recognized that the defense of laches could be asserted to prevent a municipality from enforcing its ordinances.

Petitioner, Town and Country Ford, operates an auto dealership in Charlotte and leases property from petitioner MMR Holdings. They argue on appeal that the doctrine of laches barred the City of Charlotte from declaring their balloons, pennants and other declarations to be a violation of a sign ordinance. We review *de novo* the petitioners' contention that the record contains an error of law and hold that the defense of laches does not apply to the facts of this case. *See Westminister Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417-140 (2000), *affirmed*, —— N.C. ——, 554 S.E.2d 634 (2001). Therefore, we affirm the Superior Court's holding that the City of Charlotte Zoning Board of Adjustment committed no error in denying petitioners' request for a variance from the sign ordinance.

To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvan-

tage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim. *See Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976); *Allen v. City of Burlington Bd. of Adjust.*, 100 N.C. App. 615, 397 S.E.2d 657 (1990).

In *Abernathy*, Judge Jack Lewis writing for the Court, astutely tempered "the general rule to be that laches cannot be asserted against a municipality to prevent it from enforcing its own ordinances when the delay is reasonable and defendant has suffered no disadvantage due to the delay." *Id.* at 465, 427 S.E.2d at 878. Thus, Judge Lewis narrowly determined that under the facts of that case, the doctrine of laches applied because the Town of Boone delayed for almost four years before trying to enforce the ordinance although it was aware of the potential violation. Additionally, after the business owner was assured by two town officials that its sign was in compliance, the owner spent $250,000 to purchase the adjacent property. Thus, this Court concluded,

> As a result, we hold that the unreasonable delay on the part of the Town of Boone has worked an unreasonable disadvantage to [the business owner] and that it would be unjust to allow the Town of Boone to now enforce its sign ordinance

Id. at 465, 427 S.E.2d 879.

In contrast to the fact-specific holding of *Abernathy*, in the present case, there were no assurances by city officials that the signs would not violate the Ordinance, and Town and Country Ford did not spend any money relying on assurances from city officials. Thus, the Superior Court found that:

> 11. Town and Country Ford made no change of position based upon assurances that the Zoning staff had given to Town and Country Ford any assurance that the unlawful signage could continue to be used.

Nonetheless, Town and Country Ford argues that as a result in the City's delay in enforcing the Ordinance, it will be required to spend substantially more money to renovate its building than it would have spent had it known that the City was taking the position that the decorations at issue violated the sign ordinance in 1986 or 1990. However, the record also shows that Town and Country received a warning citation in 1998 but continued to keep the banners up after

the warning. There is no evidence in the record that any city official told Town and Country that the signs complied with the Ordinance, and there is no evidence in the record that based on assurances from city officials that Town and Country changed its signs or spent money in reliance. Furthermore, the evidence fails to show a resulting prejudice because of the City's delay in enforcing the Ordinance. *See Knotville Vol. Fire Dept., N.C. v. Wilkes County*, 85 N.C. App. 598, 601, 355 S.E.2d 139, 141, *disc. review denied*, 320 N.C. 632, 360 S.E.2d 88 (1987). Since the facts of this case do not support a determination that the delay was unreasonable nor that Town and Country suffered great disadvantage due to the delay, we uphold the Superior Court's conclusion of law that the City of Charlotte is not precluded from enforcing its sign ordinance against Town and Country.

Affirmed.

Judges WALKER and THOMAS concur.

ATCHLEY GRADING COMPANY, PLAINTIFF-APPELLANT v. WEST CABARRUS CHURCH, DEFENDANT-APPELLEE

No. COA01-198

(Filed 28 December 2001)

Appeal and Error— preservation of issues—failure to present argument or authority

A plaintiff's appeal from the trial court's grant of summary judgment on 26 April 2000 in favor of defendant in a claim of lien and breach of contract action is dismissed because: (1) plaintiff only gave notice of appeal from the 20 October 2000 order denying plaintiff's N.C.G.S. § 1A-1, Rules 59(7) and 60(b) motion; and (2) plaintiff has not presented any arguments or authority pertaining to the denial of its N.C.G.S. § 1A-1, Rules 59(7) and 60(b) motion as required by N.C. R. App. P. 28.

Appeal by plaintiff from order entered 20 October 2000 by Judge Richard D. Boner in Cabarrus County Superior Court. Heard in the Court of Appeals 6 December 2001.

Carl S. Conroy for plaintiff-appellant.

Hartsell, Hartsell & White, P.A., by J. Merritt White, III, for defendant-appellee.

BRYANT, Judge.

On 17 May 1999, plaintiff Atchley Grading Company filed a claim of lien for the amount of $80,811.50 against real property owned by defendant West Cabarrus Church for services plaintiff provided for defendant. Plaintiff instituted this action on 30 August 1999 to enforce the lien and present a claim for breach of contract. Defendant filed an answer and counterclaim on 28 October 1999. Plaintiff filed a reply on 15 December 1999.

On 27 March 2000, defendant filed a motion for summary judgment, and plaintiff filed a motion to amend its complaint to include a claim of unfair and deceptive trade practices on the same date. A hearing on the motions was held on 17 April 2000 with the Honorable Richard D. Boner presiding. By order entered 26 April 2000, defendant's motion for summary judgment was granted pursuant to N.C. R. Civ. Pro. 56.

On 8 May 2000, plaintiff filed a motion for a new trial and relief from the 26 April 2000 order pursuant to N.C. R. Civ. Pro. 59(a)(7) and 60(b)(6), respectively. A hearing for plaintiff's motion was held on 5 June 2000 with Judge Boner presiding. By order entered 20 October 2000, plaintiff's N.C. R. Civ. Pro. 59(a)(7) and 60(b)(6) motion was denied. On 17 November 2000, plaintiff filed notice of appeal from the 20 October 2000 order.

On appeal, plaintiff presents three arguments all relating to the 26 April 2000 order by which defendant's motion for summary judgment was granted. We note that plaintiff only gave notice of appeal from the 20 October 2000 order denying plaintiff's N.C. R. Civ. Pro. 59(a)(7) and 60(b)(6) motion. Any arguments pertaining to the underlying 26 April 2000 order are not properly before this Court. *See* N.C. R. App. P. 3; *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 and internal quotations omitted).

In violation of the rules of appellate procedure, plaintiff has neither presented any arguments nor authority pertaining to the

denial of its N.C. R. Civ. Pro. 59(a)(7) and 60(b)(6) motion. *See* N.C. R. App. P. 28. Based on the abovementioned violations, plaintiff's appeal is deemed abandoned. Plaintiff's appeal is therefore dismissed.

Dismissed.

Judges McGEE and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 28 DECEMBER 2001

CONWAY v. YEOMANS No. 01-212	Carteret (00CVS920)	Affirmed
DOUBLE H FARMS, INC. v. SURLES No. 00-694	Sampson (99CVS688)	Dismissed
DULA v. McPHERSON No. 01-169	Guilford (99CVS535)	Affirmed
ELECTRICS OF ASHEVILLE, INC. v. JAIPUR CORP. No. 00-1335	Buncombe (97CVS3351)	Reversed and remanded
FINN v. FRANKLIN CTY. No. 00-1240	Ind. Comm. (I.C. 840232)	Affirmed
HARRELL v. HAWLEY No. 00-941	Martin (97CVS272)	Dismissed
HOWARD v. SPEECHCENTER, INC. No. 01-95	Ind. Comm. (I.C. 143065) (I.C. 640111)	Affirmed in part, and remanded in part
IN RE BOONE No. 01-857	Martin (97J34)	Affirmed
IN RE HALL No. 01-591	Alexander (97J8)	Dismissed
IN RE HYATT No. 00-1266	Mitchell (99J1)	Affirmed
IN RE RADFORD No. 01-434	Burke (00J37) (98J47)	Affirmed
IN RE RADFORD No. 01-702	Burke (00J37) (98J47)	Vacated
IN RE UZZLE No. 01-429	Guilford (00J619)	Affirmed
KEISER v. SCHULTZ No. 01-197	Mecklenburg (99CVS13784)	Affirmed
McGAHA v. McGAHA No. 00-1410	Buncombe (97CVD3944)	Dismissed
McRAE WOODTREATING, INC. v. BULLARD No. 01-579	Montgomery (00CVS489)	Affirmed

MEJIA v. FULTON No. 01-51	Ind. Comm. (I.C. 970005)	Affirmed
MERRITT v. OWEN No. 01-270	Rowan (99CVS1155)	Dismissed
MOUNTAIN LAKE SHORES DEV. CORP. v. BLUEBIRD CORP. No. 01-71	Davidson (99CVS3243)	Affirmed in part, and remanded
NEWLANDS v. NEWLANDS No. 00-1072	Mecklenburg (92CVD16496)	Vacated and remanded
PATEL v. COUNTY OF BUNCOMBE No. 01-221	Buncombe (00CVS3583)	Affirmed as to defendants. Appeal dismissed as to plaintiffs.
PINEWOOD MANOR HOMES, INC. v. SIMMONS No. 00-1340	Brunswick (99CVD658)	No error
RAPER v. RAPER No. 00-1280	Buncombe (98CVD4908)	Affirmed in part, reversed and remanded in part
ROSARIO v. ROSARIO No. 00-1540	Onslow (97CVD2697)	Affirmed
ROWE v. E.I. DUPONT DE NEMOURS & CO. No. 01-8	Ind. Comm. (I.C. 681886)	Affirmed
SCHOOLCRAFT ENTERS. v. BRIGHT LIFE, LLC No. 00-1469	Richmond (00CVS753)	Affirmed
STATE v. BAKER No. 00-1281	Catawba (99CRS3343)	No error
STATE v. BLACKWELL No. 01-83	Guilford (99CRS103879) (99CRS103880)	No error
STATE v. CARTER No. 01-307	Guilford (00CRS23389) (00CRS75615)	Affirmed
STATE v. CREWS No. 01-130	Forsyth (00CRS050667)	No error
STATE v. DAVIS No. 01-19	Buncombe (98CRS66472) (99CRS8991) (99CRS59056)	Motion to dismiss denied; no error

STATE v. EDWARDS No. 00-1392	Mecklenburg (99CRS151171) (98CRS39089)	No error
STATE v. FOWLER No. 01-69	Columbus (99CRS5613) (99CRS5614)	No error
STATE v. GARNER No. 00-1520	Lee (99CRS51892) (00CRS667) (00CRS668)	No error
STATE v. GRADY No. 01-423	New Hanover (00CRS50213)	No error
STATE v. GREENE No. 01-172	Cabarrus (96CRS16568) (97CRS17632) (00CRS13430) (00CRS13431) (00CRS13432) (00CRS13433) (00CRS13434) (00CRS13435) (00CRS13436) (00CRS13437)	Affirmed
STATE v. HAMILTON No. 01-466	Union (00CRS1259) (00CRS1261)	No error
STATE v. HASCH No. 01-535	Catawba (00CRS7466) (00CRS3534) (97CRS13269)	97CRS13269— Remanded 00CRS3534 and 00CRS7466— Affirmed
STATE v. HENDERSON No. 01-145	Moore (99CRS4200) (00CRS974)	Appeal dismissed; petition for writ of certiorari denied
STATE v. HICKS No. 01-142	Cumberland (98CRS11435)	No error
STATE v. HOLLEMAN No. 00-1207	Forsyth (99CRS009972)	Affirmed
STATE v. JENNINGS No. 00-1339	New Hanover (99CRS2090) (99CRS2091) (99CRS2491) (99CRS2492)	No error

STATE v. JOHNSON No. 00-1374	New Hanover (99CRS18772) (99CRS18773)	No error
STATE v. JONES No. 01-519	Wake (96CRS55289)	No error
STATE v. LYONS No. 01-31	Wake (99CRS79540)	No error
STATE v. MAGEE No. 01-215	Cumberland (98CRS10715)	No error
STATE v. MASON No. 01-365	Wayne (99CRS53414) (99CRS53415) (99CRS53416)	No error
STATE v. McCRAY No. 01-403	Guilford (98CRS72348)	No error
STATE v. NORMAN No. 00-1458	Wake (97CRS49066) (97CRS49067)	No prejudicial error
STATE v. PARKER No. 01-413	Halifax (98CRS1)	No error
STATE v. PULLEY No. 00-1479	Durham (99CRS13831) (99CRS58990)	No error
STATE v. PULLIUM No. 01-363	Davidson (00CRS3190)	No error
STATE v. REEVES No. 01-149	Richmond (00CRS1144)	No error
STATE v. RUTLEDGE No. 01-491	Forsyth (96CRS3457)	No error
STATE v. SHACKLEFORD No. 01-36	Greene (00CRS337)	No error
STATE v. SMITH No. 00-1192	Person (99CRS4189) (99CRS4190) (99CRS4191)	No error
STATE v. STUBBS No. 01-259	Harnett (99CRS2996) (99CRS2997) (99CRS3558)	No error
STATE v. TALBERT No. 00-1453	Davidson (98CRS7161) (98CRS7162)	No error

STATE v. URIBE No. 01-452	Buncombe (98CRS52526) (98CRS52702)	No error
STATE v. WATSON No. 00-1522	Wayne (99CRS10421)	No error
STATE v. WILLIAMS No. 01-347	Scotland (00CRS228)	No error
WATSON v. UNDERWRITERS AT LLOYD'S LONDON No. 00-1433	Columbus (00CVS810)	Vacated and remanded
WEBB v. KILLO EXTERMINATING CO. No. 00-1432	Mecklenburg (98CVS17639)	Dismissed
WILLIAM JORDAN AUCTION & REALTY, INC. v. HUFFMAN No. 01-56	Ashe (99CVS44)	Dismissed in part, reversed in part

ALCHEMY COMMUNICATIONS CORP. AND ALCHEMY COMMUNICATIONS LIMITED PARTNERSHIP #1, PLAINTIFFS v. PRESTON DEVELOPMENT COMPANY, AND FLORA DEVELOPMENT, LLC, DEFENDANTS

No. COA01-75

(Filed 2 January 2002)

Landlord and Tenant— commercial lease—declaratory judgment—change in radio station's call letters

A de novo review reveals that the trial court did not err in a declaratory judgment action seeking the meaning and application of a commercial lease by concluding plaintiffs' change in the radio station's call letters from WKIX-FM to WRBZ-AM did not constitute a breach of the lease and rendered moot defendant's counterclaims seeking possession of the premises and the fair rental value of the premises from the date of termination to the date that plaintiffs vacate the premises, because: (1) there is a latent ambiguity in the words "Radio Station WKIX-AM" found in Section 7 of the lease; (2) a review of the lease in its entirety and considering extrinsic facts revealed that the original parties to the lease used the call letters WKIX to describe and name the radio station and not to restrict the use of the transmitter site only to a radio station using particular call letters; (3) it can be deduced from the automatic consent for assignment or sublease of the original tenant's interests under the lease to a transferee of the radio station's license that the original parties knew that the radio station license might be transferred from time to time and the transferee/licensee would automatically be assigned or subleased the transmitter site; and (4) the original parties intended to have a long-term lease, the transmitter site was built and was being used to broadcast the radio station's signal at the time of the lease's formation, and the original parties were in the AM radio business.

Judge TYSON concurring in the result.

Appeal by defendant Flora Development, LLC, from judgment entered 18 August 2000 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 18 October 2001.

Womble Carlyle Sandridge & Rice, PLLC, by John C. Cooke and Christine Carlisle Odom, for plaintiff-appellees.

Higgins, Frankstone, Graves & Morris, P.A., by David J. Hart, for defendant-appellant.

MARTIN, Judge.

Defendant Flora Development, LLC (hereinafter "Flora"), appeals from a declaratory judgment in which the trial court declared the meaning of several provisions in a commercial lease. The trial court entered judgment declaring the rights of the parties under the lease and dismissing defendants' counterclaims in which defendants sought possession and rentals, based upon assertions that plaintiffs, Alchemy Communications Corp. and Alchemy Communications Limited Partnership #1 (hereinafter "Alchemy"), were in default of the lease.

Briefly summarized, the evidence showed the following facts: In 1986, Adelphi Broadcasting Company sold radio station WKIX-AM to Metroplex Communications of North Carolina, Inc. (hereinafter "Metroplex"). As a part of the sale, Metroplex and Adelphi Realty Company (hereinafter "Adelphi"), an affiliate of Adelphi Broadcasting Company, entered into a lease dated 2 September 1986 in which Adelphi leased the transmitter site to Metroplex. The transmitter site is approximately twenty-five acres in size and consists of five towers, each over 400 feet high, a small building housing the transmission equipment and underground copper wires radiating 360 degrees that run from each of the towers to the edge of the transmitter site. Under the lease, Metroplex leased the transmitter site from Adelphi for fifty years, with an option to extend the lease for fifty additional years. Thus, the lease term expires in the year 2036 but may be extended until the year 2086. The annual rent due the landlord under the lease is an amount equal to the annual *ad valorem* real property taxes assessed against the transmitter site.

In 1989, plaintiff Alchemy purchased WKIX-AM from Metroplex and assumed its obligations under the lease. On 1 January 1994, plaintiff Alchemy changed the call letters of WKIX-AM to WYLT-AM, and then again on 31 July 1995 from WYLT-AM to WRBZ-AM. In addition to changing the call letters, plaintiff Alchemy changed the format of WKIX-AM from primarily a music format to a sports and talk format. Plaintiff Alchemy also moved its offices. The only characteristic com-

mon to the former WKIX-AM and the present WRBZ-AM is that they both broadcast on the 850-AM frequency.

On 25 January 1995, an affiliate of defendant Flora acquired fee simple title to the transmitter site and surrounding land. Timothy R. Smith testified in a deposition on behalf of defendant Flora that with the lease in place, the transmitter site has a negative value. According to Smith, if defendant Flora could oust plaintiff Alchemy, the transmitter site's raw land value would be between 1.25 million and 2.5 million dollars. After realizing that the land in question would be much more valuable to defendant Flora if there were no lease, defendants attempted to negotiate a relocation deal with plaintiff Alchemy. However, this attempt was abandoned after plaintiff Alchemy determined that relocation would not be economically feasible.

Thereafter, defendants devised a plan to encircle the transmitter site with new development. This triggered plaintiffs to file a declaratory judgment action against defendants. Plaintiffs sought a declaration of the meaning and application of the lease's express covenant of quiet enjoyment. After plaintiffs instituted its declaratory judgment action, on 26 May 1999, defendant Flora sent plaintiff Alchemy written notice of default on grounds that plaintiff Alchemy had: (1) failed to use the premises for the transmission of WKIX-AM; (2) licensed the use of the premises to WRBZ-AM; and (3) assigned the lessee's interest without defendant Flora's consent. The notice gave plaintiff Alchemy ten days to cure the alleged defaults. After plaintiffs failed to cure the defaults alleged by defendants, on 18 June 1999, defendants filed counterclaims against plaintiffs seeking possession of the premises and the fair rental value of the premises from the date of termination to the date that plaintiffs vacate the premises.

Defendants sought summary judgment as to their counterclaims and plaintiffs sought summary judgment as to defendants' counterclaims. Both motions were denied on 16 December 1999. After a non-jury trial, the trial court entered judgment on 18 August 2000 declaring the rights of the parties and dismissing defendants' counterclaims. The trial court stated in its judgment that it was basing its decision only upon the four corners of the lease and the facts which appeared to be undisputed between the parties. Defendant Flora appeals.

The sole issue on appeal is whether plaintiff Alchemy violated Section 7 of the lease since it changed the radio station's call letters

from WKIX-AM to WRBZ-AM. Section 7 of the lease provides in relevant part as follows:

> USE OF PREMISES BY LESSEE: The Lessee may use the Premises only for the purpose of thereupon maintaining its AM radio transmitter and AM transmission towers for Radio Station WKIX-AM; for any and all uses which are ancillary to the use of this property for WKIX radio transmission purposes, such as parking, the erection of additional buildings for radio transmitters or for radio studios and other like uses; and, except with Lessor's permission, for no other purpose. . . . Notwithstanding the foregoing, so long as Lessee shall remain the licensee of and actively operate Radio Station WKIX-AM, it may license to others the use of its transmission towers located upon the Premises for mounting antennae and for other radio transmission purposes and permit others to erect structures for housing transmission equipment ancillary to their use of the towers for transmission purposes.

At the outset, we must establish the appropriate standard of review. The issue on appeal is a matter of contract interpretation and thus, a question of law. *Harris v. Ray Johnson Const. Co., Inc.*, 139 N.C. App. 827, 534 S.E.2d 653 (2000). Therefore, the proper standard of review is *de novo*. *Id.* Since in the instant case, no errors have been assigned to any of the findings of fact contained in the judgment, the findings of fact are presumed to be correct. *Okwara v. Dillard Dept. Stores, Inc.*, 136 N.C. App. 587, 525 S.E.2d 481 (2000).

In the case *sub judice*, the trial court found the following facts:

> 1. The Plaintiff Alchemy Communications Limited Partnership #1 ("ACLP") is licensed to operate and own the AM radio station that broadcasts at 850-AM (the "Radio Station"). At the time of the formation of the Lease, the Radio Station was called WKIX-AM and now is called WRBZ-AM. ACLP is the successor-in-interest to the tenant under the Lease.
>
> 2. Since 1982, the Radio Station's signal has been transmitted from the premises leased to the plaintiffs and their predecessor-in-interest pursuant to the Lease (the "Transmitter Site"). The Transmitter Site is approximately twenty-five (25) acres in size and consists of five (5) towers, each over 400-feet high, a small building housing the transmission equipment and underground

copper wires radiating 360 degrees from each of the towers that run to the edge of the Transmitter Site.

3. The Transmitter Site is a portion of a 95-acre tract acquired by the defendant Flora Development, LLC ("Flora"). The defendant Flora acquired the 95-acre tract subject to the Lease. The defendant Flora has purchased tracts of property adjacent to the 95-acre tract, assembled them together and owned an overall tract of approximately 225 acres at the time this action was filed.

4. Flora is the successor-in-interest to the original landlord, Adelphi Realty Company, a division of Mann Media ("Adelphi Realty") under the Lease by way of purchasing the 95-acre tract.

5. Preston Development Company sometimes acts as the agent or apparent agent on behalf of Flora in regard to the Lease and the development activities occurring on the overall tract currently owned by Flora.

6. When the defendant Flora acquired the 95-acre tract, it had record and actual notice of: (1) the Lease, (2) the use of the Transmitter Site, (3) the easement between Adelphi Realty and the Town of Cary. . . and (4) the Memorandum of Lease. . . .

7. In September of 1986, Adelphi Realty, the original landlord, formed the Lease with Metroplex Communications of North Carolina, Inc., the original tenant. Both the original landlord and the original tenant of the Lease were in the AM radio business when they formed the Lease.

8. The defendant Flora succeeded to Adelphi Realty's rights and duties as established by the Lease and currently possesses the rights granted and the duties imposed upon the landlord Adelphi Realty pursuant to the Lease.

9. Pursuant to the Lease, the initial Lease term expires in the year 2036 and may be extended for another fifty (50) years or until the year 2086. The annual rent due the landlord is to be in the amount of the annual *ad valorem* real property taxes assessed against the Transmitter Site. Put another way, the annual rent under the lease is determined by the amount of the real property tax assessed against the Transmitter Site each year.

Based on these undisputed findings and the lease, the trial court made conclusions of law as to the meaning of the lease, the legal

effect of the change of the radio station call letters in 1994 and 1995, and the legal effect of possible future call letter changes. The court stated in its judgment that it based its decision upon the four corners of the lease and the facts which appear to be undisputed between the parties. The court ruled that the change in call letters by plaintiff Alchemy from WKIX-AM to WYLT-AM and then to WRBZ-AM did not constitute a breach of the lease, nor would any subsequent change in call letters by a rightful tenant constitute a breach of the lease. The trial court also dismissed defendant's counterclaims.

Defendant Flora contends that the trial court erred in concluding that the lease extends to the licensee of the radio station which broadcasts at 850-AM. Defendant argues that the lease and specifically Section 7 is unambiguous and that the trial court improperly considered extrinsic evidence under the parol evidence rule. We hold that the trial court properly determined that plaintiff Alchemy had not breached the lease by changing the radio station's call letters.

"The terms of a lease, like the terms of any contract, are construed to achieve the intent of the parties at the time the lease was entered into." *Lexington Ins. Co. v. Tires Into Recycled Energy and Supplies, Inc.*, 136 N.C. App. 223, 225, 522 S.E.2d 798, 800, (1999), *disc. review denied*, 351 N.C. 642, 543 S.E.2d 872 (2000). Additionally, the Court should reject an interpretation of the terms of a lease which would be unreasonable or unequal if this can be done consistently with the tenor of the agreement. *Discount Corp. v. Mangel's*, 2 N.C. App. 472, 163 S.E.2d 295 (1968). Further, "a construction which is most obviously just is to be favored as being most in accordance with the presumed intention of the parties." *Id.* at 477, 163 S.E.2d at 299.

Even though words in a lease seem clear and unambiguous, a latent ambiguity exists if their meaning is less than certain when viewed in the context of all the surrounding circumstances. *Jefferson-Pilot Life Ins. Co. v. Smith Helms Mulliss & Moore*, 110 N.C. App. 78, 429 S.E.2d 183 (1993). If a latent ambiguity exists, preliminary negotiations and surrounding circumstances may be used to determine what the parties intended; *id.*, for as our Supreme Court has noted, "he who stops at the letter 'goes but skin-deep into the meaning.' " *Temple Co. v. Guano Co.*, 162 N.C. 87, 90, 77 S.E. 1106, 1107 (1913) (citations omitted). A lease should not "be interpreted according to the strict letter, especially if it will defeat the manifest intention, as gathered from the whole instrument." *Id.* at 90, 77 S.E. at

1107. Another rule of interpretation for leases is that an undefined word in a lease "should be given its natural and ordinary meaning." *Charlotte Housing Authority v. Fleming*, 123 N.C. App. 511, 514, 473 S.E.2d 373, 375 (1996).

Since this case deals with a lease provision that plaintiff Flora argues places a restriction on the use of the land, we must refer to rules regarding the interpretation of use restrictions. Use restrictions in leases will not be implied and will be construed against the landlord. *See e.g., Jenkins v. Rose's Stores, Inc.*, 213 N.C. 606, 197 S.E. 174 (1938); James A. Webster, Jr., *Webster's Real Estate Law in North Carolina*, § 12-20, at 511 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999). Such a provision must be explicit and unambiguous. *Forrest Drive Assoc. v. Wal-Mart Stores, Inc.*, 72 F. Supp. 2d 576 (M.D.N.C. 1999). A mere statement of the purpose of a lease or words that describe the use of the premises are deemed permissive rather than restrictive. James A. Webster, Jr., *Webster's Real Estate Law in North Carolina*, § 12-20, at 511 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999).

Applying these rules to the lease at issue in this case, we first note that there is a latent ambiguity in the words "Radio Station WKIX-AM" found in Section 7 of the lease. On their face, the words seem to be clear and unambiguous. However, when looking at the whole instrument and the surrounding circumstances, these words are less than certain. Therefore, it is appropriate for the trial court to consider such evidence as preliminary negotiations and surrounding circumstances in order to clarify the terms and determine what the parties intended. *See Thomco Realty, Inc. v. Helms*, 107 N.C. App. 224, 418 S.E.2d 834, *disc. review denied*, 332 N.C. 672, 424 S.E.2d 407 (1992).

From a review of the lease in its entirety and considering extrinsic facts, it is clear that the original parties to the lease used the call letters, WKIX, to describe and name the radio station and not to restrict the use of the transmitter site only to a radio station using particular call letters. Bernard Mann, owner of Adelphi (original lessor), provided the following explanation for the phrase "radio station WKIX-AM" Section 7 of the lease during his deposition:

Hart: But why specifically does it say radio station WKIX-AM?

Mann: That's what it was called at that time.

Hart: If your intent was to limit it to AM radio transmission purposes, wouldn't it have been sufficient to end that clause after the word "towers", so that—

Mann: But that was the name of it. That was the name of the radio station.

Hart: Why was it important to name the radio station?

Mann: How do you refer to it unless you name it?

Hart: Well, you can call it—couldn't this section reasonably say, the lessee may use the premises only for the purpose of thereupon maintaining it's AM transmitter and AM transmission towers?

Mann: I suppose it could, but it had a name, we used the name.

Hart: How many times does the—

Mann: It's not any different than having a driver's license and you get married, so you get your name changed. You're still permitted to drive.

Section 19 of the lease also provides insight into the original parties' intent. Section 19, in relevant part, provides the following:

> (19) ASSIGNMENT AND SUB-LEASING. Lessee shall not assign, mortgage or encumber this lease or the Premises without the prior written consent of the Lessor in each instance which consent shall not be unreasonably withheld. Notwithstanding the foregoing, Lessor consents to the assignment or sublease by Lessee of its interests under this lease to the transferee of its license for the operation of WKIX-AM . . . .

It can be deduced from the automatic consent for assignment or sub-lease of the original tenant's interests under the lease to the transferee of the radio station's license that the original parties knew that the radio station license might be transferred from time to time and the transferee/licensee would automatically be assigned or subleased the transmitter site. We must also note that it was clear that the original parties intended to have a long-term lease, the transmitter site was built and was being used to broadcast the radio station's signal at the time of the lease's formation, and the original parties were in the AM radio business. Thus, the original parties knew the technical meaning, the use and purpose of AM radio call letters gen-

erally and "WKIX-AM" particularly. After reviewing the undisputed extrinsic facts and the lease itself, we conclude that the term "WKIX-AM" in Section 7 of the lease was simply descriptive of the AM radio station that broadcasts at 850-AM and does not restrict the use of the transmitter site to the radio station WKIX-AM. Accordingly, Alchemy is not in default for changing the call letters to WYLT-AM and then to WRBZ-AM.

Defendant Flora complained of, but did not assign error to, the trial court's dismissal of defendants' counterclaims before they presented any evidence. The trial court's ruling that the change in call letters did not constitute a breach of the lease necessarily rendered moot defendant's counterclaims seeking possession of the premises and the fair rental value of the premises from the date of termination to the date that plaintiffs vacate the premises. Since the trial court concluded that there was no breach in the lease, there was no date of termination.

Affirmed.

Judge WALKER concurs.

Judge TYSON concurs in the result.

TYSON, Judge, concurring in the result.

I agree with the majority's decision that plaintiff Alchemy did not breach its lease merely by changing the radio station's call letters. I write separately because the lease does not contain a latent ambiguity that would permit extrinsic evidence or testimony. I would construe the lease within its four corners.

The trial court based its interpretation upon the "four corners" of the lease, and found that the lease did not contain ambiguity. Accordingly, extrinsic evidence should not have been allowed to explain the terms of the unambiguous lease.

If a writing is unambiguous, "all prior and contemporaneous negotiations . . . are deemed merged in the written agreement . . . . [P]arol testimony . . . or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent." *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E.2d 239, 242 (1953) (citations omitted). Trial courts that do not specifically find an ambiguity in a fully integrated writing,

should refrain from smuggling extrinsic matters into evidence to explain the document.

I agree with the majority that "the Court should reject an interpretation of the terms of a lease which would be unreasonable or unequal if this can be done consistently with the tenor of the agreement." I do not agree, however, that the lease, construed as a whole, is ambiguous. "An ambiguity exists where the language of a contract is *fairly and reasonably susceptible* to either of the constructions asserted by the parties." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993) (citing *St. Paul Fire & Marine Ins. v. Freeman-White Assoc.*, 322 N.C. 77, 366 S.E.2d 480 (1988) (emphasis supplied)).

Here, the plain language of the lease allows the lessee and its assignees to use the premises to operate and maintain a radio station including transmitter and transmission towers "for any and all uses which are ancillary to the use of this property for . . . radio transmission purposes." The parties remain bound to the terms of the lease regardless of how valuable the land containing the premises later becomes. Defendant landlord, as successor-in-interest to Adelphi Realty Company, purchased the land subject to the lease in this action. *Mosely & Mosely Builders, Inc. v. Landin Ltd.*, 97 N.C. App. 511, 525, 389 S.E.2d 576, 584 (1990).

I concur in the result.

IN THE MATTER OF: DESIREE NATASHA FLETCHER

No. COA01-171

(Filed 2 January 2002)

1. Termination of Parental Rights— standard—typographical error

The trial court applied the proper standard of proof in a termination of parental rights action where the court's order referred to "clear cogent and evidence." The intent of the court to apply the clear and convincing standard is apparent and the omission of "convincing" was most likely a typographical error.

2. Termination of Parental Rights— efforts to correct problems—insufficient

The trial court did not err by terminating respondent-mother's parental rights where she had made efforts to correct the conditions which led to her child's removal, but the evidence supports the trial court's determination that her progress was insufficient.

3. Termination of Parental Rights— progress by father— inability to protect child from mother

The trial court's findings of fact supporting the termination of a father's parental rights were not supported by clear and convincing evidence where he made reasonable progress and was cooperative, completed all of the required classes and therapy, and visited with the child. The crux of the termination appears to be the father's inability to protect his child from his wife, the child's mother, who is a chronic psychiatric patient with diagnosed psychosis and paranoid personality disorder. The record fails to show clear and convincing evidence that the father was unable or unwilling to protect his child from his wife and does not reflect whether he made the decision to remain with his wife rather than preserve his parental rights.

Appeal by respondent from order entered 17 March 2000 by Judge James W. Morgan in District Court, Lincoln County. Heard in the Court of Appeals 7 November 2001.

Rebecca J. Pomeroy attorney for Lincoln County Department of Social Services, for petitioner-appellee.

Brenda S. McLain for respondent-appellants.

Charles E. Wilson, Jr. and Katherine Haen, guardians ad litem.

WYNN, Judge.

Following our review of this termination of parental rights order, we affirm as to Karan Fletcher but reverse as to David Fletcher.

On 2 May 1997, Lincoln County Department of Social Services filed a petition alleging neglect by the Fletchers of their ten-month-old child. The Department of Social Services alleged that Ms. Fletcher's mental and physical condition caused limitations on her ability to properly care for the child and that Mr. Fletcher was

unable to provide a safe environment for the child. After a hearing, the trial court adjudicated the child to be neglected.

A disposition hearing followed in which the trial court ordered that the Fletchers undergo psychological evaluations, follow recommendations, and complete parenting classes.

On 24 February 1999, the trial court conducted a review and permanency hearing and ordered that reunification efforts be ceased with Ms. Fletcher and that Mr. Fletcher present a detailed plan of care to the court. On 21 July 1999, the trial court held a continued permanency planning hearing and found that Ms. Fletcher continued to make no progress and that Mr. Fletcher had not prepared a detailed plan as ordered by the court. Thereafter, Lincoln County Department of Social Services petitioned to terminate their parental rights; after a hearing, the trial court found that:

> 3. Petitioner filed a petition on May 2, 1997, alleging the minor child was neglected. Said child was adjudicated to be neglected at a hearing held May 19, 1997 due to the mother's mental and physical condition causing limitations in the mother's ability to properly care for the child and the father not being able to provide a safe environment for the child.
>
> 4. Following said adjudication the respondents were directed, among other things, to: undergo psychological evaluations and follow any recommendations; attend and complete parenting classes; and be allowed visitation with the child.
>
> 5. A review was held in the matter on November 10, 1997 at which the Court found that the respondents: had received psychological evaluation; had completed parenting classes; had signed a release regarding medical records; and had participated in visitation with the child. The Court found further that the respondents had not followed the recommendations made following the psychological evaluation.
>
> 6. Following said review hearing the Court directed: that visitation continue no less than bi-weekly and that changes in the visitation should be based upon the parents' response to treatment recommended by Dr. William Varley; that the mother receive psychiatric treatment beginning with an evaluation by a trained psychiatrist if said psychiatrist deems necessary; and that David Fletcher receive extensive personal counseling, further assess-

ment of his substance use, patterns, and ongoing evaluation for depression.

7. A review hearing was held May 27, 1998 at the conclusion of which the Court entered an order directing that the counseling previously ordered for the respondents be continued and that the petitioner was to assist with transportation for the Respondents and amending the visitation schedule as necessary for the Respondents' work schedule.

8. A review hearing was held August 19, 1998 at which the Court found that the Respondents had developed problems with the Department of Social Services' Social Worker assigned to their case that caused the Respondents difficulty in their reunifications efforts. The Court deemed it necessary to take the "extraordinary step" of directing that a new social worker be assigned to the case to attempt to succeed at reunification efforts. The court also ordered that medical records be obtained to assist their psychiatrist with his evaluation and treatment of the mother.

9. A review and permanency planning hearing was held February 24, 1999 at which the Court found that the respondent mother had been evaluated by Dr. Soong Lee of the Lincoln Counseling Center. The court further found that the respondent mother: was defensive and uncooperative with the evaluation; that she denied having any problems; that she was not making progress in treatment; and was not motivated for treatment. The Court further found that the respondent father intended to develop a plan of care for the child. The Court also found that the respondent mother was making no progress and insufficient efforts toward progress in correcting the conditions that led to the child's removal from the respondents' home. The Court ordered that reunification efforts be ceased with the mother and that the father present a detailed plan of care to the court by the May, 1999 court date. Said order also directed that the father have a separate residence from the mother. The findings in said order did not indicate that a separate residence was required.

10. The continued permanency planning hearing was held May 26, 1999. The Court found that the mother had continued to make no progress toward correcting the conditions that led to the child being removed from the respondents' home. The court further found that the father had been requested on numerous occasions to prepare a detailed plan of care that would provide a safe and

suitable home for the minor child. The father to date had only prepared a non-detailed outline a plan of a care for the child.

11. The mother was seen by Dr. William H. Varley on five occasions between July 9, 1997 and September 8, 1997 for the purpose of a psychological evaluation. Dr. Varley found that the mother suffered from psychological problems that would preclude the mother from being able to provide effective parenting. He recommended that the mother undergo a prolonged period of psychiatric treatment to address these problems. The Court adopts Dr. Varley's findings as its own.

12. The mother was seen by Dr. Soong Lee for further evaluation and treatment between June 26, 1998 and October 1, 1998. Dr. Lee found that she was not motivated for treatment and that it was unlikely that she would make any significant progress with the court ordered therapy. The court adopts Dr. Lee's findings as its own.

13. The parties were allowed significant and substantial supervised visitation with the minor child. During many of the visits the mother spent a portion of the time being hostile with the Social Workers and demonstrated poor parenting skills with the child and a lack of closeness with the child. The father presented much more closeness with the child and appropriate parenting skills.

14. The father never prepared a detailed plan of care for the child that would provide a safe and suitable home and appropriate day care.

Based on these findings, the trial court concluded that,

The mother and father have willfully left the minor in foster care for more than twelve months without a showing to the satisfaction of the Court that reasonable progress under the circumstances was made in correcting the conditions that led to the child's removal in accordance with NCGS 7B-1111(2).[1]

1. N.C. Gen. Stat. § 7B-1111(2) (1999) provides for termination of parental rights upon a showing that:

The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

As to Ms. Fletcher, the trial court further found that,

> The mother is incapable of providing for the proper care and supervision of the minor child due to mental illness such that the child is a dependent child in accordance with NCGS 7B-1111(6).[2]

Having found the existence of at least one ground for termination under N.C. Gen. Stat. § 7B-1111, the trial court concluded that the Fletchers' parental rights should be terminated, and that the best interest of the minor child did not require that their parental rights not be terminated. Accordingly, the trial court terminated the parental rights of the Fletchers by order dated 17 March 2000. From that Order, the Fletchers appeal.

In North Carolina, Chapter 7B sets forth the procedural requirements for the termination of parental rights; it requires that the trial court make a two stage-inquiry. *See* N.C. Gen. Stat. § 7B-1110 (1999). First, in the adjudicatory stage, the trial court must determine whether the evidence clearly and convincingly establishes at least one ground for the termination of parental rights listed in N.C. Gen. Stat. § 7B-1111. *See In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Second, if at least one ground for termination is established at the adjudication stage, the matter proceeds to the dispositional stage where the trial court,

> shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated.

N.C. Gen. Stat. § 7B-1110 (1999); *See In re Carr*, 116 N.C. App. 403, 407, 448 S.E.2d 299, 302 (1994) (holding that the court may exercise its discretion in the dispositional stage only after the court has found that there is clear and convincing evidence of one of the statutory grounds for terminating parent rights).

[1] Preliminarily, we summarily dispose of the contention of both parents that the trial court failed to apply the proper standard of

2. N.C. Gen. Stat. § 7B-1111(6) (1999) provides for termination of parental rights upon a showing that:

> [T]he parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition.

proof under N.C. Gen. Stat. § 7B-1111(b) ("The burden in such proceedings shall be upon the petitioner or movant to prove the facts justifying such termination by clear and convincing evidence"); *see In re Church*, 136 N.C. App. 654, 657, 525 S.E.2d 478, 480 (2000) ("Although the termination statute does not specifically require the trial court to affirmatively state in its order terminating parental rights that the allegations of the petition were proved by clear and convincing evidence, without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized") (citation omitted); *see also In re Lambert-Stowers*, 146 N.C. App. 438, 552 S.E.2d 278 (2001).

The trial court's Order in this case states, "based upon the foregoing findings the Court concludes by clear cogent and evidence that . . . ." The respondents argue that the omission of the word "convincing" in the order indicates that the trial court did not apply the proper standard. We, however, hold that under the facts of this case, notwithstanding the omission of the word "convincing," the intent of the trial court to apply the "clear and convincing" standard is apparent. Indeed, the omission of the word "convincing" was most likely a typographical error. Thus, this assignment of error is rejected.

I. Termination of Ms. Fletcher's Parental Rights

[2] As to Ms. Fletcher, the record shows that she was ordered to undergo a psychological evaluation, follow all recommendations from the psychological evaluation, complete parenting classes, sign medical release documents, and attend Department of Social Services visitations with her child.

At the termination proceeding, Dr. Soong Lee, a psychiatrist, testified regarding his evaluation of Ms. Fletcher. Based on his testimony, the court found as a fact that she was defensive and not very cooperative during the evaluation. Dr. Lee documented Ms. Fletcher's long-standing mental illnesses and her inability to interact with her child. He detailed her non-cooperative desire to reunite with her child and the detrimental impact that she had on her child. He opined that Ms. Fletcher should not be given custody of her child and that supervised visits between her and the child could be detrimental to the child. He recommended that no interaction between Ms. Fletcher and the child take place.

Dr. William Varley, a psychologist, also testified at the termination of parental rights hearing regarding the psychological evaluation he

completed on Ms. Fletcher. He stated that "she did not accept any responsibility or blame for any of her circumstances or any of the decisions that were made about her child." Dr. Varley also commented that he would recommend that contact between Ms. Fletcher and her child occur with supervision and monitoring.

Stephanie Hodges, a social worker for Lincoln County Department of Social Services, testified at the termination of parental rights hearing. She discussed Ms. Fletcher's inability after two years to parent her child and her aggressive nature. Ms. Hodges presented sixteen volumes of history to the court regarding Ms. Fletcher's two older children who remain in foster care in South Carolina and discussed the court's decision not to allow Ms. Fletcher to visit the boys. Ms. Hodges further testified about all of the efforts made by the Department of Social Services to reunify Ms. Fletcher with her child including transportation to and from the visits; money spent for her medical, psychological needs, parenting classes; and referrals to all of the services. Ms. Hodges testified that during numerous visits with her child, Ms. Fletcher did not interact with her child and would often seem more interested in the things in the room than her child. She also observed Ms. Fletcher hit and yell at the child.

The *Guardian ad Litem*, Dorris Hoyle, also testified about the supervised visits. She commented on the lack of affection between Ms. Fletcher and her child and that she observed Ms. Fletcher slap the child. She concluded her testimony by stating that it was in the best interest of the child for the court to terminate her parental rights.

We find that the actions and inactions of Ms. Fletcher rise to a level of willfully leaving her child in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions that led to the child's removal under N.C. Gen. Stat. § 7B-1111(a)(2). To uphold the trial court's order, we must find that the mother's failure was willful which is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. *See In re McMillon*, 143 N.C. App. 402, 546 S.E.2d 169, *disc. review denied*, 554 S.E.2d 341 (2001). A finding of willfulness does not require a showing of fault by the parent. *See In re Bishop*, 92 N.C. App. at 669, 375 S.E.2d at 681.

In the present case, even though the respondent mother made some efforts, the evidence supports the trial court's determination

that she did not make sufficient progress in correcting conditions that led to the child's removal. We therefore conclude that the findings of the trial court under N.C. Gen. Stat. § 7B-1111(a)(2) in terminating Ms. Fletcher's parental rights were supported by clear and convincing evidence. We further conclude that the record shows no abuse of discretion by the trial court in determining that it would be in the best interest and welfare of the minor child for the parental rights of Ms. Fletcher to be terminated under N.C. Gen. Stat. § 7B-1111. *See In re Nolan*, 117 N.C. App. 693, 700, 453 S.E.2d 220 (1995) (holding that a finding of any one of the statutory grounds for termination, will support an order for termination). Therefore, we uphold the decision of the trial court terminating Ms. Fletcher's parental rights.

II. Termination of Mr. Fletcher's Parental Rights

[3] As to Mr. Fletcher, the record is unclear as to the evidence that the trial court relied upon to determine that he willfully left the minor child in foster care for more than twelve months without making reasonable progress in correcting those conditions that led to the removal of the child from his home. The record shows that Mr. Fletcher attended bi-weekly visits with the child, completed psychological evaluations and treatment, completed parenting classes and maintained contact with the Department of Social Services.

Stephanie Hodges, the social worker, testified at the termination proceedings that the trial court ordered that Mr. Fletcher develop a plan. The plan was to show how Mr. Fletcher could adequately provide for the needs, safety and welfare of his child, including emergency and contingency plans and daycare, residential care and budgeting. Mr. Fletcher testified that he had contacted several daycare centers but that they did not have any openings. He met twice with Cynthia Vinson at Gaston Community Action to work on budgeting; he also met with Lori Burgess from Child Care Coordinators, who showed him films and discussed with him how to care for the minor child. The record shows that Mr. Fletcher interacted well with his daughter and he was by far the more active parent during visitations with his daughter. Greg Shugar, a mental health clinician, testified that he had fifteen appointments with Mr. Fletcher. Mr. Shugar also testified that although Mr. Fletcher was angry with others, he was able to accept responsibility and develop plans to resolve problems. He did not find anything in his treatment or sessions with Mr. Fletcher that would indicate his unfitness to be a parent. His drug assessment found that treatment was not needed.

This evidence does not support the conclusion that Mr. Fletcher willfully abandoned his minor child. Here, the record shows that Mr. Fletcher made reasonable progress; he was cooperative, completed all required parenting classes, mental health therapy and visited with the child. Therefore, we must conclude that the record fails to show clear and convincing evidence that Mr. Fletcher willfully left his child in foster care without making reasonable progress.

Indeed, the issue presented by his appeal presents a more complex determination than that presented in the appeal of Ms. Fletcher. The crux of the trial court's decision to terminate Mr. Fletcher's parental rights appears to be premised on his inability to protect his child from the child's mother and his wife, Ms. Fletcher. The record shows that Ms. Fletcher is a chronic psychiatric patient with diagnosed abnormalities of psychosis and paranoid personality disorder. According to Dr. Lee, "she can be angry easily, explosive easily, and cannot control feelings well." Indisputably, she has a profound inability to control her emotions and social interactions. Moreover, she is under prescribed medications such as Hadol (to control psychotic symptoms) and medications to control a seizure disorder. As noted earlier, the testimony of the experts at trial documents that even supervised visits with Ms. Fletcher could be detrimental to her daughter and that no interaction should occur between Ms. Fletcher and her daughter.

In light of the manifest problems that Ms. Fletcher presented in interacting with her child, the trial court directed Mr. Fletcher to develop a plan that would detail how he would care for the child to the exclusion of Ms. Fletcher. In essence, the court directed Mr. Fletcher to set out a plan that would demonstrate how he could exercise his parental rights and responsibilities in harmony with his role as a husband to Ms. Fletcher, the mother of the child. In court, Mr. Fletcher stated that he realized his wife had a problem and that he was in the process of developing a plan of care that would not include Ms. Fletcher. He stated that if necessary, he would leave his wife to obtain placement of his child.

It appears from the record that Mr. Fletcher faced a difficult decision of choosing between living with his wife or his child.[3]

3. The parties do not adequately confront this issue in their brief on appeal and for that reason, we do not address the inherent and significant public policy issues arising from requiring an individual to choose between fulfilling and maintaining marital rights and responsibilities, and maintaining parental rights over the couple's child. Nonetheless, the scope of this dilemma is a ripe subject for consideration by our legislature.

Specifically, the records fails to show clear and convincing evidence that Mr. Fletcher was unable or unwilling to protect his child from Ms. Fletcher. The record also does not reflect whether Mr. Fletcher made the decision to remain with his wife rather than preserve his parental rights. In short, the record does not contain sufficient evidence from which we can discern that Mr. Fletcher's conduct "manifest[ed] a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 252, 485 S.E.2d 612, 617 (1997). "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." *In re Nesbitt*, 147 N.C. App. 349, — S.E.2d — (Dec. 4, 2001) (No. COA 00-1168). Therefore, we do not find that the findings of fact are supported by clear and convincing evidence to establish grounds for terminating Mr. Fletcher's parental rights under N.C. Gen. Stat. § 7B-1111(a)(2).

Our determination that Mr. Fletcher's parental rights should not be terminated under this Order, however, returns Mr. Fletcher only to the status that he enjoyed before the termination of his rights; the determination of whether he should be accorded supervised visits and other opportunities to reunite with his child remains within the province of the trial court.

In sum, we affirm the termination of Ms. Fletcher's parental rights and reverse the termination of Mr. Fletcher's parental rights.

Affirmed in part and reversed in part.

Judges WALKER and THOMAS concur.

C. DWIGHT HOWARD v. CITY OF KINSTON

No. COA00-1397

(Filed 2 January 2002)

1. Zoning— conditional use permit—judicial review

The decision of a city council issuing or denying a conditional use permit is subject to review by the superior court, which sits as an appellate rather than a trial court. The Court of Appeals

must determine whether the trial court exercised the proper scope of review and correctly applied the scope of review.

2. Appeal and Error— record—video only—disfavored

The submission of videotapes of trial proceedings in lieu of written transcripts is disfavored; however, in the absence of a rule from the Supreme Court requiring a written transcript and in the interests of judicial economy, the Court of Appeals proceeded with a zoning case submitted with a videotape of the city council meeting rather than a written transcript.

3. Zoning— conditional use permit—rights of petitioner

A petitioner seeking a conditional use permit was not denied any of the rights afforded during a quasi-judicial proceeding where the city limited the number of witnesses, relied on unsworn testimony, and allowed the submission of letters after the hearing. Having heard testimony from both sides of the issue, the city was not obligated to allow every person to testify; petitioner waived the right to have witnesses sworn, to cross-examine witnesses, and to present rebuttal evidence by not being sworn himself and by not requesting these rights, and there was no evidence that the city actually considered the additional letters.

4. Zoning— conditional use permit—sufficiency of evidence

Competent, material, and substantial evidence in the record supported a city's denial of a conditional use permit for multi-family units where the city relied upon testimony about traffic from a member of the city's planning department and from a resident's personal knowledge and observation of the public health and safety. While the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use, the testimony here constitutes competent, material, and substantial evidence supporting the denial of the permit.

Appeal by petitioner from order entered 20 July 2000 by Judge Jerry Braswell in Lenoir County Superior Court. Heard in the Court of Appeals 11 October 2001.

Dal F. Wooten for the petitioner-appellant.

Vernon H. Rochelle for the respondent-appellee.

EAGLES, Chief Judge.

C. Dwight Howard ("petitioner") appeals from the trial court's order denying his petition for a writ of certiorari requesting review of the Kinston City Council's ("the City") denial of his application for a conditional use permit. On appeal, petitioner asserts that the trial court erred in denying the petition because (1) the City denied him the procedural guarantees required in a quasi-judicial hearing and (2) the City's decision was not supported by competent evidence in the record. After careful review, we affirm the trial court.

The evidence tended to show that petitioner and his wife owned a thirty-seven acre tract of land located in Kinston, North Carolina. Approximately thirty years before the commencement of this action, the City zoned petitioner's land RA-6, which allows for the construction of multi-family dwellings on the land. Petitioner's land adjoins a subdivision known as Westwood (comprised of Westwood I and Westwood II), which the City zoned RA-8 and limited to single family dwellings approximately twenty-five years ago. In 2000, petitioner filed an application with the City for a conditional use permit requesting approval of construction of a major subdivision on his land. In his application, petitioner sought to subdivide his thirty-seven acre tract of land into thirty-three separate lots on which to construct multi-family units.

On 20 March 2000, a public hearing on petitioner's application was held before a joint session of the Kinston Planning Board ("Planning Board") and the City Council. At this hearing, the City limited both sides' number of witnesses and the amount of time each witness could speak. Initially, Ed Lynch of the City's Planning Department testified that the number of vehicular trips in the area would increase if petitioner's proposal was approved.

Next, petitioner provided the City with unsworn statements in support of his application. The City then allowed eight of the approximately thirty residents of Westwood in attendance to provide unsworn testimony in opposition to petitioner's application. The witnesses's testimony was of the general nature that the potential subdivision would reduce property values, increase traffic, and endanger the public health and safety.

Following the hearing, on 27 March 2000, the Planning Board met and recommended that the City deny petitioner's application.

Thereafter, on 3 April 2000, the City issued an order denying the application because it determined that the proposal would endanger the public health and safety. On 17 April 2000, the City vacated its 3 April 2000 order and entered a second order denying petitioner's application. In the 17 April 2000 order, the City concluded that the proposed subdivision would materially endanger the public health and safety, would affect existing property values, and would not be in harmony with existing development and uses in the area.

Petitioner filed a petition for a writ of certiorari requesting review of the denial of his application in Lenoir County Superior Court. On 5 June 2000, petitioner's case came on for hearing before the Honorable Jerry Braswell. After the hearing, the trial court entered an order denying the petition. In its order, the trial court ruled that the City's decision "in denying Petitioner's request for a Conditional Use Permit was not arbitrary and capricious and was supported by competent evidence." Petitioner appeals.

[1] Every decision of a city council issuing or denying a conditional use permit "shall be subject to review by the superior court by proceedings in the nature of certiorari." G.S. § 160A-381(c). During review pursuant to writ of certiorari under G.S. § 160A-381(c), "the superior court judge [sits] as an appellate court, not a trial court." *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662 (1990). Review is based solely upon the record as certified, and "[t]he test is whether the findings of fact are supported by competent evidence in the record; if so, they are conclusive upon review." *Id.*

"Our task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review." *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999). Here, the trial court made its determination "based upon the record evidence." Accordingly, we conclude that the trial court exercised the proper scope of review. Next, we must review whether the trial court exercised that scope of review correctly.

Zoning decisions regarding conditional use permits are quasi-judicial in nature. *See Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). Generally,

the task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Id.

When, as here, "it is alleged that the action of a quasi-judicial body was not supported by substantial evidence or was arbitrary and capricious, the reviewing court must apply the 'whole record' test.' " *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849 (1997). " 'The "whole record" test requires the reviewing court to examine all the competent evidence . . . which comprise[s] the "whole record" to determine if there is substantial evidence in the record to support the [quasi-judicial body's] findings and conclusions.' " *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528, *writ of supersedeas and disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000) (quoting *Ellis v. N.C. Crime Victims Compensation Comm.*, 111 N.C. App. 157, 162, 432 S.E.2d 160, 164 (1993)). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Tate Terrace*, 127 N.C. App. at 218, 488 S.E.2d at 849. "In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported that court's order but whether the evidence before the town board was supportive of its action." *Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383.

[2] At the outset, we note that as part of the record on appeal the parties submitted a videotape of the City's 20 March 2000 public hearing. "The parties stipulated that the video tape filed with the Clerk of

the Court of Appeals is an exact copy of the tape viewed, heard, and considered by Judge Braswell at the hearing of this cause on June 5, 2000." No written transcripts accompanied the record or briefs.

In *Shillington v. K-Mart Corp.*, 102 N.C. App. 187, 190, 402 S.E.2d 155, 157 (1991), this Court expressed the view that the submission of videotapes of trial proceedings, in lieu of written transcripts, is disfavored. We opined that "the use of videotapes in this Court for appellate review greatly frustrates effective review of the trial proceedings . . . ." *Id.* Nevertheless, "in the interests of judicial economy and a timely resolution of th[is] appeal[] and in the absence of a rule from the Supreme Court requiring a written transcript in cases that are appealed to this Court," we choose to proceed with a resolution of this case. *Id.*

[3] Petitioner contends that the trial court erred in denying his petition for certiorari because the City denied him the procedural guarantees required in a quasi-judicial hearing. We disagree.

> Procedurally, a city council
>
> conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial:
>
> (1) The party whose rights are being determined must be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal;
>
> (2) absent stipulations or waiver such a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn statements; and
>
> (3) crucial findings of fact which are "unsupported by competent, material and substantial evidence in view of the entire record as submitted" cannot stand.

Refining Co. v. Board of Aldermen, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974) (citation omitted). Here, petitioner contends that the City dispensed with the procedural guarantees required in a quasi-judicial hearing by (1) limiting the number of witnesses and the amount of time each witness could speak, (2) relying on the unsworn testimony of witnesses in opposition to his application, and (3) allowing the submission of letters in opposition to his application after the hearing.

As to the City's limiting testimony of witnesses,

> [t]he contention that the [City was] required to hear all persons in attendance without limitation as to number and time is untenable . . . . [The law does] not contemplate that all persons entertaining the same views [should] have an unqualified right to iterate and reiterate these views in endless repetition.

Freeland v. Orange County, 273 N.C. 452, 457, 160 S.E.2d 282, 286 (1968). Here, the record reflects that approximately thirty residents of Westwood were in attendance and ready to testify in opposition to petitioner's application at the hearing. The City limited the discussion by individuals to three minutes each, groups to five minutes each, and each side to a total of five witnesses (the City actually heard from eight residents in opposition). "Having heard testimony from both sides of the issue, the [City] was not obligated to allow every person to testify." *Richardson v. Union County Bd. of Adjust.*, 136 N.C. App. 134, 140, 523 S.E.2d 432, 437 (1999). Accordingly, we conclude that the City did not abuse its discretion in limiting testimony.

Next, as to the City's reliance on the unsworn testimony of witnesses, a city may not base critical findings of fact on unsworn statements absent stipulations or waiver. *See Jarrell v. Board of Adjustment*, 258 N.C. 476, 481, 128 S.E.2d 879, 883 (1963). "However, by voluntary participation in a hearing, a [petitioner providing unsworn testimony] may waive the right to insist that the witnesses should be under oath." *Craver v. Board of Adjustment*, 267 N.C. 40, 42, 147 S.E.2d 599, 601 (1966); *see also Burton v. Zoning Board of Adjustment*, 49 N.C. App. 439, 442, 271 S.E.2d 550, 552 (1980). Here, petitioner was not sworn as a witness. Moreover, petitioner was accompanied by counsel to the hearing. Neither petitioner nor counsel made a request that those in opposition to the application be sworn, that petitioner have the right to cross-examine the witnesses, or that he have the right to present evidence in rebuttal. Thus, we conclude that petitioner waived these rights.

Lastly, the City allowed the "submission of letters after the public hearing," which petitioner claims "denied [him] his right to cross examine . . . ." In its 17 April 2000 order, the City stated that its decision was based upon "all of the evidence and arguments presented at the public hearing, . . . the reports from the City Planning Staff and . . . the recommendation of the City Planning Board concerning the application . . . ." While the City admitted in its order that it "receiv[ed] additional objections and petitions from property own-

ers in the affected subdivision[]," the record does not reflect that the City actually considered these letters in rendering its decision. In the absence of evidence that the City considered these letters, petitioner's argument as to his being denied the right to cross-examine is moot.

In sum, we conclude that the public hearing before the City was not procedurally flawed. Accordingly, petitioner was not denied any of the rights afforded a party during a quasi-judicial proceeding.

[4] Next, petitioner contends that the trial court erred in denying his petition for writ of certiorari because the City's decision was not supported by competent evidence in the record. After careful examination of the record, we disagree.

The Kinston Unified Development Ordinance ("UDO") provides that

[e]ven if the permit-issuing board finds that the application complies with all other provisions of this chapter, it may still deny the permit if it concludes, based upon the information submitted at the hearing, that if completed as proposed, the development:

> (1) Will materially endanger the public health or safety; *or*
>
> (2) Will substantially injure the value of adjoining or abutting property; *or*
>
> (3) Will not be in harmony with existing development and uses within the area in which it is to be located; *or*
>
> (4) Will not be in general conformity with the land use plan, thoroughfare plan, or other plan officially adopted by the council.

Kinston UDO § 54(d) (emphasis added). In denying petitioner's application for a conditional use permit, the City concluded that the proposal would "materially endanger the public health or safety of the residents, including children, in the adjacent subdivision[]," would "affect existing property values," and would "not be in harmony with existing development and uses in the area in which it is to be located." The enumerated bases for denying a permit are listed in the ordinance in the disjunctive and any one will suffice. "If even one of the reasons articulated by the [City] for denial of the subdivision permit is supported by valid enabling legislation and competent evidence

on the record, the [City's] decision must be affirmed." *Batch*, 326 N.C. 1, 12, 387 S.E.2d 655, 662.

When an applicant for a conditional use permit "produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a *prima facie* showing of entitlement to a permit." *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 27, 539 S.E.2d 18, 22 (2000). Once an applicant makes this showing, the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit. *See Woodhouse v. Board of Commissioners*, 299 N.C. 211, 219, 261 S.E.2d 882, 888 (1980). Denial of a conditional use permit must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record. *See SBA*, 141 N.C. App. at 27, 539 S.E.2d at 22.

A city council may not deny a conditional use permit in their unguided discretion or because, in their view, it would adversely affect the public interest. *See In re Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970). Moreover, a city council's denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible. *See Gregory v. County of Harnett*, 128 N.C. App. 161, 165, 493 S.E.2d 786, 789 (1997). Speculative assertions, mere expression of opinion, and generalized fears "about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body." *Sun Suites*, 139 N.C. App. at 276, 533 S.E.2d at 530. In other words, the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use. See *Woodhouse*, 299 N.C. at 220, 261 S.E.2d at 888.

Here, the City concluded that "[t]he proposed subdivision will create from [300] to [800] additional daily trips on existing streets which will materially endanger the public health or safety of the residents, including children, in the adjacent subdivision[]." In reaching this conclusion, the City relied on the testimony of Ed Lynch, a member of the City's Planning Department, and Phyllis Gay, a Westwood resident testifying in opposition to petitioner's application.

At the public hearing, Mr. Lynch provided a presentation on the impact of petitioner's proposal on existing traffic in the area. In sum, Mr. Lynch concluded that the proposed subdivision would signifi-

cantly increase vehicular activity in the area by approximately 300 to 800 trips a day. Ms. Gay also testified during the public hearing. During her testimony, Ms. Gay testified that approximately 100 children lived in Westwood, that existing traffic has caused near accidents involving children while they were walking and riding their bicycles, and increased traffic would endanger the health and safety of the children.

We note that Ms. Gay based her testimony about the adverse effects of the proposed subdivision on traffic congestion and safety upon her personal knowledge and observations. Thus, unlike *Gregory*, *Sun Suites*, and *Woodhouse*, cited above, we conclude that Ms. Gay's concerns were valid and not the result of speculative assertions, mere expression of opinion, or her generalized fears.

"An increase in traffic does not necessarily mean an intensification of traffic congestion or a traffic hazard." *Refining Co.*, 284 N.C. 458, 469, 202 S.E.2d 129, 136. Nevertheless, Mr. Lynch's testimony regarding an increase in traffic, in conjunction with Ms. Gay's testimony regarding danger to the public health and safety does constitute competent, material, and substantial evidence. *See In re Application of Goforth Properties*, 76 N.C. App. 231, 332 S.E.2d 503 (1985) (holding that testimony regarding increased traffic, as well as witness testimony expressing concern for the safety of children walking and riding bicycles, constituted competent, material, and substantial evidence supporting a town's denial of a special use permit). Accordingly, we conclude that competent, material, and substantial evidence in the record supports the City's denial of petitioner's conditional use permit, and we affirm the trial court.

Having concluded that there is competent evidence to support the Council's denial of the conditional use permit, we need not consider whether all of the City's other findings were supported by competent evidence. The trial court's order denying petitioner's petition for writ of certiorari is

Affirmed.

Judges HUDSON and CAMPBELL concur.

LESLIE DAVIS, ADMINISTRATOR OF THE ESTATE OF LEANA PATRICIA TRONCONY, DECEASED, EMPLOYEE, JOSE TRONCONY, FATHER OF LEANA PATRICIA TRONCONY, DECEASED, EMPLOYEE, PLAINTIFFS v. TRUS JOIST MacMILLAN, EMPLOYER, SELF-INSURED (AIG CLAIM SERVICES, SERVICING AGENT), DEFENDANT

No. COA01-81

(Filed 2 January 2002)

1. **Workers' Compensation— death benefits for parents—willful abandonment—child support arrears**

The Industrial Commission did not err by concluding that the deceased employee's father was precluded from sharing in any workers' compensation death benefits under N.C.G.S. § 97-40 based on the father's willful abandonment of both the care and maintenance of his child, because: (1) in order to rehabilitate, a parent must resume the care and maintenance of a child, not just one or the other; and (2) there was competent evidence to support the findings that the father did not make consistent payments of court ordered child support, the father was still in arrears of his child support obligations eight-and-a-half years after his support obligations should have ended, the father never showed any interest in the lives of his daughters although he had visitation rights under the child custody order, and the father did not even attend his daughter's funeral even though he resided where the funeral took place and was notified in advance of the arrangements.

2. **Workers' Compensation— jurisdiction—reduction of attorney fees**

Although plaintiffs contend the Full Industrial Commission erred in a workers' compensation case by reducing the Deputy Commissioner's award of attorney fees under N.C.G.S. § 97-90 when the Full Commission included no reasons for the reduction, the Court of Appeals is without jurisdiction to hear the issue, because any dispute as to attorney fees must be appealed according to the procedures set out in N.C.G.S. § 97-90(c).

Appeals by plaintiffs Jose Troncony, Leslie Davis, and Gladys Guzman from opinion and award of the North Carolina Industrial Commission filed 17 October 2000. Heard in the Court of Appeals 27 November 2001.

Bollinger & Piemonte, PLLC, by Bobby L. Bollinger, Jr., for plaintiff-appellant Jose Troncony.

Casstevens, Hanner, Gunter & Riopel, P.A., by Robert P. Hanner, II and Mark D. Riopel, for plaintiff-appellants Leslie Davis and Gladys Guzman.

No brief filed for defendant appellee.

GREENE, Judge.

Jose Troncony (Troncony) appeals an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Full Commission) filed 17 October 2000 denying him any workers' compensation death benefits as the father of Leana Patricia Troncony (Patricia), deceased, under N.C. Gen. Stat. § 97-40. Leslie Davis (Davis), the administrator of Patricia's estate, and Gladys Guzman (Guzman), Patricia's mother, appeal the Full Commission's reduction of attorney's fees in its October 17 opinion and award.

On 20 February 1998, Patricia was killed in a motor vehicle accident during the course and scope of her employment with Trus Joist MacMillan (MacMillan). MacMillan conceded liability for payment of workers' compensation death benefits under N.C. Gen. Stat. § 97-38 but sought an allocation of those death benefits from the Industrial Commission. Guzman and Troncony were the only two individuals with a claim to Patricia's workers' compensation death benefits.

The evidence presented to the deputy commissioner established that Guzman and Troncony were married in 1966. Patricia was born on 4 December 1970. She had two sisters, Rose Mary, born 11 May 1967, and Davis, born 14 June 1972. Guzman and Troncony separated in 1973 and divorced on 25 April 1977, at which time the trial court entered a judgment awarding the "permanent care, custody and control" of the three minor children to Guzman. The trial court also ordered Troncony to pay child support for the support of all three children in the amount of $60.00 per week.[1]

According to Guzman, Troncony paid the court-ordered support only "sporadically," on average failing to pay support two or three months out of the year. On 23 June 1987, Guzman initiated an action against Troncony in juvenile court in an effort to collect past due child support and force payment of the ongoing child support order.

1. This amount was never adjusted for inflation and the share allocated for Patricia's needs was only $20.00 per week.

Guzman testified that at the time of the proceeding in juvenile court Troncony was between $2,000.00 and $5,000.00 in arrears with his child support obligations. Troncony testified that when he did get behind on his payments, it was because he was unable to work due to a lack of jobs in his weather-sensitive construction occupation.

The juvenile court entered a new order for child support that superceded the 1977 child support order. This order, however, did not improve the consistency of Troncony's child support payments. According to Guzman's testimony before the deputy commissioner, Troncony never made all the support payments that were required of him. A child support printout from the juvenile court indicates that on 25 January 1999 Troncony was still $582.14 in arrears in his support obligations.

From approximately 14 September 1988 until 4 December 1988, the date Patricia reached the age of majority, Troncony made no child support payments. Troncony testified that on or about 14 September 1988, he received a letter from the juvenile court notifying him that Guzman and the children had moved and the juvenile court did not have a forwarding address, thus creating the potential that the juvenile court might not be able to credit any of Troncony's payments. Troncony also testified he was diagnosed with gall bladder disease during this time and had to return to his native Honduras for surgery as he lacked the health insurance to have the necessary operation performed in the United States.

Following the divorce, Troncony was granted visitation with his children for five hours every Sunday, during which time he claimed he would often take them to the city park. Troncony explained that as the kids got older, the visitation lessened because the girls would not be ready when Troncony came to pick them up. Davis' only recollection of her father, however, was in 1984 when she attended the World's Fair in New Orleans with Troncony and her sisters. Neither Davis nor Rose Mary saw Troncony after that date. Testimony further revealed that Troncony neither telephoned nor wrote his children for their birthdays, graduations, or other important events in their lives, nor did he send them Christmas presents. When Davis suffered from seizures and was hospitalized in 1984, Troncony did not contact her in any way. When Patricia was growing up, she was hospitalized with pneumonia. Troncony did not contact or visit her either. Troncony also did not attend the graduations of any of his children from high school and was not present at their church confirmation. Guzman admitted that she and the girls did not invite Troncony to participate

in such special events, but she also did not discourage Troncony from being involved in his children's lives. Finally, Troncony did not attend Patricia's funeral even though evidence indicates Guzman's husband contacted Troncony's residence and passed along the information concerning the wake and the funeral.

The deputy commissioner concluded Troncony willfully abandoned his minor daughter Patricia. On appeal, the Full Commission found in pertinent part that:

> 5. Following the divorce, [Troncony] did not make consistent payment[s] of the court-ordered support. By 1987, his support payments were in arrears, such that [Guzman] went back to court to seek an order for payment of the arrearage.
>
> . . . .
>
> 7. . . . Although they lived in the same town [prior to 1988], [Troncony] did not visit his three daughters.
>
> 8. When [Patricia] was in the fifth grade, she was ill and in the hospital. Although [Guzman] called and told [Troncony] about it, [he] did not visit her. Leslie was also sick and in the hospital in 1984, and [Troncony] did not visit her.
>
> 9. Since the [parties'] separation, [Troncony] has never shown any interest in the lives of his daughters or acted as a true parent to them. He did not send cards, letters, or gifts to his daughters over the years. He never called them on the telephone. He never attended any day-to-day events or any special events in their lives, such as their confirmation in the Catholic Church or high school graduations. [Guzman] never prevented [Troncony] from visiting his daughters, and the court order gave him visitation rights.
>
> 10. . . . [Troncony] has had virtually no contact with his daughters from 1973 and continuing to date.
>
> . . . .
>
> 12. The funeral services for [Patricia] were held in New Orleans. Although he resided in New Orleans and was notified in advance of the arrangements of the wake and funeral service for [Patricia], [Troncony] did not attend either. He did not call to express any condolences or send any notes to his other daughters or to [Guzman].

13. [Troncony] failed to meet his child support obligations during the year prior to [Patricia's] majority.

. . . .

15. There is no evidence that [Troncony] ever performed any parental duties or provided any emotional support or care for [Patricia].

16. At the time of the February 22, 1999 hearing before the [d]eputy [c]ommissioner, [Troncony] was still in arrears with his child support requirements, even though his obligation to [Guzman] should have terminated in 1990.

Accordingly, the Full Commission concluded that "[d]ue to [Troncony's] willful abandonment of the care and support of his daughter, [Patricia], [he] is not entitled to any benefits as next of kin pursuant to N.C. Gen. Stat. § 97-40." The Full Commission upheld the deputy commissioner's award of the entire workers' compensation death benefits to Guzman.

The law firm representing Davis and Guzman submitted an agreement for attorney's fees to the deputy commissioner, providing for twenty-five percent of the recovery. The deputy commissioner found the agreement inappropriate and awarded reasonable attorney's fees of $15,000.00 to the law firm. The award of attorney's fees was not appealed to the Full Commission. Upon appeal by Troncony to the Full Commission on different grounds, the Full Commission reduced this award to $12,000.00 while adopting verbatim the deputy commissioner's reasoning for granting the original $15,000.00 attorney fee award.

The issues are whether: (I) Troncony willfully abandoned the care and maintenance of Patricia and thus is precluded from sharing in any workers' compensation death benefits as Patricia's next of kin pursuant to N.C. Gen. Stat. § 97-40; and (II) this Court has jurisdiction to determine whether the Full Commission erred in reducing the deputy commissioner's award of attorney's fees.

I

[1] Troncony argues N.C. Gen. Stat. § 97-40 requires the willful abandonment of both the care and maintenance of a minor child before a parent is precluded from sharing in the workers' compensation death benefits of a deceased child. Because Troncony substantially complied with his child support obligations over the years and thus did

not abandon the maintenance of Patricia, Troncony contends he cannot be found to have willfully abandoned Patricia.[2]

Section 97-40 prohibits the disbursement of workers' compensation death benefits to:

> a parent who has willfully abandoned the care and maintenance of his or her child and who has not resumed its care and maintenance at least one year prior to the first occurring of the majority or death of the child and continued its care and maintenance until its death or majority.

N.C.G.S. § 97-40 (1987). Contrary to Troncony's assertion, the words "care and maintenance" are not to be read separately but instead combined to define a parent's overall responsibilities. This is evident from the phrasing of the statute. If abandonment of *both* care and maintenance were required to terminate a parent's right to share in a child's workers' compensation death benefits, the renewed assumption of either care or maintenance within one year "prior to the first occurring of the majority or death of the child" would necessarily rehabilitate the parent. *See* N.C.G.S. § 97-40. The language of the statute, however, requires that, in order to rehabilitate, a parent must resume the "care and maintenance" of the child, not just one or the other. *Id.* This signifies that the words are indivisible, representing a single concept. *See id.* Consequently, the analysis of whether a parent has "willfully abandoned the care and maintenance" of a child requires the consideration of numerous factors: the parent's display of love, care, and affection for the child and the parent's financial support and maintenance of the child. *See Lessard v. Lessard*, 77 N.C. App. 97, 101, 334 S.E.2d 475, 477 (1985), *affirmed*, 316 N.C. 546, 342 S.E.2d 522 (1986).

2. Troncony argues that in determining compliance with his obligation to provide financial support, substantial compliance is sufficient. The substantial compliance language is found in N.C. Gen. Stat. § 31A-2(2) and is only relevant to establish a parent's right to inherit from his child when that child dies intestate. N.C.G.S. § 31A-2(2) (1999). We acknowledge that prior to 1971, a parent's right to receive a child's workers' compensation death benefits turned on the application of section 31A-2. *See Smith v. Exterminators*, 279 N.C. 583, 184 S.E.2d 296 (1971). In 1971, however, the General Assembly amended section 97-40 so as to provide a method for determining when a parent loses the right to receive his child's workers' compensation death benefits, making it both unnecessary and inappropriate to look to section 31A-2 to determine the disqualification issue. N.C.G.S. § 97-40 (1971); *see also Trustees of Rowan Tech. v. Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985) (where two statutes "might apply to the same situation, the statute that deals more directly and specifically with the situation controls over the statute of more general applicability"). Accordingly, we reject Troncony's argument.

On appeal from the Full Commission, our review is limited to: errors of law; whether the Full Commission's findings are supported by competent evidence; and whether the findings justify the Full Commission's conclusions and decision. *Carpenter v. Tony E. Hawley, Contractors*, 53 N.C. App. 715, 717-18, 281 S.E.2d 783, 785, *disc. review denied*, 304 N.C. 587, 289 S.E.2d 564 (1981). Troncony assigns error to the Full Commission's findings (1) that he did not make "consistent" payments of the court ordered support and (2) that as of 22 February 1999, eight-and-a-half years after Troncony's support obligations should have ended, Troncony was still in arrears. There was competent evidence to establish both findings: Guzman testified that Troncony missed between two to three months of payments per year and never fulfilled all his support obligations; the juvenile court issued an order in 1987 to compel payment of the child support; and a January 1999 child support printout from the juvenile court indicated a remaining arrearage of $582.14. Additional findings entered by the Full Commission, to which there is no exception, reveal Troncony never showed "any interest in the lives of his daughters," although he had visitation rights under the custody order.[3] Indeed, Troncony did not even attend Patricia's funeral, although "he resided in New Orleans [where the funeral took place] and was notified in advance of the arrangements."

Based on these findings, which sufficiently incorporate the factors set out in section 97-40 and *Lessard*, the Full Commission correctly concluded Troncony's "willful abandonment of [Patricia's] care and support" precluded him from sharing in any of Patricia's workers' compensation death benefits. As the Full Commission's conclusion is supported by its findings and this conclusion justifies the award of the workers' compensation death benefits to Guzman, there was no error.

II

[2] Davis and Guzman argue the Full Commission either made a mistake or abused its discretion in reducing the Deputy Commissioner's award of attorney's fees when the Full Commission included no reasons for the reduction.

3. Troncony argues in his brief to this Court that because Guzman was given custody of Patricia in a court order in 1977, he was "deprived . . . of the care" of his daughter and cannot be found to have "abandoned" Patricia. We disagree. Although Guzman was given custody of the children in 1977, Troncony was given "reasonable visitation rights" and thus was given the opportunity to provide "care" for his children. Even if a non-custodial parent is not given any visitation rights, we are not prepared to hold that parent is deprived of the opportunity to provide "care" for his children.

N.C. Gen. Stat. § 97-90 sets out the process through which attorney's fees are approved by the Industrial Commission as well as the procedure for disputing a decision by the Industrial Commission on such matters. N.C.G.S. § 97-90 (1999); *Creel v. Town of Dover*, 126 N.C. App. 547, 551, 486 S.E.2d 478, 480 (1997). If an attorney submits a fee agreement to the "hearing officer or Commission" and the "agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed." N.C.G.S. § 97-90(c) (1999). Notice of appeal from such a decision must go to the Full Commission. *Id.* After the Full Commission renders a decision, the matter must be appealed to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides." *Id.*

In this case, there was an agreement for attorney's fees which the law firm representing Davis and Guzman submitted to the deputy commissioner. The deputy commissioner, however, found the agreement inappropriate and awarded a reasonable attorney's fee of $15,000.00 to the law firm. Thereafter, the award of attorney's fees was not appealed to the Full Commission. Upon appeal by Troncony to the Full Commission on different grounds, the Full Commission reduced the attorney fee award to $12,000.00, and Davis and Guzman subsequently appealed the reduction to this Court. Davis and Guzman argue because they appealed from the Full Commission's reduction of attorney's fees, not the deputy commissioner's award of attorney's fees, the process outlined in section 97-90(c) does not apply to them. We disagree.

In *Creel*, this Court dismissed a plaintiff's appeal that assigned as error the Full Commission's failure to make a finding as to attorney's fees. *Creel*, 126 N.C. App. at 551, 486 S.E.2d at 480. The plaintiff had not appealed the Deputy Commissioner's failure to make such findings. *Id.* This Court nevertheless found section 97-90(c) to require appeal of the issue to the superior court. The same principles apply in this case. Because any dispute as to attorney's fees must be appealed according to the procedures set out in section 97-90(c), we are without jurisdiction to hear the issue and must dismiss the appeal of Davis and Guzman.

Affirmed in part; dismissed in part.

Judges McCULLOUGH and CAMPBELL concur.

WILLIAM EDWARD DOLAN, PLAINTIFF v. KAREN ANN DOLAN, DEFENDANT

No. COA01-103

(Filed 2 January 2002)

1. **Divorce— equitable distribution—hypothetical tax consequences**

The trial court erred by considering hypothetical tax consequences as a distributional factor in an equitable distribution action where the court determined the tax consequences of the liquidation of rental properties, but did not find that the parties would have to liquidate the rental properties or that there would be any actual tax consequences.

2. **Divorce— equitable distribution—distributional factors—rental income**

The trial court erred in an equitable distribution action by not making sufficient findings as to whether rental income should be a distributional factor.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 31 August 2000 by Judge H. Thomas Jarrell, Jr. in Guilford County District Court. Heard in the Court of Appeals 28 November 2001.

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

Floyd and Jacobs, L.L.P., by Jack W. Floyd and Robert V. Shaver, Jr., for defendant-appellant.

WALKER, Judge.

Plaintiff and defendant were married on 7 August 1971. At the time, plaintiff was in optometry school and defendant was employed as a teacher to support the family. After having children, they agreed that defendant should stay at home to take care of them.

During the marriage, plaintiff began his own optometry practice and the couple acquired eight rental properties—mainly single family dwellings. Plaintiff's optometry practice held title to five of the rental properties while plaintiff and defendant held the other three as tenants by the entirety.

The parties separated on 11 October 1994 and plaintiff filed for absolute divorce one year later. Defendant counterclaimed for equitable distribution of the marital property. The divorce was granted on 4 December 1995; however, the issue of equitable distribution was preserved for subsequent hearings. In the pre-trial order, the parties entered into certain stipulations, including the value of the rental properties and the distribution of the optometry practice to the plaintiff. Therefore, the trial court only had to determine the value of the optometry practice, the distribution of the rental properties, and the distribution of debts existing at the date of separation.

After hearing the evidence and arguments on 26 April 2000, the trial court outlined its findings and distributions. It then sent a letter to both counsel again stating its findings and asking that counsel for plaintiff prepare a proposed order. On 10 June 2000, counsel for plaintiff faxed the proposed order to counsel for defendant. On 21 June 2000, counsel for defendant informed the trial court that he "strongly objected" to the proposed order and requested a hearing. On 31 August 2000, without a further hearing, the trial court signed and filed its final order for distribution of the marital property. The findings included the following in part:

> 11. The Plaintiff's expert, Mr. Boger, a CPA, testified that based upon the tax basis as reflected in the tax returns provided to him, if the rental property distributed to the Plaintiff were liquidated at the present value which was stipulated in the Pre-Trial Order, the Plaintiff would pay state and federal taxes at a rate of 25% for personal income taxes of $46,726. Because the five properties distributed to the Plaintiff are held by the Plaintiff's professional corporation, he would also pay corporate taxes at the rate of 35% in the amount of $65,415. The Court has taken this tax implication into account in determining the distribution of the marital estate.
>
> 12. Using the same tax returns to determine the tax basis and using the present value as stipulated in the Pre-Trial Order, the Defendant would pay state and federal taxes at a rate of 25% if she were to liquidate the three rental properties distributed to her in the amount of $21,500. The Court has taken this tax implication into account in determining the distribution of the marital estate.
>
> . . .
>
> 17. During most of the marriage, the Defendant remained at home and raised the parties' children. While she had a college

degree, until the children were all in school, there was no disagreement that she would not seek public work. She is employed part-time in a book store earning $7 an hour. Since the date of separation, the Plaintiff has collected the rent on the parties' rental property and has paid down the debt. He has also managed the properties and tended to repairs and tenant problems.

18. In establishing the distribution of the marital estate as set out herein, the Court considered the homemaker's contribution made by the Defendant, the Defendant's lower earning capacity, and the tax consequences of the division of the rental property upon each party. After consideration of these facts, the Court finds that an equal distribution is not equitable.

The trial court concluded that plaintiff should receive a distribution with a total value of $602,169.07. Defendant should receive a distribution with a total value of $526,592.82. These totals do not reflect the estimated tax consequences to either party which the trial court specifically took into account as a distributional factor. We only consider the order filed on 31 August 2000 in this appeal.

[1] We first address defendant's contention that the trial court erred by considering speculative tax consequences as a factor in determining the distribution of the marital property. In determining whether an equal distribution of marital property is equitable to the parties, the trial court must consider all of the factors listed in N.C. Gen. Stat. § 50-20(c) (2001). These factors include "[t]he tax consequences to each party." N.C. Gen. Stat. § 50-20(c)(11). Our courts have construed this provision "as requiring the court to consider tax consequences that will result from the distribution of property that the court actually orders." *Weaver v. Weaver*, 72 N.C. App. 409, 416, 324 S.E.2d 915, 920 (1985). It is error for a trial court to consider "hypothetical tax consequences as a distributive factor." *Wilkins v. Wilkins*, 111 N.C. App. 541, 553, 432 S.E.2d 891, 897 (1993).

Here, the trial court found that if the rental properties were liquidated at the present stipulated value, plaintiff would have personal income tax consequences of $46,726 and a corporate tax liability of $65,415. It also found that defendant would have income tax consequences of $21,500 "if she were to liquidate the three rental properties distributed to her." Furthermore, there was no finding that, as a direct result of the distribution, the parties would have to liquidate the rental properties or that there would be any actual tax consequences.

The trial court did not order any of the rental properties to be liquidated as part of the distribution.

The tax consequences which the trial court specifically took into account were hypothetical and speculative and fell within the *Wilkins* prohibition. Without a finding that there would be tax consequences as a direct result of the distribution, it is error to consider these speculative tax consequences. *Accord*, *Crowder v. Crowder*, 147 N.C. App. 677, 556 S.E.2d 639 (2001). Thus, the trial court erred in using these hypothetical and speculative tax consequences as a distributional factor.

[2] Defendant also claims that the trial court erred in not taking into account post-separation income which plaintiff received from the rental properties. When evidence of multiple distributional factors exists, "the trial court must make findings as to each factor for which evidence was presented." *Rosario v. Rosario*, 139 N.C. App. 258, 261, 533 S.E.2d 274, 276 (2000). Here, the trial court found the plaintiff had received post-separation rental income and had paid certain expenses. However, the trial court failed to make sufficient findings based on the evidence as to whether the rental income should be a distributional factor.

In summary, the trial court erred in considering hypothetical tax consequences as a distributional factor. It further erred by failing to make proper findings as to whether the post-separation rental income should be a distributional factor. On remand the trial court, in proceeding consistent with this opinion, may take additional evidence or make additional findings based on the existing record.

Vacated and remanded.

Judge THOMAS concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

N.C. Gen. Stat. § 50-20(c)(11) (1999) requires the trial court in determining whether "an equal division is not equitable" to consider as a factor: "The tax consequences to each party." I dissent from the majority holding and *certify* to our Supreme Court under N.C. Gen. Stat. § 7A-30 (1999) the issue of whether the plain language of N.C. Gen. Stat. § 50-20(c)(11) should be judicially limited to apply only

where such taxes are incurred as a direct result of the distributional award. *See Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993); *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985).

"The law has long been that where the plain language of a statute . . . is unambiguous on its face, the court is bound by the clear meaning." *Hamby v. Hamby*, 143 N.C. App. 635, 645, 547 S.E.2d 110, 117, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 39 (2001). "When language used in [a] statute is clear and unambiguous, [the Court] must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning." *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996), (quoting *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995)). "[W]here the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself." *Upchurch v. Funeral Home*, 263 N.C. 560, 565, 140 S.E.2d 17, 21 (1965) (quoting 50 Am. Jur. Statutes § 432, p. 453 (1944)). Here, the language of the statute is clear and it is not necessary for us to resolve an ambiguity.

Under N.C. Gen. Stat. § 50-20(c)(11) the legislature imposed no limitation on the trial court's consideration of the tax consequences as a factor in the distribution of marital property. N.C. Gen. Stat. § 50-20(c) provides in pertinent part that:

> There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. Factors the court shall consider under this subsection are as follows:
>
> . . .
>
> (11) The tax consequences to each party.

Moreover, other jurisdictions have not been restrictive in determining when a trial court may consider tax consequences. *See, e.g., In re Bookout*, 833 P.2d 800, 806 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993); *Hogan v. Hogan*, 796 S.W.2d 400, 408 (Mo. App. 1990); *White v. White*, 105 N.M. 600, 734 P.2d 1283, 1286 (1987); *Barnes v. Barnes*, 16 Va. App. 98, 428 S.E.2d 294, 300 (1993); *see also* Tracy A. Bateman, Annotation, Divorce and Separation:

Consideration of Tax Consequences in Distribution of Marital Property, 9 A.L.R. 5th 568, 592, § 2[a] (1993).

Since the plain language of the statute provides no such limitation on the consideration of tax consequences in determining whether an equal division is not equitable, I *certify* to our Supreme Court the holdings of this Court to the contrary. N.C. Gen. Stat. § 7A-30.

ESMAY FRYE STEVENSON, BY AND THROUGH HER GUARDIAN, SYLVIA FRYE LONG, PLAINTIFF v. C. WAYNE JOYNER AND WIFE, CAROL JEAN JOYNER, AND CATAWBA VALLEY BANK AND D. STEVE ROBBINS, TRUSTEE, DEFENDANTS

No. COA01-237

(Filed 2 January 2002)

Appeal and Error— appealability—discovery order compelling answer to deposition questions—interlocutory order

Although defendants appeal from a discovery order compelling them to answer questions proposed during a deposition by plaintiff in an action alleging claims including undue influence, fraud, and lack of mental capacity, the appeal is dismissed because the order is interlocutory and defendants have failed to demonstrate that a substantial right will be affected.

Appeal by defendants from order entered 29 November 2000 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 5 December 2001.

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

Wyatt, Early, Harris & Wheeler, L.L.P., by William E. Wheeler, for defendant-appellants.

HUDSON, Judge.

C. Wayne Joyner and his wife, Carol Jean Joyner, ("defendants") appeal an order compelling defendants to answer questions proposed during a deposition by plaintiff. This order is interlocutory and defendants have failed to demonstrate that a substantial right will be affected should they not be given the immediate right to appeal from this order. We dismiss this appeal.

The pertinent procedural history is as follows. Plaintiff, Sylvia Frye Long, filed an action in the Superior Court of Catawba County, as the guardian of her aunt, Esmay Frye Stevenson, on 20 July 2000. In her complaint, plaintiff alleges a number of causes of action including undue influence, fraud, and Esmay Frye Stevenson's lack of mental capacity against defendants C. Wayne Joyner and his wife, Carol Jean Joyner, Catawba Valley Bank, and D. Steve Robbins. During the course of plaintiff's deposition of C. Wayne Joyner, plaintiff's counsel asked Mr. Joyner questions concerning work with which his counsel had assisted him. Mr. Joyner's counsel instructed him not to answer based on an invasion of his attorney-client privilege, and he did not answer. On 25 October 2000, plaintiff filed a motion to compel Mr. Joyner to answer the questions presented at the deposition. On 29 November 2000, Judge Timothy S. Kincaid ordered Mr. Joyner to answer the questions. Defendants appeal this order.

Plaintiff filed a "Motion to Dismiss Appeal as Interlocutory and Not Affecting a Substantial Right" addressing the propriety of raising this issue on appeal and its interlocutory nature. "Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citations omitted). "The policy behind this rule is to avoid fragmentary, premature and unnecessary appeals by allowing the trial court to completely and finally adjudicate the case before the appellate courts review it." *Romig v. Jefferson-Pilot Life Ins. Co.*, 132 N.C. App. 682, 685, 513 S.E.2d 598, 600 (1999) (internal quotation marks omitted), *aff'd*, 351 N.C. 349, 524 S.E.2d 804 (2000).

In general, there is no right to appeal from an interlocutory order. *See, e.g. Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). However, a party may appeal an interlocutory order "where the order represents a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal," or "where delaying the appeal will irreparably impair a substantial right of the party." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999) (internal quotation marks omitted); *see* N.C. Gen. Stat. §§ 1A-1, Rule 54(b), 1-277, 7A-27(d) (1999). "In either instance, the burden is on the appellant 'to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those

grounds.' " *Romig*, 132 N.C. App. at 685, 513 S.E.2d at 600 (quoting *Jeffreys*, 115 N.C. App at 379, 444 S.E.2d at 253).

North Carolina Rule of Appellate Procedure 28(b) has been amended effective 31 October 2001 to add a new subsection, 28(b)(4), which requires that the brief contain "a statement of the grounds for appellate review" and when an appeal is interlocutory, "the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." This amendment does not apply to briefs, as in this case, filed before the effective date.

Generally, appellate courts do not review discovery orders because of their interlocutory nature. *See Romig*, 132 N.C. App. at 685, 513 S.E.2d at 600. However, our Courts have recognized a narrow exception to this rule when a discovery order includes a finding of contempt or certain other sanctions. *See id*; *Woody v. Thomasville Upholstery Inc.*, 146 N.C. App. —, 552 S.E.2d 202 (2001) (holding that a discovery order in workers' compensation case was not immediately appealable because there was no finding of contempt and no sanctions had been imposed); *Willis v. Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976) (holding that a contempt order entered against defendant for not complying with discovery requirements was immediately appealable); *but cf. Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999) (holding that a trial court's order compelling the disclosure of documents subject to an absolute statutory privilege affected a substantial right and was, thus, immediately appealable), *disc. rev. denied*, 352 N.C. 150, 544 S.E.2d 228 (2000). No such order was entered in this case. The trial court's order only compelled Mr. Joyner to answer the questions posed during the deposition; it did not assess sanctions or find defendant in contempt.

In their "Response to Plaintiff/Appellee's Motion to Dismiss Appeal," defendants have argued to this Court that the discovery order impairs a substantial right. *See Sharpe*, 351 N.C. at 163-65, 522 S.E.2d at 580-81; *Romig*, 132 N.C. App. at 686, 513 S.E.2d at 600. They base this argument on this Court's opinion in *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782, *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001). In *Evans*, plaintiff requested information and documents from defendant during discovery, that defendant deemed excluded from discovery as work product and protected by attorney-client privilege. The trial court reviewed the questionable documents *in camera*, ordered that some of the documents should be produced, and found that others were protected "by the attorney

client privilege and/or are matters prepared in anticipation of litigation." *Id.* at 23, 541 S.E.2d at 785 (internal quotation marks omitted). Both parties appealed the trial court's decision. This Court determined that the appeal should proceed, even though appeals from discovery orders generally are interlocutory. *See Romig*, 132 N.C. App. at 685, 513 S.E.2d at 600. This Court noted the extent and import of the materials at issue, and decided that the trial court's order "affects a substantial right." *Evans*, 142 N.C. App. at 24, 541 S.E.2d at 786. Defendants in this case urge us to apply *Evans* to find that we should hear their appeal, because it affects a substantial right. We believe this Court's holding in *Evans* is distinguishable and we decline to read it as defendants urge.

We reach this conclusion based on important differences between *Evans* and the case at issue. In *Evans*, defendant was asked to turn over an enormous amount of information about the internal processes and practices of defendant-company. This material included documents alleged to be protected under both the attorney-client privilege and work-product doctrine. Here, the discovery at issue consists of only a few questions posed during a deposition, which defendants' counsel instructed Mr. Joyner not to answer. From the record before us, it appears that defendants never presented their deposition answers to the judge *in camera* or under seal for a determination of the application of the privilege to the information. Defendants bear the burden of showing that this information sought was protected by attorney-client privilege, but our record is insufficient to determine whether that burden has been carried by defendants. *See id.* at 32, 541 S.E.2d at 791 (noting that "[t]he burden of establishing the attorney-client privilege rests upon the claimant of the privilege"). We do not read *Evans* as opening the door to appellate review of every contested discovery order in which attorney-client privilege is simply asserted, without more. A substantial right has not been shown to be at issue here, and we dismiss defendant's appeal as interlocutory.

"Motion to Dismiss Appeal as Interlocutory and Not Affecting a Substantial Right" is granted.

Appeal dismissed.

Judges TIMMONS-GOODSON and TYSON concur.

ANNIE MOORE JAMES, EMPLOYEE-PLAINTIFF v. WILSON MEMORIAL HOSPITAL, EMPLOYER-DEFENDANT AND SPECIALTY INSURANCE SERVICES, CARRIER-DEFENDANT

No. COA01-122

(Filed 2 January 2002)

Workers' Compensation— time period for claim—proper version of statute

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's claim for benefits was barred by N.C.G.S. § 97-24(a) as it existed at the time of her injury, because: (1) an employer acquires a vested right on the date of the employee's injury since the employer is entitled to assess its potential liability as of the date of injury based on the existing law; and (2) plaintiff's right to compensation and defendant's corresponding liability arose prior to the effective date of N.C.G.S. § 97-24(a) as amended which extended the period for filing a claim from one to two years.

Appeal by plaintiff from order filed 27 October 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 December 2001.

Perry & Brown, by Cedric R. Perry, for plaintiff-appellant.

Young Moore and Henderson, P.A., by Terryn D. Owens and Zachary C. Bolen, for defendants-appellees.

WALKER, Judge.

Plaintiff filed a claim on 13 December 1996 seeking benefits under the Workers' Compensation Act for a back injury she sustained on 22 September 1994 while employed by defendant. Following a hearing, a deputy commissioner concluded that plaintiff's claim was barred by N.C. Gen. Stat. § 97-24(a) as it existed at the time of her injury and denied her claim for benefits. On appeal, the Full Commission (Commission) concluded it did not have jurisdiction and affirmed the deputy commissioner's order.

The pertinent facts as found by the Commission are not in dispute. On 22 September 1994, plaintiff sustained an injury to her back while employed as a nurse assistant for defendant. Plaintiff sought medical treatment for her injury but did not miss any work.

Defendant paid for plaintiff's medical treatment. In November 1994, plaintiff was laid off as part of a general reduction in work force. Nevertheless, defendant continued to pay for the medical treatment related to plaintiff's injury until August 1997.

With this appeal, plaintiff contends the Commission erred in concluding that her claim for benefits was barred by N.C. Gen. Stat. § 97-24(a).

At the time of plaintiff's injury, our Workers' Compensation Act provided:

> The right to compensation under this Article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident.

N.C. Gen. Stat. § 97-24(a) (1993). However, in 1994, our legislature amended this provision as part of the Workers' Compensation Reform Act of 1994. Under the amended version, a party may file a claim:

> within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C. Gen. Stat. § 97-24(a) (1995). By its expressed terms, the amendment applies to all claims filed on or after its effective date of 1 January 1995. 1993 N.C. Sess. Laws ch. 679, s. 11.1(f).

Plaintiff argues that N.C. Gen. Stat. § 97-24(a) as amended should apply to her claim for benefits as she filed it after 1 January 1995 and within two years after defendant last paid medical compensation. We disagree.

In *McCrater v. Engineering Corp.*, 248 N.C. 707, 104 S.E.2d 858 (1958), our Supreme Court addressed the issue of whether an amendment to N.C. Gen. Stat. § 97-24(a), which extended the time period for filing a claim from one to two years, applied retrospectively to an injury sustained prior to the amendment's effective date. The Court held that since such an amendment effectively enlarged an employee's substantive right to recovery, if applied retrospectively, it would divest an employer of a vested right. Therefore, the amendment did not apply to those existing claims at the time it became effective. The Court reasoned:

> [A] plaintiff's inchoate right to compensation [arises] by operation of law on the date of the accident. But [the] substantive right to compensation [is] not fixed by the simple fact of injury arising out of and in the course of . . . employment. The requirement of filing [a] claim within the time limited by G.S. 97-24 [is] a condition precedent to [the] right to compensation. Necessarily, then, the element of filing [a] claim within the time limited by the statute [is] of the *very essence of the plaintiff's right to recover compensation*. This time limit as fixed by statute as it existed on the date of the accident, being a part of the plaintiff's substantive right of recovery, could not be enlarged by subsequent statute. Any attempt to do so would be to deprive the defendant[] of vested rights.

Id. at 709-10, 104 S.E.2d at 860 (emphasis added).

Plaintiff contends *McCrater* is not binding authority because defendant would not be deprived of a vested right by an application of the amended version of N.C. Gen. Stat. § 97-24(a). Specifically, plaintiff argues that applying the statute as amended would not deprive defendant of "any property or title" or "any immunity or exemption which had become fixed or certain" by 1 January 1995. However, plaintiff's argument fails to recognize the crux of the *McCrater* holding which is that in cases involving injury by accident, an employer acquires a vested right on the date of the employee's injury. *McCrater*, 248 N.C. at 710, 104 S.E.2d at 860. This vested right arises because the employer is entitled to assess its potential liability as of the date of injury based on the existing law.

Here, N.C. Gen. Stat. § 97-24(a) conditioned plaintiff's right to compensation and defendant's corresponding liability on her filing a claim within two years of the date she was injured. *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 401 S.E.2d 138 (1991) (the timely filing of a claim for compensation under the Workers' Compensation Act is a condition precedent to right to receive compensation). Thus, defendant had an exemption from liability which had become fixed or certain as of 22 September 1994. To apply N.C. Gen. Stat. § 97-24 as amended so as to allow plaintiff to file her claim more than two years after 22 September 1994 would deprive defendant of this exemption.

Plaintiff also maintains our Supreme Court's holding in *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979) and this Court's holding in *Long v. N.C. Finishing Co.*, 82 N.C. App. 568, 346

S.E.2d 669 (1986) requires that N.C. Gen. Stat. § 97-24(a) as amended be applied to allow her claim. However, our holding today does not conflict with the holdings of these cases.

In *Booker*, the plaintiffs were family members seeking benefits for an employee's death, which they alleged resulted from an occupational disease. One issue before the Court was whether an amended version of N.C. Gen. Stat. § 97-53(13) applied to the family members' claim. The employer argued the version which existed at the time the employee allegedly contracted the occupational disease should apply. The Court disagreed, holding that since the family members did not acquire a substantive right to recovery until the employee's death, the amended version applied. Citing *McCrater*, the Court noted, "[t]he proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect." *Booker*, 297 N.C. at 461, 467-68, 256 S.E.2d at 192, 195-96 (other citations omitted).

In *Long*, this Court applied the *Booker* holding to an amendment which extended employers' liability for employees' exposure to asbestos. Under the original version, liability was limited to instances in which disablement or death occurred two years after the last exposure. However, the amendment lengthened the liability to ten years after the last exposure. The employer argued the amendment should not apply to a family member's claim for death benefits where the last exposure occurred prior to the amendment's effective date. We disagreed noting that, as in *Booker*, the amended version was in effect at the time the family member's right to compensation arose. *Long*, 82 N.C. App. at 571-73, 346 S.E.2d at 671-72.

Here, in contrast to the factual circumstances in *Booker* and *Long*, plaintiff's right to compensation and defendant's corresponding liability arose prior to the effective date of N.C. Gen. Stat. § 97-24(a) as amended.

In sum, we conclude that N.C. Gen. Stat. § 97-24(a) as amended does not apply so as to allow plaintiff's claim for benefits. The Commission's order barring plaintiff's claim is affirmed.

Affirmed.

Judges WYNN and THOMAS concur.

TAYLOR v. CITY OF LENOIR

[148 N.C. App. 269 (2002)]

DALE E. TAYLOR, B. J. FORE; DILLARD A. BROWN, HARVEY R. COOK, JR., THOMAS P. DEIGHTON, JAMES M. FLOYD, CATHY ANN HALL, GRANT HAROLD, MARY ROSE HART, RAYMOND HIGGINS, KENNETH D. HINSON, ALLEN C. JONES, JAMES T. MALCOLM, III, RANDY W. MARTIN, RICHARD N. OULETTE, RALPH PITTMAN, SID A. POPE, DANIEL L. POWERS, II, DARYL D. PRUITT, LISA D. ROBERTSON, RICKY E. SHEHAN, GREGORY F. SNIDER, TIMOTHY C. STOKER, ANN R. STOVER, JOAN C. SMITH, INDIVIDUALLY, AND FOR THE BENEFIT OF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. CITY OF LENOIR, A MUNICIPAL CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, BODY POLITIC AND CORPORATE; O.K. BEATTY, JOHN W. BRITTE, JR., JAMES M. COOPER, RONALD E. COPLEY, CLYDE R. COOK, JR., BOB ETHERIDGE, JAMES R. HAWKINS, SHIRLEY A. HISE, WILMA M. KING, GERALD LAMB, W. EUGENE MCCOMBS, WILLIAM R. MCDONALD, III, DAVID G. OMSTEAD, PHILLIP M. PRESCOTT, JR., JAMES W. WISE, AS TRUSTEES; DENNIS DUCKER, AS DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION, AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA; HARLAN E. BOYLES, AS TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT RETIREMENT SYSTEM; AND THE STATE OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, DEFENDANTS

No. COA99-1228-3

(Filed 15 January 2002)

Class Actions; Costs— attorney fees—common fund doctrine—benefits from settlement

The trial court correctly limited an award of attorney fees to a court-approved settlement in a class-action involving the retirement of law enforcement officers where defendant-city converted from a local plan to the North Carolina Local Government Retirement System (LGERS) while the litigation was pending, not all of the members of the class became enrolled in LGERS, the city agreed to pay $96,000 to those members, and attorney fees were awarded only from that amount as opposed to a "common fund" representing the increased benefits received from the plaintiffs who became enrolled in LGERS. No award of attorney fees may be made pursuant to the common fund doctrine where a lawsuit brings about a voluntary change in a defendant's conduct with financial benefits to certain class members without the merits being determined. Attorney fees may be awarded only from monies obtained as a result of a formal judgment or a court-approved settlement, the common fund doctrine applies when the party seeking the award is the prevailing party in a successful lawsuit, and the court must have control over a pool of money in order to award attorney fees from that pool.

Judge WALKER concurring.

Appeal by plaintiffs Dale E. Taylor, B. J. Fore, Dillard A. Brown, the Estate of James Floyd, Raymond Higgins, Thomas P. Deighton, and Ricky E. Shehan, from a class action final settlement order entered 5 March 1999 by Judge Claude S. Sitton in Caldwell County Superior Court. Originally heard in the Court of Appeals on 23 August 2000. An opinion was filed 17 October 2000, *Taylor v. City of Lenoir*, 140 N.C. App. 337, 536 S.E.2d 848 (2000), but was superceded on rehearing by a second opinion filed 2 January 2001, *Taylor v. City of Lenoir*, 141 N.C. App. 660, 542 S.E.2d 222 (2001). The case was appealed and, by order of the North Carolina Supreme Court on 20 July 2001, the second opinion was vacated and the case was remanded to the Court of Appeals for reconsideration. *Taylor v. City of Lenoir*, 353 N.C. 695, 550 S.E.2d 141 (2001). Reheard without additional briefing or oral arguments.

Kuehnert Bellas & Bellas, PLLC, by Daniel A. Kuehnert and Steven T. Aceto, for plaintiff-appellants.

Wilson, Palmer, Lackey & Rohr, P.A., by David S. Lackey, for plaintiff-appellee Derek K. Poarch; Todd, Vanderbloemen, Brady & LeClair, P.A., by Bruce W. Vanderbloemen, for plaintiff-appellees Frank M. Hicks, Jr., Sid A. Pope, Tim Stoker, Sharon Cook Poarch and Arnold Dula; Potter, McCarl & Whisnant, P.A., by Lucy R. McCarl and Steve B. Potter, for plaintiff-appellees Jack Warlick, Jim Higgins, Mike Phillips, Gary Clark, Harold Brewer, Ronda Watts, Helen Gallardo and Michael Wayne Sutton.

Groome, Tuttle, Pike & Blair, by Edward H. Blair, Jr., for defendant-appellee City of Lenoir.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for defendant-appellees Board of Trustees of the North Carolina Local Government Employees' Retirement System and its individually named members or their successors, Jack W. Pruitt (Successor to Dennis Ducker), Harlan E. Boyles, and the State of North Carolina.

HUNTER, Judge.

Plaintiffs' class counsel ("class counsel") appeal from a "Class Action Final Settlement Order" granting in part and denying in part their "Verified Petition/Request for Attorneys' Fees" based upon the "common fund doctrine." We affirm.

I. Facts and Procedural History

Plaintiffs herein are law enforcement officers who are currently employed by the City of Lenoir ("the City") or who were in the City's employ as of 1 January 1986. On 17 November 1992, plaintiffs filed a "Revised Complaint" against the City, the Board of Trustees of the North Carolina Local Government Employees' Retirement System and its individual members or successors, Dennis Ducker, Harlan E. Boyles, and the State of North Carolina (collectively "the State defendants"). The named plaintiffs alleged that the City had "an affirmative statutory duty" to enroll them, and others similarly situated, in the Local Government Employees' Retirement System ("LGERS") as of 1 January 1986, and that the City had improperly failed to enroll them in LGERS and had, instead, offered them enrollment only in the City of Lenoir Pension Plan. Plaintiffs also alleged, among other things, that the City had failed to inform plaintiffs of their rights to voluntarily elect to enroll in LGERS on an individual basis, and that in some cases the City had impermissibly denied requests by individual plaintiffs to enroll in LGERS. Plaintiffs sought declaratory relief determining their rights pursuant to the applicable statutes. Additionally, plaintiffs sought damages against the City for accrued benefits to which plaintiffs would have been entitled had they been enrolled in LGERS. During the course of this litigation, plaintiffs and class counsel agreed by stipulation not to seek to recover damages or attorney's fees from the State defendants.

While the action was pending before the trial court, and following a majority vote of its employees, the City applied for participation in LGERS and, on 1 July 1995, converted its retirement plan to LGERS ("the 1995 conversion") and transferred the total assets of its then-existing pension plan ($5,183,600.90) to LGERS. As a result of the 1995 conversion, approximately sixty-two members of the plaintiff class became enrolled in LGERS. In this appeal, class counsel seek attorney's fees from the increased retirement benefits that these sixty-two plaintiffs will receive as a result of becoming enrolled in LGERS in 1995. Also, between the filing of the lawsuit in 1992 and the 1995 conversion, a small number of officers were enrolled in LGERS by the City. The remaining plaintiffs, approximately thirty-five, were not enrolled in LGERS either prior to 1995 or as a result of the 1995 conversion.

On 21 August 1996, plaintiffs and the City entered into stipulations regarding the procedure for litigating the issues involved in this case and, thereby, agreed that this action would be tried in three

phases. In Phase I, the court was to determine "all legal issues of declaratory relief" pertaining to the plaintiff class generally. If the court concluded, based upon a determination of the legal issues, that any of the class plaintiffs might be entitled to monetary or other relief, the trial would proceed to Phase II. In Phase II, individual claimants would be entitled to "present evidence pertaining to such individual's particular assertion of rights, claims or other entitlement against the City of Lenoir based upon the general declaratory relief as shall have been determined by the Court in Phase I of the trail [sic]." After considering such evidence, the court would then determine which individual claimants, if any, would be entitled to some award of damages or other monetary relief. Finally, Phase III of the trial would be conducted in order for the court to determine what amounts of damages or other monetary relief would be awarded to these individual plaintiff class members.

At the conclusion of Phase I of the trial, the trial court entered a judgment in favor of plaintiffs. The trial court ruled that, as a matter of law, the City had a statutorily-imposed, affirmative duty to enroll its law enforcement officers in LGERS as of 1 January 1986. The court further ruled that the City was liable to plaintiffs for any damages resulting from the City's failure to enroll them in LGERS as of 1 January 1986. The trial court also ruled as a matter of law that plaintiffs were not entitled to attorney's fees against the City pursuant to the common fund doctrine. The City and the State defendants appealed to this Court.

In an opinion filed 7 April 1998, we reversed the trial court's judgment and remanded for further proceedings. *Taylor v. City of Lenoir*, 129 N.C. App. 174, 497 S.E.2d 715 (1998) ("*Taylor I*"). We stated:

> We hold, therefore, that the trial court erred in interpreting and applying sections 123-28(g) and 143-166.50(b) of the North Carolina General Statutes. Accordingly, we reverse the trial court's order concluding that, as a matter of law, defendants are liable to plaintiffs for failing to enroll them in LGERS as of 1 January 1986.

Id. at 182, 497 S.E.2d at 721. In that opinion, this Court also briefly addressed plaintiffs' argument that they were entitled to attorney's fees under the common fund doctrine, stating:

> The trial court concluded that, as a matter of law, plaintiffs are not entitled to attorneys fees against the City pursuant to the

> Common Fund Doctrine or any other legal theory. Plaintiffs assign error to this ruling. However, in light of our holding regarding the matter of statutory construction, we need not address the issue of attorneys fees, as it is moot.

Id. at 182-83, 497 S.E.2d at 721.

This Court's reversal of the trial court's judgment was only a partial resolution of plaintiffs' various claims. Although we held that the State defendants were not statutorily obligated to have automatically enrolled plaintiffs in LGERS as of 1 January 1986, certain allegations in plaintiffs' complaint remained to be adjudicated, including, for example, the allegation that certain plaintiffs, who had requested voluntary enrollment in LGERS on an individual basis after 1986, had been denied enrollment by the City. Thus, approximately three weeks after our opinion was filed, the parties convened before the trial court to discuss, in light of this Court's opinion, how best to proceed with the litigation. The parties agreed that the trial would resume on 10 August 1998.

However, before the trial resumed, the parties entered into a "Recommended Settlement" agreement, tentatively approved by the trial court on 19 August 1998. This document states that the purpose of the settlement was "to provide cash benefits [$96,000.00] in lieu of actual State Retirement benefits to those approximately 35 remaining class members" who were still not enrolled in LGERS following the 1995 conversion. On the same day, class counsel filed a "Verified Petition/Request for Attorneys' Fees Pursuant to Common Fund Doctrine." Specifically, class counsel requested that the trial court set aside twenty-five to forty percent of the financial benefits produced as a result of the litigation, including both (1) the monies directly resulting from the settlement ($96,000.00), and (2) the increased retirement benefits that the sixty-two class members, who received full LGERS enrollment as a result of the 1995 conversion, would receive over time (which amount, class counsel contended, was equal to a present value of between $2,100,000.00 and $2,850,000.00). In a "Supplemental Petition for Attorneys' Fees" filed on 4 September 1998, class counsel acknowledged that, as to the increased retirement benefits to certain plaintiffs as a result of the 1995 conversion, they sought attorney's fees "in the form of a reduction of benefits due Plaintiffs' class members," as opposed to seeking attorney's fees directly from the City.

Notice was provided to all class members of the proposed settlement agreement. Prior to a hearing, some of the individual class members filed objections to the petition for attorney's fees and/or notices that the class member intended to opt out of the recommended settlement. Following a hearing, the trial court entered a "Class Action Final Settlement Order." Pursuant to this order, the City agreed to pay $96,000.00 to the plaintiff class members (approximately thirty-five) who did not become enrolled in LGERS as a result of the 1995 conversion. The order states that this settlement amount constitutes "a full and complete settlement and satisfaction of any and all claims and causes of action of the members of the plaintiffs' class based upon, or arising out of, the facts and circumstances alleged in the plaintiffs' revised complaint." Thus, the City was freed from the obligation to pay any additional attorney's fees directly to plaintiffs or class counsel. The court found that the $96,000.00 constituted a "common fund" procured as a direct result of the efforts of class counsel and, as a result, awarded class counsel twenty-seven and a half percent of this amount as attorney's fees.

However, the trial court entered the following conclusion of law regarding additional attorney's fees:

> 4. The Court concludes that the plaintiff class members' interests in present and/or future LGERS benefits to be paid from or into the LGERS as [a] result of the effective July 1, 1995, conversion of the City of Lenoir Pension Plan to LGERS are not an identifiable amount of monies subject to sufficient control of this Court. The Court concludes as a matter of law, it does not exercise control over these benefits to make any disbursements from such benefits or monies, which therefore do not constitute a common fund from which this Court can order the payment of attorneys fees.

We also note that the trial court's order does not include any findings or conclusions as to the causal relationship between the filing of the lawsuit and the 1995 conversion by the City. Class counsel appeal from the trial court's order denying in part their petition for attorney's fees.

II. Analysis

On appeal, class counsel contend that the trial court erred in awarding attorney's fees *only* from the $96,000.00 arising from the court-approved settlement. Class counsel contend they are entitled to

additional attorney's fees. Their argument can be summarized as follows: (1) that this lawsuit prompted the City to convert to LGERS in 1995; (2) that the approximately sixty-two plaintiffs who became enrolled in LGERS as a result of the 1995 conversion will now receive greater retirement benefits than they would otherwise have received had they not become enrolled in LGERS; (3) that these increased retirement benefits which these sixty-two plaintiffs will receive constitute a "common fund" created as a result of this lawsuit; (4) that class counsel are entitled to receive attorney's fees from these plaintiffs as compensation for the reasonable value of their services in bringing and maintaining this lawsuit; and (5) that, pursuant to the "common fund doctrine," such attorney's fees should be deducted from the purported common fund that has been created by this lawsuit.

At the outset, we note that class counsel have assigned error to the trial court's failure to enter findings or conclusions as to whether this lawsuit prompted the 1995 conversion, resulting in increased retirement benefits to sixty-two plaintiffs. Because we hold that class counsel are not entitled to attorney's fees from these benefits on other grounds, we need not reach the issue of whether the trial court erred in not making findings or conclusions on the issue of causation.

The common fund doctrine is well recognized in North Carolina. The doctrine "is based on an exception to the general rule that attorneys' fees may not be awarded to the prevailing party without statutory authority." *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 696, 483 S.E.2d 422, 430 (1997). Pursuant to the common fund doctrine, ". . . 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.' " *Bailey v. State of North Carolina*, 348 N.C. 130, 160, 500 S.E.2d 54, 71 (1998) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 681 (1980)).

> The application for the fees may be made by the plaintiffs themselves, on the ground that they have performed a service benefiting others similarly situated. *But a plaintiff's attorney may himself present a claim to compensation and reimbursement for expenses from the fund, on the theory that he has provided or preserved a benefit—the fund itself—and that the reasonable value of his services should be borne proportionately by all plaintiffs.*

Van Gemert v. Boeing Co., 590 F.2d 433, 437 (2d Cir. 1978) (emphasis added) (citations omitted), *affirmed*, *Boeing Co.*, 444 U.S. 472, 62 L. Ed. 2d 676 (1980); *see also*, *Lindy Bros. Bldrs., Inc. of Phila. v. American R. & S. San. Corp.*, 487 F.2d 161, 165-66 (3d Cir. 1973). Here, class counsel seek attorney's fees pursuant to this latter type of common fund doctrine claim.

However, two facts distinguish this case from the three principle North Carolina common fund doctrine cases upon which class counsel substantially rely. *See Bailey*, 348 N.C. 130, 500 S.E.2d 54; *Faulkenbury*, 345 N.C. 683, 483 S.E.2d 422; *Horner v. Chamber of Commerce*, 236 N.C. 96, 72 S.E.2d 21 (1952). First, the particular benefits from which class counsel seek attorney's fees (the increased retirement benefits to those sixty-two plaintiffs who became enrolled in LGERS in 1995) are benefits arising from a "voluntary" action taken by the City—"voluntary" in the sense that it did not occur as a result of any judicial mechanism of the trial court. The City was not obligated to convert to LGERS pursuant to any judgment or order entered by the trial court; and, unlike the $96,000.00, the benefits resulting from the City's decision to convert to LGERS in 1995 did not arise pursuant to a court-approved settlement agreement.

The second fact that sets this case apart is the fact that there has never been a determination in favor of plaintiffs as to the merits of plaintiffs' legal claims. At the conclusion of Phase I, the trial court ruled that the City had violated the statutes in question by failing to enroll plaintiffs in LGERS as of 1986. On appeal from that judgment, this Court reversed the trial court's ruling and remanded for further proceedings. *See Taylor I*, 129 N.C. App. 174, 497 S.E.2d 715. Our ruling in *Taylor I* disposed only of one of plaintiffs' claims—namely, that the City was statutorily obligated to automatically enroll plaintiffs in LGERS as of 1 January 1986. Following remand, the remainder of plaintiffs' claims were still pending and were to be adjudicated when the trial resumed. However, the merits of these remaining claims have never been determined because, before the trial resumed, the parties reached a settlement agreement.

Thus, the question presented is this: where a lawsuit, the merits of which have never been determined, brings about a voluntary change in a defendant's conduct (in the sense that the defendant's action is not undertaken pursuant to a judgment, order, or court-approved settlement), and where that change in conduct results in financial benefits for certain plaintiff class members, are the attorneys who brought and maintained the lawsuit entitled to an award of

attorney's fees from those benefits pursuant to the common fund doctrine? For the reasons that follow, we hold that no award of attorney's fees may be made under these particular circumstances.

First and foremost, our Supreme Court has consistently held that attorney's fees may only be awarded from monies that are actually "recovered" by the litigation. For example, our Supreme Court stated in *Horner*:

> [W]e conclude that where, as in the present case, on refusal of municipal authorities to act, a taxpayer successfully prosecutes an action to recover, *and does actually recover and collect*, funds of the municipality which had been expended wrongfully or misapplied, the court has implied power in the exercise of a sound discretion to make a reasonable allowance, *from the funds actually recovered*, to be used as compensation for the plaintiff taxpayer's attorney fees.

Horner, 236 N.C. at 101, 72 S.E.2d at 24 (emphasis added). Similarly, in *Bailey*, the Court stated that ". . . 'a litigant or a lawyer *who recovers a common fund* for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.' " *Bailey*, 348 N.C. at 160, 500 S.E.2d at 71 (emphasis added) (quoting *Boeing*, 444 U.S. at 478, 62 L. Ed. 2d at 681).

Black's Law Dictionary defines "Recovery" as follows:

> In its most extensive sense, the restoration or vindication of a right existing in a person, by the formal judgment or decree of a competent court, at his instance and suit, or the obtaining, by such judgment, of some right or property which has been taken or withheld from him. . . .
>
> The obtaining of a thing by the judgment of a court, as the result of an action brought for that purpose. The amount finally collected, or the amount of judgment. . . .

Black's Law Dictionary 1276 (6th ed. 1990). Thus, attorney's fees may only be awarded from monies that are obtained as a result of a "formal judgment" or a court-approved settlement (or consent decree).

In the present case, class counsel are seeking attorney's fees specifically from the financial benefits that sixty-two plaintiffs will receive as a result of becoming enrolled in LGERS due to the 1995 conversion. These benefits have not been obtained by means of a judgment, an order, or a court-approved settlement, and, therefore,

do not constitute monies "recovered" by plaintiffs in this lawsuit. Thus, class counsel are not entitled to an award of attorney's fees from these benefits.

Similarly, and perhaps even more fundamentally, North Carolina cases involving the common fund doctrine indicate that, in order for the common fund doctrine to apply, the party seeking an award of attorney's fees must be the prevailing party, and must show that he has maintained a successful lawsuit. For example, our Supreme Court stated in *Faulkenbury* that "[t]he common-fund doctrine is based on an exception to the general rule that attorneys' fees may not be awarded *to the prevailing party* without statutory authority." *Faulkenbury*, 345 N.C. at 696, 483 S.E.2d at 430 (emphasis added). Moreover, in *Horner*, the Court stated that the common fund doctrine may be applied where a litigant "*has maintained a successful suit* for the preservation, protection, or increase of a common fund or of common property." *Horner*, 236 N.C. at 97-98, 72 S.E.2d at 22 (emphasis added) (citation omitted). Thus, to be entitled to attorney's fees from the specific benefits in question, class counsel must establish that the sixty-two plaintiffs who became enrolled in LGERS in 1995 qualify as prevailing parties in this lawsuit. *See* Alba Conte, *Attorney Fee Awards* § 1.02, at 2 (2d ed. 1993) (party seeking attorney's fees under the common fund doctrine must "demonstrate some level of success in obtaining the litigation benefits sought").

Here, we are not persuaded that the sixty-two plaintiffs in question should be considered prevailing parties for purposes of awarding attorney's fees. First, as noted above, there has been no determination as to the merits of the majority of plaintiffs' legal claims. Further, the one claim that has been ruled upon—that the City was statutorily obligated to enroll plaintiffs in LGERS in 1986—was rejected by this Court. In addition, although it is possible that this lawsuit may have had some impact upon the City's decision to convert to LGERS in 1995, the 1995 conversion was not a legally enforceable action required by judgment, or an order or a court approved settlement of the trial court. Thus, we hold that these sixty-two plaintiffs do not qualify as prevailing parties for purposes of awarding attorney's fees. *Cf. Buckhannon Home v. West Va. Dept.*, 532 U.S. 598, 149 L. Ed. 2d 855 (2001) (holding that, pursuant to federal civil rights statutes which allow award of attorney's fees to "prevailing party" only, "prevailing party" does not include party that has failed to secure either judgment on the merits or court-ordered consent decree, even where lawsuit brings about voluntary change in defendant's conduct,

because there must be some judicially sanctioned change in legal relationship between parties).

Finally, under the circumstances presented in this case, it is not at all clear that the trial court had sufficient "control" over the benefits in question to order an award of attorney's fees from these benefits. The North Carolina cases dealing with the common fund doctrine indicate that a court must have control over a pool of money in order to award attorney's fees from that pool of money. For example, in *Horner*, our Supreme Court quoted with approval the following statement: ". . . 'The right of a court of equity to subject a fund [] recovered [through an equitable class action lawsuit], *and under the control of the court*, to the reasonable costs of such creation or preservation, is well established.' " *Horner*, 236 N.C. at 99, 72 S.E.2d at 23 (emphasis added) (quoting *Shillito v. City of Spartanburg*, 214 S.C. 11, —, 51 S.E.2d 95, 100 (1948)). Furthermore, this Court has held that one of the necessary "ingredients for application of the common fund doctrine" is that the award in question be "under the trial court's supervision and control." *Raleigh-Durham Airport Authority v. Howard*, 88 N.C. App. 207, 214, 363 S.E.2d 184, 187 (1987), *disc. review denied*, 322 N.C. 113, 367 S.E.2d 916 (1988).

Here, the benefits to some of the class plaintiffs resulting from the 1995 conversion are not the result of any judicial action by the trial court in this litigation. The trial court had no opportunity to review these benefits, or to approve or disapprove them, because the 1995 conversion was not undertaken pursuant to a settlement approved by the court. Because these benefits are the result of the City's voluntary action undertaken outside of the purview of the trial court, and because the benefits themselves were not subjected to the trial court's review or approval, we do not believe the trial court had sufficient "control" to award attorney's fees from these benefits.

In summary, we hold that, under these particular circumstances, class counsel are not entitled to an award of attorney's fees from the specific benefits in question pursuant to the common fund doctrine. Therefore, the trial court's order, granting in part and denying in part class counsel's petition for attorney's fees, is affirmed.

Affirmed.

Judge SMITH concurs.

Judge WALKER concurs in a separate opinion.

WALKER, Judge, concurring.

I concur with the majority opinion which affirms the order of the trial court.

On 1 July 1995, the City of Lenoir converted its retirement system to LGERS. This 1995 conversion was not pursuant to a judgment, an order, nor a court-approved settlement. In 1998, this Court held that the statutes creating LGERS did not require the City to convert its retirement system to LGERS. *Taylor v. City of Lenoir*, 129 N.C. App. 174, 497 S.E.2d 715 (1998). After that decision, the parties entered into a court-approved settlement by which a total of $96,000 was paid to the plaintiff class members who did not become enrolled in LGERS as a result of the 1995 conversion. From this amount, the trial court ordered attorneys' fees paid to the plaintiffs' attorneys pursuant to the common fund doctrine. It also specifically concluded that, as to the benefits resulting from the 1995 conversion, "[the trial court] does not exercise control over these benefits to make any disbursements from such benefits or monies, which therefore do not constitute a common fund from which this Court can order the payment of attorneys[']fees."

As addressed by the majority, our Courts have held that to create a common fund, the trial court must have control over the award from which the common fund would be created. In *Raleigh-Durham Airport Authority v. Howard*, 88 N.C. App. 207, 363 S.E.2d 184 (1987), *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 916 (1988), this Court stated that one of the "ingredients for application of the common fund doctrine" is that the award from which a common fund would be created is "under the trial court's supervision and control." 88 N.C. App. at 214, 363 S.E.2d at 187.

In other cases involving the common fund doctrine in this State, the award from which the common fund was created was under the control of the trial court because the award was a judgment or order of the court. *See Bailey v. State of North Carolina*, 348 N.C. 130, 500 S.E.2d 54 (1998) (The common fund was created out of the court-ordered refund of taxes); *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997) (The common fund was created out of the court-ordered payment of actuarial value of underpayments and interest thereupon of disability benefits under the State Employees' Retirement System); *Horner v. Chamber of Commerce*, 236 N.C. 96, 72 S.E.2d 21 (1952) (The common fund was

created out of the court-ordered refund of monies); and *Raleigh-Durham Airport Authority, supra* (The common fund was created out of the condemnation award).

In the present case, the plaintiffs' attorneys seek to recover attorneys' fees from the benefits resulting from the 1995 conversion. Therefore, the 1995 conversion must be under the supervision and control of the trial court. However, there was no order, judgment, nor court-approved settlement resulting in the 1995 conversion. In 1998, this Court held that the City was not obligated to convert to LGERS, thus, precluding the plaintiff from obtaining an order requiring the City to convert. Therefore, it is clear that the trial court does not now have sufficient supervision nor control over the 1995 conversion to create a common fund out of those benefits.

If there had been a court-approved settlement in 1995 evidencing the City's commitment to convert to LGERS while preserving other issues for trial, the trial court would have control over the 1995 conversion and its resulting benefits. If that event had occurred, there is enough evidence here to convince me that a common fund could have been identified.

My prior comment, in connection with my dissent in *Taylor v. City of Lenoir*, 141 N.C. App. 660, 542 S.E.2d 222 (2001), focused on the issue of causation. I concluded there was a "common fund" created from the benefits because of the causal connection between the lawsuit filed and the 1995 conversion by the City. Upon further review of the record and the 1998 decision of this Court, I concur with the majority that the trial court did not have sufficient supervision nor control over the benefits of the 1995 conversion to create a common fund because there was no judgment, order, nor court-approved settlement at that time.

STATE OF NORTH CAROLINA v. NORMAN BECKHAM, JR.

No. COA00-1494

(Filed 15 January 2002)

1. **Constitutional Law— double jeopardy—misdemeanor larceny—civil versus criminal penalty**

The trial court did not err by denying defendant's motion to dismiss the charge of misdemeanor larceny on double jeopardy grounds even though defendant paid money to the merchant owner of the property in response to a demand made under N.C.G.S. § 1-538.2, because: (1) the effect of N.C.G.S. § 1-538.2 does not transform what was intended as a civil remedy into a criminal penalty; (2) the mere presence of a deterrent quality is insufficient to render a sanction criminal; and (3) the sanction allowed by N.C.G.S. § 1-538.2 is not excessive in relation to the remedial purpose since the damages are limited to between $150 and $1,000, and the statute's purpose is to restore to the victims of theft, embezzlement, and fraud the value of their loss caused by the misconduct of others.

2. **Constitutional Law— excessive fines clause—misdemeanor larceny—qui tam actions**

The trial court did not err by denying defendant's motion to dismiss the charge of misdemeanor larceny even though defendant argues the extra $50 he paid to the merchant owner of the property in response to a demand made under N.C.G.S. § 1-538.2 is an excessive fine under the Eighth Amendment, because: (1) neither the government nor a specified public institution received any portion of the amount paid by defendant to the merchant owner; and (2) no action was prosecuted by the merchant owner since defendant voluntarily paid in response to the demand letter, and thus, there was no qui tam action.

Appeal by defendant from judgment entered 11 August 2000 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 November 2001.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Roberta Ouellette, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Dean P. Loven, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from a judgment entered upon his conviction of misdemeanor larceny. The record discloses that defendant was convicted of misdemeanor larceny in the district court and appealed to the superior court. He moved, in superior court, to dismiss the charge on double jeopardy grounds, based upon his payment to the owner of the stolen property, The Sports Authority, of the sum of $200.00 in response to a demand made pursuant to G.S. § 1-538.2. The trial court denied the motion after concluding that G.S. § 1-538.2 provided for a civil remedy rather than a criminal penalty.

The State's evidence at trial tended to show that defendant was employed by The Sports Authority in Charlotte, North Carolina in March 1999. On the evening of 23 March 1999, defendant left the store at the end of his work period carrying a Sports Authority shopping bag that contained a pair of Nike Air Tail Wind shoes worth approximately $119.99. The store's loss prevention manager, Samuel Grier, asked defendant to produce a receipt for proof of purchase, in accordance with established store policy. In response, defendant told Grier that he had left the receipt at home. Although the store policy was not to allow an employee to leave with store merchandise unless a receipt was produced, Grier allowed defendant to leave the store with the shoes since it was so late in the evening. Grier planned to investigate the matter the following day.

The next day, Grier checked defendant's purchase records and determined that defendant had not purchased the shoes in question. Grier also reviewed the inventory records of the store which revealed that the store was missing a pair of Nike Air Tail Wind shoes. Grier and his supervisor subsequently confronted defendant about the shoes. Defendant told them that he had taken the shoes for a friend.

Defendant offered no evidence.

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[1] Defendant's sole contention on appeal is that the trial court erred in denying his motion to dismiss the criminal charge on double jeopardy grounds. His argument is based upon the letter from an attorney for The Sports Authority demanding payment of $200.00, pursuant to G.S. § 1-538.2, and his payment in response thereto. He contends that the demand exceeded by $50.00 the restitution authorized by the statute, and that his payment of the additional $50.00 constituted a punishment and should be considered an excessive fine under the

Eighth Amendment to the United States Constitution. In addition, defendant maintains that the statute authorizing collection of the civil penalty is a *qui tam* action, and therefore involves state action. Thus, since the excessive fine involves state action, defendant argues double jeopardy precludes him from being tried for larceny based on the same set of facts for which the excessive civil penalty was imposed.

The Double Jeopardy Clause provides that no person shall ". . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This clause prohibits "a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *Montana Dept. of Rev. v. Kurth Ranch*, 511 U.S. 767, 769, n.1, 128 L. Ed. 2d 767, 773, n.1 (1994). "The Law of the Land Clause incorporates similar protections under the North Carolina Constitution." *State v. Oliver*, 343 N.C. 202, 205, 470 S.E.2d 16, 18 (1996) (citing N.C. Const. art. I, § 19).

The United States Supreme Court modified the standard for double jeopardy analysis in *Hudson v. United States*, 522 U.S. 93, 139 L. Ed. 2d 450 (1997). The *Hudson* Court noted that "the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, 'in common parlance,' be described as punishment." *Id.* at 98-99, 139 L. Ed. 2d at 458 (*quoting United States ex rel. Marcus v. Hess*, 317 U.S. 537, 87 L. Ed. 443 (1943)). Instead, "[t]he Clause protects only against the imposition of multiple criminal punishments for the same offense." *Id.* at 99, 139 L. Ed. 2d at 458 (citations omitted). In *Hudson*, the Court applied the following two-part test for determining whether a statute imposes punishment for double jeopardy purposes:

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty."

Id. at 99, 139 L. Ed. 2d at 459 (citations omitted).

The *Hudson* Court suggested that when determining the second part of the test, the factors listed previously in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 9 L. Ed. 2d 644 (1963), are useful. These factors include:

> [(1)] [w]hether the sanction involves an affirmative disability or restraint[;] [(2)] whether it has historically been regarded as a punishment[;] [(3)] whether it comes into play only on a finding of scienter[;] [(4)] whether its operation will promote the traditional aims of punishment—retribution and deterrence[;] [(5)] whether the behavior to which it applies is already a crime[;] [(6)] whether an alternative purpose to which it may rationally be connected is assignable for it[;] and [(7)] whether it appears excessive in relation to the alternative purpose assigned.

Kennedy, 372 U.S. at 168-69, 9 L. Ed. 2d at 661. The *Hudson* Court emphasized that no one factor is controlling. Further, the clearest proof is required to override legislative intent and conclude that an Act denominated civil is punitive in purpose or effect. *Seling v. Young*, 531 U.S. 250, 261, 148 L. Ed. 2d 734, 746 (2001).

In applying the *Hudson* two-part inquiry, we must examine the purpose behind G.S. § 1-538.2, the statute at issue in this case. We first note that G.S. § 1-538.2 is labeled "Civil liability for larceny, shoplifting, theft by employee, embezzlement, and obtaining property by false pretense." Additionally, according to subsection (a), any person who commits the listed crimes is liable for "civil damages" to the owner of the property. The statute provides only a civil remedy, limited to an amount between $150 and $1,000.

Having determined that the legislature expressly intended that the remedy under the statute is civil in nature, we now turn to the issue of whether the effect of G.S. § 1-538.2 transforms what was intended as a civil remedy into a criminal penalty. In our determination of this second part of the inquiry we refer to the seven *Kennedy* factors listed *supra*. As to the first factor, the statute in question does not impose an "affirmative disability" since that term is normally understood to mean some sanction "approaching the 'infamous punishment' of imprisonment." *Hudson*, 522 U.S. at 104, 139 L. Ed. 2d at 462 (citations omitted). As to the second *Kennedy* factor, monetary sanctions have historically not been viewed as criminal punishment. *Helvering v. Mitchell*, 303 U.S. 391, 82 L. Ed. 917 (1938). "Historically, punishment has taken the forms of incarceration and incapacitation." *State v. Evans*, 145 N.C. App. 324, 333, 550 S.E.2d

853, 859 (2001). Because these forms of punishment are not available under G.S. § 1-538.2, defendant has failed to establish the second *Kennedy* factor. The third *Kennedy* factor is met since a finding of scienter is required by the statute because the underlying criminal acts require intentional conduct.

The fourth *Kennedy* factor asks whether the sanction promotes "the traditional aims of punishment—retribution and deterrence." *Kennedy*, 372 U.S. at 168, 9 L. Ed. 2d at 661. Defendant contends that the threat of punitive damages if defendant does not pay the amount demanded promotes a traditional aim of punishment in the form of deterrence. But, the Supreme Court recognized in *Hudson*, ". . . all civil penalties have some deterrent effect." *Hudson*, 522 U.S. at 102, 139 L. Ed. 2d at 461. The Court further stated "[i]f a sanction must be 'solely' remedial (i.e., entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause." *Id.* Thus, the Court noted that "the mere presence of a [deterrent quality] is insufficient to render a sanction criminal [because] deterrence 'may serve civil, as well as criminal goals.' " *Id.* at 105, 139 L. Ed. 2d at 463 (quoting *United States v. Ursery*, 518 U.S. 267, 135 L. Ed. 2d 549 (1996)). The statute at issue in this case, has a remedial effect in that it allows merchants to recover for their losses attributable to others' misconduct. That the statute may also have a deterrent effect is, by itself, insufficient to implicate double jeopardy.

The fifth *Kennedy* factor asks "whether the behavior to which [the statute] applies is already a crime." *Kennedy*, 372 U.S. at 168, 9 L. Ed. 2d at 661. The statute at issue only applies to a person who commits a crime punishable under G.S. §§ 14-72 (larceny of property; receiving stolen goods or possessing stolen goods), 14-72.1 (concealment of merchandise in mercantile establishments), 14-74 (larceny by employees), 14-90 (embezzlement of property received by virtue of office or employment), or 14-100 (obtaining property by false pretenses). Thus, the fifth factor is met. However, "[t]his fact is insufficient to render" the monetary sanction "criminally punitive, particularly in the double jeopardy context." *Hudson* 522 U.S. at 105, 139 L. Ed 2d at 462 (citations omitted).

To apply the final two factors of the *Kennedy* analysis, we must determine whether there is a remedial purpose behind G.S. § 1-538.2, and if so, whether the sanction is excessive in relation to the remedial purpose. As stated earlier, there is a remedial purpose behind the

monetary sanctions imposed by G.S. § 1-538.2 since it allows merchants to recover their losses due to others' malfeasance without having to resort to the criminal process or wait for the results of the criminal process before collecting damages. Defendant contends that the penalty is excessive *per se* because it is greater than the penalty allowed by the statute. Defendant argues that under the statute, the merchant may seek actual damages listed in G.S. § 1-538.2(a) or a minimum of $150, whichever is greater, by way of a demand letter. Defendant reasons that since The Sports Authority sought damages of $200 but failed to list any damages in excess of $150 in the demand letter, The Sports Authority sought civil damages beyond those allowed by statute. Defendant further states that since the additional $50 requested in the demand letter could not be damages or attorney's fees, it must therefore be a penalty. We disagree.

First, we note that there is no explicit requirement in G.S. § 1-538.2 that the demand letter contain an itemization of additional damages sought over $150. Thus, the monetary sanction is not excessive *per se*. Further, defendant's argument that the additional $50 could not be damages or attorney's fees and therefore must be a penalty fails as well, as the additional $50 sought by the victim in this case could reasonably consist of consequential damages recoverable under the statute. Subsections (c1)(1) and (c1)(2) include, as recoverable consequential damages "[t]he salary paid to any employee for investigation, reporting, testifying, or any other time related to the investigation or prosecution for any violation under subsection (a) of this section; and [a]ny costs, such as mileage, postage, stationery, or telephone expenses that were incurred as a result of the violation." Clearly, The Sports Authority incurred such costs, even though not itemized in the letter; therefore, the additional $50 does not constitute an excessive fee.

There is some ambiguity in the statute as to the amount of damages that may be demanded. The sample demand letter set out in section (c2) provides the following:

> "Our records show that on (date), you unlawfully took possession of property from (store name/owner of the property), located in (city, state), without the consent of (store name/owner of the property), without paying for the property, and with the intent of converting the property to your own use. In accordance with G.S. 1-538.2, we are authorized to demand that you pay damages of one hundred fifty dollars ($150.00).

> In the event you fail to comply with our demand for one hundred fifty dollars ($150.00) within 15 days from the date of your receipt of the notice, you may be held civilly liable for an amount not less than one hundred fifty dollars ($150.00) and not more than one thousand dollars ($1,000) in a civil action against you to recover the penalties and damages authorized by law, which include court costs and attorneys' fees. If you pay the one hundred fifty dollars ($150.00), (store name/owner of the property) will have no further civil remedy against you arising from the events occurring on (date).
>
> If you are the parent or legal guardian of an unemancipated minor who unlawfully took possession of property as set out above, you can be held liable if you knew or should have known of the propensity of the child to commit the act complained of, and you had the opportunity and ability to control the child and you made no reasonable effort to correct or restrain the child.
>
> If you believe you have received this notice in error, please contact (name) immediately.
>
> YOU HAVE A RIGHT TO CONTEST YOUR LIABILITY IN COURT."

In the sample letter, $150 is used for the amount of damages demanded. However, a demand letter sent, according to the statute, must only be "substantially similar" to the sample demand letter. Thus, the $150 listed in the sample letter is not a predetermined, limited amount. Similarly, the language of subsection (c4) lends further ambiguity to the amount which can be requested, stating that if the recipient of the notice "pays the demanded one hundred fifty dollars ($150.00) within 15 days of the recipient's receipt of the notice, the owner of the property shall have no further civil remedy . . . ." To interpret the subsection as limiting to $150 the amount which the victim may demand would, however, be inconsistent with the statutory scheme as a whole, since the purpose of the statute is to give the owner of property an expedited and simple means of recovering his/her loss. Subsection (c4) may be explained as simply parroting the language found in the sample demand letter in subsection (c2).

We conclude that the sanction allowed by G.S. § 1-538.2 is not excessive in relation to the remedial purpose since the damages are limited to between $150 and $1,000 and the statute's purpose is to

restore to the victims of theft, embezzlement or fraud the value of their loss caused by the misconduct of others.

[2] Defendant also argues that the extra $50 which he paid to The Sports Authority is an excessive fine under the Excessive Fines Clause of the Eighth Amendment. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The United States Supreme Court has concluded that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257, 264, 106 L. Ed. 2d 219, 231 (1989). The Court, however, specifically left open the question of whether the Clause applies to *qui tam* actions. *Id.* at 276, n.21, 106 L. Ed. 2d at 238, n.21. "*Qui tam* actions are those 'brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.' " *Fuller v. Easley*, 145 N.C. App. 391, 397, 553 S.E.2d 43, 47 (2001), (quoting *Black's Law Dictionary* 1262 (7th ed. 1998)). In the present case, neither the government nor a specified public institution received any portion of the amount paid by defendant to The Sports Authority. Moreover, no action was prosecuted by The Sports Authority since defendant voluntarily paid in response to the demand letter. Therefore, there was no *qui tam* action and accordingly, defendant's Eighth Amendment argument fails.

Defendant has expressly abandoned his remaining assignment of error. We find no error in the denial of his motion to dismiss.

No error.

Chief Judge EAGLES and Judge BIGGS concur.

STATE OF NORTH CAROLINA v. HASSON S. FLOYD, DEFENDANT

No. COA00-1022

(Filed 15 January 2002)

1. Criminal Law— joinder of charges—transactional connection

The trial court did not abuse its discretion by granting the State's motion to join for trial under N.C.G.S. § 15A-926 all offenses other than the violent habitual felon charges that occurred within a single two-week period including felony larceny, robbery with a dangerous weapon, possession of a firearm by a felon, and conspiracy to commit robbery with a weapon, because: (1) the charges were connected transactionally and the evidence was overlapping; and (2) joinder of the charges did not unjustly or prejudicially hinder defendant's ability to defend himself.

2. Evidence— other crimes, wrongs, or acts—armed robbery—common plan or scheme

The trial court did not err in a felony larceny, robbery with a dangerous weapon, possession of a firearm by a felon, and conspiracy to commit robbery with a weapon case by admitting evidence under N.C.G.S. § 8C-1, Rule 404(b) of an armed robbery of a bank allegedly committed by defendant and his coparticipant during the same two-week period as the charged offenses, because the evidence of the bank robbery was introduced to show it was part of a scheme or plan to commit such offenses during the applicable two-week period.

3. Criminal Law— defendant in restraints—motion for mistrial

The trial court did not abuse its discretion in a felony larceny, robbery with a dangerous weapon, possession of a firearm by a felon, and conspiracy to commit robbery with a weapon case by failing to declare a mistrial when a juror saw defendant in restraints shortly after finding him guilty of the offenses, but before considering the violent habitual felon charges.

4. Sentencing— verdict forms—violent habitual felon

Although there was error in the verdict forms sustaining defendant's convictions for the status of violent habitual felon as charged in the indictments based on their mention of the most recent underlying substantive felony and not the two prior violent felony convictions, there was no plain error because: (1) there

was extensive evidence of defendant's guilt; and (2) the indictments properly allege all elements of the charge, and the trial court correctly instructed the jury on each.

Appeal by defendant from judgments entered 29 July 1999 by Judge Loto G. Caviness in Buncombe County Superior Court. Heard in the Court of Appeals 17 September 2001.

Attorney General Michael F. Easley, by Assistant Attorney General Staci Tolliver Meyer, for the State.

Haley H. Montgomery, for the defendant-appellant.

HUDSON, Judge.

On 29 July 1999, Defendant was convicted by a jury of one count of felony larceny, three counts of robbery with a dangerous weapon, four counts of possession of a firearm by a felon, and one count of conspiracy to commit robbery with a weapon. Based upon two prior felony convictions in Florida that qualify in North Carolina as violent felonies, defendant was indicted as a violent habitual felon and convicted on four counts for the status of violent habitual felon. Defendant was sentenced to eleven to fourteen months for the felony larceny, twenty to twenty-four months for each of the four counts of possession of a firearm by a felon, and four life sentences as a violent habitual felon. Pursuant to N.C. Gen. Stat. § 14-7.12 (1999), defendant's sentences "shall run consecutively with and shall commence at the expiration of any other sentence being served by the person." Defendant appeals his convictions and sentences. We find no error.

In defendant's trial, the state's evidence tended to show that during November 1998 defendant and his accomplice, Andrew Debellott, went on a crime spree in western North Carolina. The two men planned and committed numerous offenses including armed robberies of cash checking businesses, robberies at gunpoint of individuals, a robbery at gunpoint of an individual's automobile, and the larceny of a car in a parking lot. Debellott testified against defendant in the trial, as did more than a dozen other witnesses. Two officers also testified to defendant's confession of the multiple crimes upon his arrest. The state presented physical evidence found after a consensual search of defendant's girlfriend's home tending to show defendant's involvement in the crimes with which he was charged. The jury found defendant guilty of all charges.

At sentencing, the state produced evidence of aggravating factors involving defendant's violent and threatening behavior during his stay in the Buncombe County jail. Defendant offered no evidence of mitigating factors. The court sentenced defendant within the presumptive range for the current offenses and sentenced him to the statutorily required life sentences without parole for each of his convictions as a violent habitual felon. *See* N.C.G.S. § 14-7.12.

Defendant's appointed attorney filed notice of appeal, listing three assignments of error. Pursuant to defendant's request, the court assigned him a new attorney on appeal who filed an "*Anders* brief" with this court. *See Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967) (requiring criminal appellate attorneys who find no merit in their client's case to comply with specific procedures). Defendant's counsel notes in her brief that, "after repeated and close examination of the record and extensive review of relevant law, [she] is unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal." In accordance with *Anders*, and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), defense counsel requests that this court review the transcript and record on appeal for any "possible prejudicial error and to determine whether any justiciable issue has been overlooked by counsel." In compliance with *Anders* and *Kinch*, Defense counsel sent a copy of her brief to defendant, along with the trial transcript, and a letter explaining defendant's opportunity to independently file additional arguments with this court. Defendant has filed two briefs with additional arguments to support his appeal. *See Anders*, 386 U.S. 738, 18 L. Ed. 2d 493; *Kinch*, 314 N.C. 99, 331 S.E.2d 665.

At the outset we note that defendant has not brought forward any of the three assignments of error raised in the record on appeal, and they are therefore deemed abandoned. However, pursuant to *Anders* and *Kinch*, we review these three issues in addition to the entire record for any legal errors that would require us to grant relief. *See Kinch*, 314 N.C. at 102-03, 331 S.E.2d at 667.

In addition to the briefs initially filed by defendant and both counsel, this Court, on its own motion, ordered the parties "to file and serve briefs to this Court, addressing the following issue: Are the verdict forms as submitted to the jury sufficient under applicable law to sustain the defendant's convictions for the status of violent habitual felon as charged in the indictments . . . ?" Counsel filed briefs on this issue 19 November 2001; we conclude there was no plain error in the verdict forms.

[1] In his first assignment of error, defendant challenged the granting of the State's motion to join for trial all offenses other than the violent habitual felon charges. Defendant was charged with committing several offenses during a single two-week period. In its motion to join, the State argued that, "these occurrences all fit together in a very short span of time. It's basically a crime spree by these two Defendants, an armed crime spree. And the State does not see how we can separate those and try them individually since the evidence is going to be intertwined between all of those cases." The court agreed and granted the State's motion.

"N.C. Gen. Stat. § 15A-926 (1999) permits the joinder of offenses within the discretion of the trial court, and such joinder will only be disturbed on appeal where defendant demonstrates that joinder denies him a fair trial." *State v. Beckham*, 145 N.C. App. 119, 125, 550 S.E.2d 231, 236 (2001) (citing *State v. Wilson*, 108 N.C. App. 575, 424 S.E.2d 454, *appeal dismissed, disc. review denied*, 333 N.C. 541, 429 S.E.2d 562 (1993)). This statute allows the joinder of offenses when they "are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926 (1999). The Supreme Court, in *State v. Bracey*, explained that "[t]here must be some sort of 'transactional connection' between cases consolidated for trial." 303 N.C. 112, 117, 277 S.E.2d 390, 394 (1981) (quoting *State v. Powell*, 297 N.C. 419, 255 S.E.2d 154 (1979)). There, the Court concluded that joinder was proper where the trial judge found "common issues of fact" in the three robberies committed over a ten day period. *See Bracey*, 303 N.C. at 117, 277 S.E.2d at 394.

The Supreme Court also pointed out that "[t]he question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial." *Id.* at 117, 277 S.E.2d at 394. Here, as in *Bracey*, the trial court joined the charges based on its conclusion that they were connected transactionally, and the evidence was overlapping. This joinder did not "unjustly or prejudicially" hinder defendant's ability to defend himself. *See id.* We overrule this assignment of error.

[2] Defendant's second assignment of error concerns the trial court's admission of evidence pursuant to North Carolina Rule of Evidence 404(b). The defendant objected to the State's presentation of evidence of an armed robbery of a Wachovia bank allegedly committed

by defendant and Debellott during the same two-week period as the charged offenses. Defendant was not on trial for the Wachovia robbery here because he was charged for this robbery under federal, rather than state, law. However, the State offered the testimony of a bank employee, who described the incident in detail.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. R. Evid. 404(b). Under Rule 404(b), such evidence is not admissible "if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990). Here, the evidence of the Wachovia robbery was not introduced to show defendant's propensity to commit the crime, but as part of a scheme or plan to commit such offenses during the applicable two-week period, and the court did not err in admitting it as such.

[3] Defendant contends in his last assignment of error, that the trial court erred by failing to declare a mistrial when a juror saw the defendant in restraints shortly after finding him guilty of the offenses. The jury had already reached its verdict of guilty on the substantive offenses, but had not yet considered the violent habitual felon charges. Defendant's trial counsel did not argue that there was prejudice and under these circumstances, we see none. The trial court noted the following on this point,

> this jury is aware, having just returned verdicts of guilty of several serious felony charges, that this individual has been this morning convicted of those charges. The Court would find that to a reasonable person, it might not appear unusual for such an individual to have been placed into custody over the lunch break.

In *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999), the Supreme Court found no abuse of discretion where the trial judge ordered the defendant shackled in the courtroom, after he made a threatening comment. These events transpired following a guilty verdict, but before capital

sentencing began with the same jury. *See id.; see also* N.C. Gen. Stat. § 15A-1031 (1999) "Custody and restraint of defendant and witnesses" (specifically allowing the restraint of the defendant in the courtroom under specific restrictions and with certain precautions). If there was no abuse of discretion in *White*, certainly there was none here. The trial court's denial of a mistrial will not be disturbed absent an abuse of discretion, and we find none. *See State v. Upchurch*, 332 N.C. 439, 453-54, 421 S.E.2d 577, 585 (1992) (citing *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986)).

[4] Upon order of this Court, the parties filed separate briefs addressing the sufficiency of the verdict forms to sustain defendant's convictions for the status of violent habitual felon as charged in the indictments. After reviewing the parties' arguments, we conclude that although there was error in the verdict sheets, the error does not require a new trial. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983) (holding when an objection is not raised at trial, the review is by the "plain error" standard of review). Reversal for plain error is only appropriate where the error is so fundamental that it undermines the fairness of the trial, or where it had a probable impact on the guilty verdict. *See id.* We do not believe that this was such an error.

Although the statutes do not specify what constitutes a proper verdict sheet, they contain "no requirement that a written verdict contain each element of the offense to which it refers." *State v. Sanderson*, 62 N.C. App. 520, 524, 302 S.E.2d 899, 902 (1983); *see also* N.C. Gen. Stat. § 15A-1237 (1999). Nor have our Courts required the verdict forms to match the specificity expected of the indictment.

The indictment must, by contrast, "charge all the essential elements of the alleged criminal offense." *State v. Lewis*, 58 N.C. App. 348, 354, 293 S.E.2d 638, 642 (1982), *cert. denied*, 311 N.C. 766, 321 S.E.2d 152 (1984). If the charge is a statutory offense, the indictment is sufficient "when it charges the offense in the language of the statute." *State v. Norwood*, 289 N.C. 424, 429, 222 S.E.2d 253, 257 (1976) (citing *State v. Penley*, 277 N.C. 704, 178 S.E.2d 490 (1971)); N.C. Gen. Stat. § 15A-644 (1999). At issue here are defendant's four convictions of violent habitual felon. The indictments are sufficient: each one lists two prior convictions for felonies in Florida that meet the requirements under North Carolina law for violent habitual felon status, and each specifies a different one of the current offenses as an

underlying substantive charge. This satisfies the statutory requirements for "Charge of violent habitual felon" pursuant to N.C. Gen. Stat. § 14-7.9 (1999). The question before us is whether the verdicts sufficiently reflect convictions on these charges.

To convict of the status of violent habitual felon, "the State must prove beyond a reasonable doubt that the defendant has been convicted of two prior violent felonies . . . ." *State v. Safrit*, 145 N.C. App. 541, 553, 551 S.E.2d 516, 524 (2001). The jury must determine "whether the defendant who has just been convicted of the underlying substantive felony is the same person as the individual the State alleges has two prior violent felony convictions . . . ." *Id.* at 553, 551 S.E.2d at 524. Here, each verdict sheet gives the jury the option of finding the defendant: guilty based on each new violent felony conviction, or not guilty. For example, the verdict sheet for charge 99 CRS 4907 reads: "We the jury unanimously find the defendant, Hasson Sermon Floyd: ( ) guilty of the status of violent habitual felon based on robbery with a dangerous weapon on or about November 17, 1998 (re: Tony Barnes, D/B/A Cash Advance) or ( ) Not guilty[.]"

In *State v. Sanderson*, defendant argued that the trial court erred by omitting an essential element of the charge from the verdict form, raising a question about whether the jury actually found that defendant had committed that element of the crime. *See* 62 N.C. App. at 523, 302 S.E.2d at 902. This Court found that even though the verdict forms improperly omitted an essential element of the crime charged, "the form itself . . . sufficiently identified the offenses found by the jury to enable the court to pass judgment on the verdict and sentence defendant appropriately." *Id.* at 524, 302 S.E.2d at 902.

Here, the indictments properly allege all elements of the charge, and the trial judge correctly instructed the jury on each. However, the verdict sheets, as noted above, only mention the most recent underlying substantive felony, not the two prior violent felony convictions. In *State v. Connard*, this Court held that a verdict sheet is sufficient "if the verdict can be properly understood by reference to the indictment, evidence and jury instructions." 81 N.C. App 327, 336, 344 S.E.2d 568, 574 (1986), *aff'd*, 319 N.C. 392, 354 S.E.2d 238 (1987). Standing alone, the verdict sheets erroneously appear to permit conviction based on only one offense. *See id.* at 336, 344 S.E.2d at 574. In light of the extensive evidence of defendant's guilt, and the trial court's proper instructions to the jury, we do not believe the circumstances here amounted to plain error.

After carefully reviewing all of the briefs and the entire record, we find no error warranting the reversal of defendant's convictions or the reduction of his sentences.

NO ERROR.

Judges EAGLES and HUNTER concur.

IN THE MATTER OF: T.C.S., JUVENILE

No. COA01-176

(Filed 15 January 2002)

1. **Sexual Offenses— indecent liberties between children—motion to dismiss—sufficiency of evidence—perpetrator of crime**

The juvenile court did not err by failing to dismiss the charge of taking indecent liberties between children under N.C.G.S. § 14-202.2 based on the sufficiency of the evidence regarding defendant juvenile as the perpetrator of the crime, because: (1) one witness testified that she saw the child victim, the victim's sister, and another boy who was around twelve years old walking together, and that the victim took off her clothes at the boy's urging and lay down while the boy climbed on top of her; (2) another witness testified that at a time consistent with the time the other witness saw the three children, she saw the victim walk out of the woods holding hands with defendant juvenile with the victim's sister trailing behind; and (3) the victim identified the perpetrator from a photographic lineup.

2. **Sexual Offenses— indecent liberties between children—motion to dismiss—sufficiency of evidence—purpose of arousing or gratifying sexual desire**

The juvenile court did not err by failing to dismiss the charge of taking indecent liberties between children under N.C.G.S. § 14-202.2 based on the sufficiency of the evidence showing that defendant juvenile acted for the purpose of arousing or gratifying sexual desire, because: (1) the juvenile was almost twelve years of age when he was seen holding hands with the five-year-old victim in the presence of her three-year-old sister; (2) a

witness testified that the victim's actions appeared to be done at the insistence and direction of the boy, and the boy appeared to put his hands on his private parts while the victim was taking off her clothes; and (3) the age disparity, the control by the juvenile, the location and secretive nature of their actions, and the attitude of the juvenile is evidence of the maturity and intent of the juvenile.

3. Evidence— hearsay—medical diagnosis exception

Although the juvenile court erred in an indecent liberties between minors case by admitting the statements of the child victim to a social worker through the testimony of a doctor without a showing that the victim knew her statements were for treatment purposes or were otherwise reliable, there was no prejudicial error in light of the other evidence of identity.

4. Trials— juvenile delinquency hearing—recess and continuation for three months

The juvenile court did not commit plain error in an indecent liberties between minors case by recessing and continuing the hearing for three months, because defendant juvenile has failed to show prejudice as a result of the delay.

Appeal by respondent-juvenile from adjudication order entered 23 February 2000 by Judge Michael R. Morgan in Wake County District Court and disposition order entered 14 August 2000 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 5 December 2001.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth N. Strickland, for the State.

Law Offices of James R. Ansley, by James R. Ansley and Robert J. Clements, for respondent-appellant.

WALKER, Judge.

On 26 July 1999, T.C.S., a juvenile, only one month from being twelve years old, was charged with second degree rape and taking indecent liberties between children involving A.H. who was five years old. The adjudication hearing began on 18 November 1999, and when it was not concluded that day, the juvenile court tentatively scheduled the hearing to continue on 22 December 1999. However, the hearing did not resume until 23 February 2000.

The State's evidence tended to show the following. On 26 July 1999, Martha Sullivan saw three children, two girls and a boy, walking by her house between 1:00 p.m. and 3:00 p.m. She identified A.H. and her younger sister as the two girls but did not know the identity of the boy. Ms. Sullivan testified that the boy was tall and slender, was wearing jeans and a hat, and appeared to be white. Ms. Sullivan testified that, as she observed these children, A.H. pulled down her shorts and underpants and laid down on the ground at what appeared to be the request of the boy. The boy's back was toward Ms. Sullivan, but she testified that "he had his hands down like, you know, on his privates. And then he got down on the ground on his knee and gotten on—getting on top of her . . . . Just like he had put [his hands] down on the front, you know, of his privates and whenever he got—and then he got on top of her." Ms. Sullivan then ran to the back door and "hollered at them." A.H. got up and put her clothes on. Then the three children walked away in the direction of the next trailer.

John Sullivan, Ms. Sullivan's husband, was also home that day and testified that, after being called to the back door by his wife, he saw A.H. on the ground and it appeared she did not have on any shorts or underpants. He then observed a boy who at first walked away but then turned around and came back for his bike. Mr. Sullivan testified that he could not identify the boy.

Candi Bowen testified that on the day in question, at around 1:00 p.m., after talking with her younger brother, she went looking for the juvenile to speak with him. After searching, Ms. Bowen found the juvenile and A.H. holding hands and coming from the direction of the woods and a trampoline on which the children played. A.H.'s sister was following behind them. When Ms. Bowen asked where they had been, the juvenile "smarted off at me like 'none of your business.' " A.H. told Ms. Bowen that they had been on the trampoline. Ms. Bowen testified that "[A.H.] looked roughed up. She had branches in her hair. She didn't have no shoes on or no socks on. Her pants were on backwards. Her tags were sticking out the front of her shorts and was smiling, but you know, she looked kind of—her eyes were like big, like kind of real big kind of acting."

A.H. was called to testify, but after being non-responsive to examination by the judge and the prosecutor, the juvenile court determined A.H. was not in a position to testify and declared her unavailable for questioning.

A.H.'s mother testified that when she got home from work on the evening of 26 July 1999, her daughter was "shook up" and "looked rough." She testified that A.H. told her that "her private parts was hurting her." After talking on the telephone with the clinic, she took her daughter to Wake Medical Center the next day. The testimony of A.H.'s mother showed that she related to the clinic physician that A.H. had been playing in the woods when she and a boy went off together. A.H. pulled down her pants and laid down on the ground. The boy got on top of her and "stuck his wee wee in."

Vivian Denise Everett, M.D., the Director of the Child Sexual Abuse Team (the Team) at Wake Medical Center, testified that she examined A.H. on 10 August 1999, pursuant to a referral to the Team. Although she personally had not interviewed A.H., Dr. Everett stated that a social worker on the Team had interviewed her and reported her findings to Dr. Everett. Over objection, Dr. Everett testified as to statements made by A.H. to the social worker who then related them to Dr. Everett in preparation for the medical examination. According to Dr. Everett, A.H. told the social worker, in response to leading questions and using anatomically correct dolls, that the juvenile took his pants off and got on top of A.H. with her pants and underwear off. The social worker asked whether the juvenile put "his wee wee" in A.H. and A.H. nodded her head. The social worker asked "if his wee wee went on the outside or if it went on the inside" of A.H.'s private parts and A.H. responded that it was on the inside.

Dr. Everett also testified that her physical examination of A.H. revealed the following in part:

> that there was asymmetry, so that the hymen is shaped like a crescent and you would expect on either side of 12 o'clock to basically look the same, since the hymen would be a crescent. Instead, it was asymmetric, so the area at 11 o'clock was much higher than that at 1 o'clock . . . . My assessment was that the physical exam was consistent with the history that she gave, which was that of penile vaginal penetration.

When the hearing resumed on 23 February 2000, Terry Gallagher of the Cary Police Department testified that she twice interviewed A.H. Officer Gallagher was called to the scene at the time of the initial report on 26 July 1998 and returned one week later with a photographic lineup created by Seth Lambert, a juvenile investigator for the Cary Police Department. A.H. pointed out one of the photographs presented to her to be that of the perpetrator.

Officer Lambert testified that he responded to the original call from Ms. Harris. He had developed a photographic lineup from a yearbook which included a photograph of the juvenile. He testified that neither Mr. nor Ms. Sullivan could identify the perpetrator. He also interviewed the juvenile's father, who indicated that, on 26 July 1999, the juvenile had been with him all day and had been watching television in the living room.

At the close of the evidence, the juvenile successfully argued for the dismissal of the charge of second degree rape by reason of the failure of the evidence to support all of the elements of the charge. However, the juvenile court denied the motion to dismiss the charge of indecent liberties between children. The juvenile did not present any evidence.

On appeal, the juvenile argues that the juvenile court erred in failing to dismiss the charge of indecent liberties between children for insufficient evidence. To survive a motion to dismiss, the State must present " 'substantial evidence of each element of the charged offenses sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt.' " *In re Lucas*, 94 N.C. App. 442, 452-53, 380 S.E.2d 563, 569 (1989) (*quoting State v. Griffin*, 319 N.C. 429, 433, 355 S.E.2d 474, 476 (1987)). This may be from either direct or circumstantial evidence and taken in a light most favorable to the State. *Id.*

The juvenile was charged under the "Indecent liberties between children" statute, N.C. Gen. Stat. § 14-202.2 (1999), which states as follows:

> (a) A person who is under the age of 16 years is guilty of taking indecent liberties with children if the person either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire.

Thus, the State must prove that (1) *this juvenile* (2) who is under the age of sixteen years (3) took or attempted to take (4) indecent liberties (5) with A.H. (6) who is at least three years younger than the juvenile (7) for the purpose of arousing or gratifying sexual desire.

[1] The juvenile first claims there was insufficient evidence of his being the perpetrator of the crime. Ms. Sullivan testified that between

the hours of 1:00 p.m. and 3:00 p.m. on 26 July 1999, she saw A.H., A.H.'s sister, and another boy, who was roughly twelve years old, walking together. Ms. Sullivan saw A.H., at the urging of the boy, take off her clothes and lie down while the boy climbed on top of her.

Ms. Bowen testified that, at a time consistent with the time when Ms. Sullivan saw the three children, she saw A.H. walk out of the woods holding hands with the juvenile with A.H.'s sister trailing behind. A.H. looked "roughed up" with twigs and branches in her hair, barefoot, clothes on backwards, and tags hanging out.

Officer Gallagher testified that A.H. identified the perpetrator from a photographic lineup created by Officer Lambert which included the juvenile. After the identification, the officers continued their investigation of the juvenile. Although the evidence is conflicting, when viewed in its totality and in the light most favorable to the State, it is sufficient to show that the juvenile was the perpetrator.

[2] The juvenile also contends there was insufficient evidence to show that he acted "for the purpose of arousing or gratifying sexual desire" as required by N.C. Gen. Stat. § 14-202.2. In arguing for a dismissal, the juvenile's counsel argued that even if the juvenile were the perpetrator, the State failed to present any evidence that he committed this act for the purpose of arousing or gratifying sexual desire.

This Court has recently interpreted this provision of N.C. Gen. Stat. § 14-202.2 in the case of *In re T.S.*, 133 N.C. App. 272, 515 S.E.2d 230, *disc. rev. denied*, 351 N.C. 105, 540 S.E.2d 751 (1999). In that case, we held that, unlike the adult statute, "the purpose to arouse or gratify sexual desires should not be inferred from the act alone between children." *In re T.S.*, 133 N.C. App. at 276, 515 S.E.2d at 233. "[A] lewd act by adult standards may be innocent between children, and unless there is a showing of the child's sexual intent in committing such an act, it is not a crime under G.S. 14-202.2." *Id.* Thus, this Court has held that the State must show "some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting" before imputing sexual ambitions to the child. *Id.* at 277, 515 S.E.2d at 233.

Here, the juvenile was almost twelve years of age when he was seen holding hands with the five-year-old victim in the presence of her three-year-old sister. The children were coming from a wooded area and A.H. looked "roughed up." Ms. Sullivan testified that A.H.'s

actions appeared to be done at the insistence and direction of the boy she saw. Although his back was to her, Ms. Sullivan testified that he appeared to put his hands on his private parts while A.H. was taking off her clothes.

Also, as a result of a discussion with her younger brother, Ms. Bowen searched for the juvenile on the afternoon of 26 July 1999. When found and confronted by Ms. Bowen as he was walking out of the woods with A.H., the juvenile "smarted off" and told Ms. Bowen that what the children had been doing was "none of your business." A.H.'s mother testified that A.H. stated that she and a boy went off by themselves while they were out playing and the boy "stuck his wee wee in" her.

The age disparity, the control by the juvenile, the location and secretive nature of their actions, and the attitude of the juvenile is evidence of the maturity and intent of the juvenile. Taking all of the circumstances in the light most favorable to the State, there is sufficient evidence of maturity and intent to show the required element of "for the purpose of arousing or gratifying sexual desire." Thus, the juvenile court properly denied the motion to dismiss the charge of indecent liberties between children.

[3] The juvenile next contends that the juvenile court erred in admitting the statements of A.H. to the social worker through the testimony of Dr. Everett. Our Courts have held that statements of a victim to a social worker, even if ultimately used for the purpose of medical diagnosis, are inadmissible hearsay if the record fails to show that the victim "had a treatment motive" or that there was some other indicia of reliability and truthfulness in the manner of obtaining the statement. *See State v. Waddell*, 351 N.C. 413, 527 S.E.2d 644 (2000); *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000); *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597 (2000), *disc. rev. denied*, 353 N.C. 383, 547 S.E.2d 20 (2001).

Here, the State failed to show that A.H. knew her statements were for treatment purposes or were otherwise reliable. Thus, the admittance of the testimony of Dr. Everett that A.H. told the social worker that the juvenile was the perpetrator was in error. However, in light of the other evidence of identity, there was no prejudicial error in admitting such evidence.

[4] The juvenile finally contends that there was plain error in the recess and continuing of the hearing for three months. The juvenile

has failed to show prejudice as a result of the delay. We find there was no plain error. This assignment of error is overruled.

In conclusion, we find there was sufficient evidence for the juvenile court to adjudicate T.C.S. as delinquent based on his committing indecent liberties between children. The hearing was free of prejudicial error.

Affirmed.

Judges WYNN and THOMAS concur.

STATE OF NORTH CAROLINA v. PHILLIP EUGENE BOYD

No. COA99-1368-2

(Filed 15 January 2002)

1. Sentencing— second-degree kidnapping—use of firearm

The trial court was not precluded from enhancing the sentence of a second-degree kidnapping defendant for use of a firearm because the use or display of a firearm is not an essential element of second-degree kidnapping.

2. Sentencing— firearm enhancement—indictment—statutory factors

A sentence under the firearm enhancement provision of N.C.G.S. § 15A-1340.16A was vacated and remanded where the indictment did not allege the statutory factors supporting enhancement.

3. Appeal and Error— law of the case—prior Court of Appeals panel in same case

A decision by a prior panel of the Court of Appeals on the same issue in the same case was the law of the case and governed on further appeal after remand and resentencing.

4. Sentencing— resentencing—mitigating factor

A kidnapping and rape defendant did not show error in his resentencing hearing where defendant contended that the judge's statement that he could not find a mitigating factor showed a mis-

apprehension that he was precluded from finding factors not found at a previous hearing, but the statement was ambiguous and could also be read as stating that the judge was not finding a mitigating factor.

5. Sentencing— mitigating factor—supporting family—insufficient evidence

The trial court did not err when sentencing defendant for kidnapping and rape by refusing to find as a mitigating factor that defendant supports his family where the only evidence submitted was that defendant had directed $2,000 from the settlement of a lawsuit to his former wife for the benefit of his child.

On remand based on an order of the Supreme Court filed 19 July 2001, *State v. Boyd* (No. 34P01), 353 N.C. 729, 551 S.E.2d 106 (2001), remanding the unanimous decision of the Court of Appeals, *State v. Boyd* (COA99-1368, unpublished opinion filed 29 December 2000), 141 N.C. App. 350, 541 S.E.2d 810 (2000), for reconsideration in light of the Supreme Court's opinion in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001). Appeal by defendant from judgments entered 3 May 1999 by Judge Orlando F. Hudson in Durham County Superior Court. Originally heard in the Court of Appeals 11 October 2000.

Attorney General Michael F. Easley, by Assistant Attorney General Robert C. Montgomery, for the State.

Daniel Shatz for defendant-appellant.

HUNTER, Judge.

This opinion supersedes and replaces our unpublished opinion in this case filed 29 December 2000. The following is a brief recitation of the facts necessary to the issues presented in this appeal.

This case arose from defendant's encounter with his girlfriend, Onjaya Scott, and her friend, Jacqueline Murphy, on 13 May 1995. On the night of 12 May 1995, Ms. Murphy was spending the night with Ms. Scott in Ms. Scott's apartment. The State's evidence tended to show that during the early morning of 13 May 1995, defendant entered the apartment, struck Ms. Scott in the face, pointed a gun at Ms. Murphy, and held the two women in the apartment for approximately two and one-half hours. During this time, he threatened to kill the women if they tried to run, and savagely beat Ms. Murphy with a rolling pin, fracturing both of her hands.

Defendant was convicted of one count of simple assault on Ms. Scott, one count of assault with a deadly weapon with intent to kill inflicting serious bodily injury on Ms. Murphy, two counts of second degree kidnapping, and two counts of being an habitual felon. In defendant's first appeal, another panel of this Court found no error in defendant's trial, but vacated the sentence and awarded him a new sentencing hearing. *State v. Boyd* (COA96-662, unpublished opinion filed 6 May 1997), 126 N.C. App. 226, 491 S.E.2d 563, *disc. review denied*, 346 N.C. 550, 488 S.E.2d 811 (1997). In a second appeal, defendant contested his resentencing. Another panel of this Court again vacated his sentences and remanded for still another sentencing hearing. *State v. Boyd* (COA98-197, unpublished opinion filed 29 December 1998), 131 N.C. App. 879, 516 S.E.2d 652 (1998). In the present appeal, we are asked to review defendant's sentence.

The resentencing at issue here was conducted on 3 May 1999. The court imposed two consecutive sentences on defendant. The first sentence is based on defendant's conviction in 95CRS 14675 of Ms. Murphy, enhanced to a Class C felony by reason of defendant's habitual felon status. As to this offense, defendant received a minimum of 86 and a maximum of 113 months' imprisonment. The second sentence relates to the following consolidated offenses: (1) second degree kidnapping of Ms. Scott in 95CRS 14676, enhanced to a Class C felony by reason of habitual felon status, (2) assault with a deadly weapon inflicting serious injury on Ms. Murphy in 95CRS 14674, a Class E felony, and (3) simple assault on Ms. Scott in 95CRS 13585, a misdemeanor. For these consolidated offenses, defendant received a minimum of 108 and a maximum of 139 months' imprisonment. Pursuant to N.C. Gen. Stat. § 15A-1340.16A, the firearm enhancement section of the Structured Sentencing Act, the sentencing judge enhanced the punishment for these consolidated offenses by sixty months. Defendant's sentence for the consolidated offenses then became a minimum of 168 and a maximum of 211 months' imprisonment.

The firearm enhancement section of the Structured Sentencing Act provides:

> (a) 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.

(b) Subsection (a) of this section does not apply in any of the following circumstances:

(1) The person is not sentenced to an active term of imprisonment.

(2) The 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.

(3) The person did not actually possess a firearm about his or her person.

N.C. Gen. Stat. § 15A-1340.16A (1999).

[1] At the outset, we address defendant's contention that evidence of the display or threatened use of a firearm in this case was necessary to prove the element of restraint in the underlying felony of second degree kidnapping, in violation N.C. Gen. Stat. § 15A-1340.16A(b)(2). Our own Supreme Court has made clear that even where a defendant displayed a firearm when he kidnapped and raped the victim, "the use or display of a firearm is not an essential element of second-degree kidnapping" and thus, a trial court is "not precluded from relying on evidence of defendant's use of the firearm and enhancing defendant's term of imprisonment pursuant to the firearm enhancement section [in N.C. Gen. Stat. § 15A-1340.16A(b)(2)]." *State v. Ruff*, 349 N.C. 213, 216-17, 505 S.E.2d 579, 581 (1998). Defendant's argument is without merit.

[2] Defendant next contends his sentence under the firearm enhancement provision in N.C. Gen Stat. § 15A-1340.16A must be vacated in light of the United States Supreme Court's recent decision in *Apprendi v. New Jersey*, because it subjected him to increased punishment which was not charged in the indictment, not submitted to a jury and not proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). For the reasons stated in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712, we agree with defendant's contention on this issue. In *Lucas*, our Supreme Court held that "in every instance where the State seeks an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A, it must allege the statutory factors supporting the enhancement in an indictment . . . and submit those

factors to the jury." *Id.* at 597-98, 548 S.E.2d at 731. Accordingly, since defendant's indictment failed to allege the statutory factors supporting enhancement, the imposition of the firearm enhancement penalty to defendant's sentence in this case is vacated and the case is remanded for resentencing consistent with the Supreme Court's decision in *Lucas*.

[3] Defendant next contends the trial court erred by using the aggravating factor that Ms. Murphy suffered permanent and debilitating injuries to increase defendant's sentence as to the consolidated judgment. Defendant concedes he raised this issue in his previous appeal. Indeed, a prior panel of this Court addressed defendant's contention and found no error in applying the aggravating factor to the entire consolidated judgment. "According to the doctrine of the law of the case, once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994). Accordingly, this issue is not properly before this panel of our Court and we will not address it.

[4] In his next assignment of error, defendant contends that during his second resentencing, the sentencing judge failed to apply the statutory mitigating factor that defendant supports his family pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(17). *Citing State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986), defendant points to the sentencing judge's statement that "[t]he Court cannot find a mitigating factor" to establish that the judge was operating under a misapprehension that he was precluded from considering mitigating factors not found at a previous sentencing hearing. In *Swimm*, our Supreme Court held that "[a] resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing." *Id.* at 31, 340 S.E.2d at 70.

As the State maintains, the sentencing judge's statement is largely ambiguous. It could either imply that the sentencing judge thought he was not *allowed* to find a mitigating factor, or it may be read as a finding that the court *did not*, after consideration, find a mitigating factor. We find the latter interpretation more reasonable. The statement was made directly after the sentencing judge finished making its own findings as to the applicable aggravating factors in defendant's case. The State also points out that the sentencing judge began the hearing by asking the parties whether there would be any further evidence

presented, and by accepting an affidavit in support of the mitigating factor now at issue. Furthermore, the sentencing judge heard defendant's argument as to why the new mitigating factor should be found and the court's written findings state that "after considering the evidence and arguments presented at the trial and sentencing hearing, [the court] finds that the aggravating and mitigating factors marked, if any, were proven by a preponderance of the evidence." These facts tend to indicate that the trial court was not operating under a misapprehension of the law, but clearly understood that the resentencing hearing was a *de novo* proceeding. Defendant has not met his burden on appeal to show error. *See, e.g., State v. Small*, 301 N.C. 407, 430-31, 272 S.E.2d 128, 142-43 (1980).

[5] Defendant also contends that an affidavit he submitted to the trial court in the previous resentencing sufficiently established the mitigating factor that defendant supports his family under N.C. Gen. Stat. § 15A-1340.16(e)(17). A defendant has the burden of proving by a preponderance of the evidence the existence of mitigating factors. *State v. Canty*, 321 N.C. 520, 523, 364 S.E.2d 410, 413 (1988). A trial judge is given wide latitude in determining the existence of mitigating factors. *Id.* at 523, 364 S.E.2d at 413. The trial court's failure to find a mitigating factor is error only when the evidence so clearly establishes the fact in issue such that "no other reasonable inferences can be drawn from the evidence." *Id.* at 524, 364 S.E.2d at 413.

Defendant's affidavit stated that while he was imprisoned, he settled a civil lawsuit for $2,000.00 and directed the proceeds to be disbursed to his former wife for the benefit of his minor child. This being the *only* evidence submitted indicating that defendant supported his minor child, it is quite possible that this is the only time defendant has offered support in favor of his minor child. Thus, defendant's evidence does not so clearly establish that defendant supports his family such that no other reasonable inference can be drawn. The sentencing judge thus did not err in refusing to find this mitigating factor.

In summary, we vacate the judgment entered for enhanced firearm penalty in cases 95CRS 13585, 95CRS 14674 and 95CRS 14676, and remand these cases for resentencing in accordance with our Supreme Court's decision in *State v. Lucas*.

Vacated and remanded for resentencing.

Judges GREENE and WYNN concur.

STATE OF NORTH CAROLINA v. RONNIE HAYZE WILKERSON

No. COA00-1090

(Filed 5 February 2002)

1. **Evidence— prior crimes or bad acts—drug activity and convictions**

The trial court did not abuse its discretion in a possession with intent to sell or deliver cocaine and trafficking in cocaine case by admitting testimony regarding defendant's prior drug activity and prior drug convictions even though defendant did not testify at trial, because: (1) the evidence was not unfairly prejudicial under N.C.G.S. § 8C-1, Rule 403 and the trial court gave a proper limiting instruction; (2) the other crimes were sufficiently similar since all occurred at the same location, defendant was present, all involved cocaine, and the prior convictions occurred within a year of the present offenses; and (3) the testimony of the underlying facts and circumstances leading to defendant's prior convictions was relevant and admissible under N.C.G.S. § 8C-1, Rule 404(b) to show intent to sell and knowing possession of cocaine.

2. **Criminal Law— instructions—no expression of opinion—totality of circumstances**

The trial court did not commit plain error in a possession with intent to sell or deliver cocaine and trafficking in cocaine case by allegedly commenting upon the evidence during the trial court's instructions to the jury with respect to defendant's 15 June 1994 statement at the time of his arrest, because: (1) the trial court properly instructed the jury that it must consider all of the evidence presented and that defendant's statement was admissible only for the limited purpose for which it was allowed into evidence; and (2) the totality of circumstances revealed that the trial court's instructions did not constitute an impermissible expression of opinion on the evidence.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 16 November 1995 by Judge Howard R. Greeson, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 22 August 2001.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey M. Seigle, for the State.

Lisa Miles, for defendant-appellant.

TYSON, Judge.

I. Facts

The State's evidence at trial tended to establish that on 25 January 1995, Eunice Tolar ("Tolar") purchased cocaine from Ronnie Hayze Wilkerson ("defendant"), for the Eden Police Department, at 133 Roosevelt Street, Eden, North Carolina.

On 26 January 1995, a search warrant was executed at 133 Roosevelt Street. During the search, a test tube containing cocaine was found in defendant's pocket. Cocaine was also found in the commode and a crack pipe was found in a bedroom.

Officer Pyrtle testified that he found cocaine inside a test tube in the kitchen trash can and that defendant was found in the kitchen when he arrived to conduct the 1994 search. After *voir dire* and withdrawal of defendant's objection, Officer Pyrtle read the following statement made by defendant on 15 June 1994 to the jury:

> I purchased eighty dollars worth of powder cocaine . . . then I decided to cook the powder up into crack. When I was cooking the powder into crack that is when the officers came up with the search warrant. I don't sell drugs. I buy powder cocaine because you get more cocaine for your money.

Special Agent Windy Long ("Agent Long"), with the North Carolina Bureau of Investigation, testified that on 11 October 1994 and 12 October 1994, she made undercover purchases of crack cocaine from defendant at 133 Roosevelt Street.

After both Pyrtle and Long testified, Shelby Newcomb, the Deputy Clerk of Court, testified that defendant had prior convictions for: (1) possession of cocaine on 15 June 1994, (2) possession with intent to sell or deliver cocaine on 11 October 1994, and (3) sale and delivery of cocaine on 11 October 1994.

Defendant did not testify or offer any evidence at trial. The jury found defendant guilty of possession with intent to sell or deliver cocaine and trafficking in cocaine. Defendant was sentenced to a minimum of thirty-five months and a maximum of forty-two months

for trafficking in cocaine and a minimum of ten months and maximum of twelve months for possession with intent to sell or deliver to be served at the expiration of the previous sentence. Defendant's retained counsel failed to perfect his appeal. This Court granted certiorari upon petition of his present counsel. We hold there was no error.

II. Issues

The issues presented are: (1) whether the trial court erred in admitting testimony regarding defendant's prior drug activity and prior drug convictions and (2) whether the trial court committed plain error in its comment upon the evidence.

III. Admission of Prior Drug Activity and Prior Convictions

[1] Defendant contends that he was unfairly prejudiced by the admission of the underlying facts and circumstances of his prior drug activities and subsequent convictions. We disagree.

Defendant's reliance on Rule 609 of the Rules of Evidence is misplaced. Rule 609 governs the use of evidence of criminal convictions for purposes of impeachment. "When a defendant appears as a witness at trial, evidence of the defendant's past convictions may be admissible for the purpose of attacking the defendant's credibility as a witness. Such evidence, however, is not admissible as substantive evidence to show the defendant committed the crime charged." *State v. McEachin*, 142 N.C. App. 60, 69, 541 S.E.2d 792, 799 (2001) (citations omitted); *see also State v. Holston*, 134 N.C. App. 599, 606, 518 S.E.2d 216, 221 (1999) ("Rule 609 allows a defendant's prior convictions to be offered into evidence *when he takes the stand and thereby places his credibility at issue.*") (emphasis added).

Defendant did not testify or offer any evidence at trial and the evidence of his prior convictions was not being offered for purposes of impeachment under Rule 609. Instead, the State offered the evidence for admission under N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999), which 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.

This rule is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). Therefore, evidence of bad conduct and prior crimes is admissible under Rule 404(b) "as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (1995). A prior bad act or crime is sufficiently similar to warrant admissibility under Rule 404(b) if there are "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes." *State v. Sokolowski*, 351 N.C. 137, 150, 522 S.E.2d 65, 73 (1999) (citations omitted). The similarities between the two situations need not "rise to the level of the unique and bizarre" but "must tend to support a reasonable inference that the same person committed both the earlier and later acts." *Id.*

Even where such evidence is relevant, the ultimate test of its admissibility is whether its probative value is substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (1999); *State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995); *State v. Everhardt*, 96 N.C. App. 1, 384 S.E.2d 562 (1989). "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. Whether to admit or exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, and the trial court's decision to admit such evidence will only be disturbed upon a showing of abuse of discretion. *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992).

In the present case, defendant was charged with possession with intent to sell or deliver cocaine and trafficking in cocaine. Intent and knowledge are elements of these offenses which must be proven by the State. *See* N.C. Gen. Stat. §§ 90-95(a)(1) and (h)(3) (1999). "Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused." *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 366 (1954).

Officer Pyrtle testified to the underlying facts and circumstances which led to defendant's conviction for possession of cocaine on 15 June 1994. The trial court gave a proper limiting instruction to the jury that defendant's statement from 15 June 1994 is to be considered only as evidence of intent and knowledge.

After the trial court denied defendant's request to suppress, Agent Long testified to the underlying facts and circumstances which led to defendant's convictions for possession with intent to sell or deliver cocaine and for sale and delivery of cocaine on 11 October 1994. The trial court held that the testimony was admissible under Rule 404(b) to show intent and knowledge and was not unfairly prejudicial under Rule 403. The trial court again instructed the jury to consider this evidence for intent or knowledge and not to prove the offense for which defendant was being tried.

We conclude that the other crimes were sufficiently similar: (1) all occurred at 133 Roosevelt Street, (2) defendant was present, (3) all involved cocaine, and (4) the prior convictions occurred within a year of the present offenses. We also conclude that the testimony of the underlying facts and circumstances leading to defendant's prior convictions was relevant to show intent to sell and knowing possession of cocaine.

Our courts have held that it is not error to admit the underlying facts and circumstances that formed the basis of defendant's prior convictions. *See State v. Barnett*, 141 N.C. App. 378, 540 S.E.2d 423 (2000), *disc. review denied*, 353 N.C. 527, 549 S.E.2d 552 (2001); *State v. Cinema Blue of Charlotte, Inc.*, 98 N.C. App. 628, 392 S.E.2d 136 (1990); *State v. Winslow*, 97 N.C. App. 551, 389 S.E.2d 436 (1990); *State v. Rosario*, 93 N.C. App. 627, 379 S.E.2d 434 (1989).

Our courts have also held that it is not error to admit the fact of defendant's prior convictions. *See State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000); *State v. McAllister*, 138 N.C. App. 252, 530 S.E.2d 859 (2000); *State v. Fuller*, 138 N.C. App. 481, 531 S.E.2d 861, *disc. review denied*, 353 N.C. 271, 546 S.E.2d 120 (2000); *State v. Miller*, 142 N.C. App. 435, 543 S.E.2d 201 (2001); *State v. Grice*, 131 N.C. App. 48, 505 S.E.2d 166 (1998); *State v. Hall*, 85 N.C. App. 447, 355 S.E.2d 250 (1987).

Our courts have also held that it is proper to admit both: (1) testimony of the underlying facts and circumstances and (2) that defendant had been convicted for the bad act under Rule 404(b). *See State v.*

Hipps, 348 N.C. 377, 501 S.E.2d 625 (1998); *State v. Barkley*, 144 N.C. App. 514, 551 S.E.2d 131 (2001).

In *Hipps*, defendant was indicted for first-degree murder. Defendant did not testify or offer any evidence during the guilt-innocence phase of trial. *Hipps*, 348 N.C. at 387, 501 S.E.2d at 632. The State presented evidence that defendant had been convicted of murder in 1978 and details about the similarities between the 1978 and 1995 murders. *Id.* Our Supreme Court found that: (1) the evidence tended to show that defendant had both knowledge and intent when he committed the crime, (2) the seventeen year time lapse was not too remote for its admissibility, (3) there was no abuse of discretion by the trial court in concluding that the probative value outweighed any prejudicial effect, as the trial court was "careful to give a proper limiting instruction to the jury", and (4) the evidence was properly admitted under Rule 404(b). *Id.* at 405-06, 501 S.E.2d at 642.

This Court, in *Barkley*, affirmed the admission of court records showing that defendant had been convicted of rape in 1990 and testimony by the victim who accused defendant of raping her. *Barkley*, 144 N.C. App. at 521-22, 551 S.E.2d at 136. Defendant did not offer evidence at trial. *Id.* at 517, 551 S.E.2d at 134. This Court stated that "[e]vidence of prior crimes is admissible." *Id.* at 522, 551 S.E.2d at 136. We concluded that: (1) the similarities between the rapes supported a reasonable inference that the crimes were committed by the same person, (2) the six year time lapse was not too remote to affect admissibility, and (3) the trial court did not err in admitting both the victim's testimony and the record of conviction pursuant to Rule 404(b) and Rule 403. *Id.* at 522, 551 S.E.2d at 136-37 (citing *State v. Murillo*, 349 N.C. 573, 595, 509 S.E.2d 752, 765 (1998) (quoting *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991)).

Federal Rule of Evidence 404(b) is substantially similar to our Rule 404(b). Many federal courts have held that evidence of a prior conviction is admissible for a proper purpose even though defendant did not testify. *See United States v. King*, 768 F.2d 586, 588 (4th Cir. 1985) (defendant's prior convictions for dispensing cocaine were admissible on issues of intent and absence of mistake under Rule 404(b)); *United States v. Naylor*, 705 F.2d 110, 111-12 (4th Cir. 1983) (defendant's prior conviction for attempted theft of a motor vehicle was admissible under Rule 404(b) on the issue of knowledge since it

was an essential element of the crime charged); *United States v. Bibo-Rodriguez*, 922 F.2d 1398, 1401-02 (9th Cir. 1991) (defendant's subsequent arrest after the charged offense for transporting marijuana was admissible under Rule 404(b) to show knowledge); *United States v. Mehrmanesh*, 689 F.2d 822, 830-33 (9th Cir. 1982) (defendant's prior conviction for possession of cocaine was admissible to show intent and knowledge under Rule 404(b)).

The dissent focuses on the issue of introduction of "the bare fact of defendant's prior conviction" absent the underlying facts and circumstances, which is not before us. The question presented in this appeal is whether evidence of the underlying facts and circumstances of defendant's prior drug activities and subsequent convictions is admissible.

The dissent would abolish the Rule 403 balancing test as it finds that the admission of defendant's subsequent convictions for his prior drug activity is "inherently prejudicial." Our Supreme Court directly addressed this issue in *Hipps*, stating that defendant had not demonstrated an abuse of discretion as the trial court gave a proper limiting instruction to the jury. *Hipps*, 348 N.C. at 405-06, 501 S.E.2d at 642.

The dissent states it is "implied" that: (1) since evidence of defendant's prior convictions is admissible only under Rule 609 then evidence of the underlying facts and circumstances of defendant's prior convictions is admissible only under Rule 404(b) and (2) Rule 403 "envisions a comparison of facts and circumstances, rather than charges and convictions."

Justice O'Connor, dissenting in *Old Chief v. United States*, 519 U.S. 172, 196, 136 L. Ed. 2d 574, 597 (1997), stated that Federal Rule 404(b) "contemplates the admission of evidence of prior crimes" for purposes other than to show the character of a person in order to show conformity therewith. Both our courts and the federal courts have recognized the admissibility of prior convictions when: (1) relevant to an issue other than character, (2) the probative value substantially outweighs the prejudicial impact, and (3) the trial court gives a limiting instruction to offset any potential for prejudice.

Finally, the dissent argues that the existence of other evidence of defendant's intent and knowledge reduces the probative value of defendant's prior convictions. The other evidence being testimony of defendant's prior drug activity did not conclusively establish in-

tent and knowledge. The defense offered at trial was that defendant used drugs and was around drugs but did not sell drugs. Defendant asserted this theory in his 1994 statement, which was read to the jury, and on cross-examination of Agent Long that defendant was not the individual who delivered the drugs but was merely present at 133 Roosevelt Street during the sale. Evidence of defendant's prior drug convictions was highly probative to establish intent and knowledge.

We hold that the trial court did not abuse its discretion in admitting the testimony of defendant's prior drug activity nor in admitting the fact that defendant was convicted for said drug activity. This assignment of error is overruled.

IV. Judicial Comment Upon the Evidence

[2] Defendant's final contention is that the trial court's instructions to the jury, with respect to defendant's 15 June 1994 statement, constituted improper judicial comment on the evidence and warrants a new trial. We disagree.

During deliberations, the jury asked to see the statement defendant made at the time of his arrest on 15 June 1994. Before sending the statement into the jury room with the jurors, the trial court instructed the jury as follows:

> I want to caution you of two things ladies and gentlemen of the jury. First matter is that I am going to let you take this to the jury room as it was requested but you are not to alter it in any way and you are not to give it any undue weight. You have asked for it and obviously you feel that it is necessary but please don't put any undue importance on it. You are to consider all of the evidence in this case. All of the evidence is important. Second, my recollection of that statement is that it pertained to a June, 1994, incident. I must remind you, and I will remind you, once again, you may consider that statement in as much as it was received, for the limited purpose which I allowed it to begin with.

"The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (1999). A totality of the circumstances test is used to determine whether a judge's comments constitute impermissible opinion. *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). Since defendant claims that he was deprived of a fair trial by the judge's statements, he "has the bur-

den of showing prejudice in order to receive a new trial." *State v. Gell*, 351 N.C. 192, 207, 524 S.E.2d 332, 342, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). Finally, the trial court's words " 'may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred.' " *State v. Chandler*, 342 N.C. 742, 752, 467 S.E.2d 636, 641 (1996) (quoting *State v. McWilliams*, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971)).

Defendant failed to object to the instructions given by the trial court, which generally operates to preclude raising the error on appeal. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985); N.C.R. App. P. 10(b)(1) (1999). However, defendant has specifically and distinctly contended plain error on appeal as allowed pursuant to N.C.R. App. P. 10(c)(4) (1999).

In this case, the trial court properly instructed the jury that they must consider all of the evidence presented and that defendant's statement was admissible only for the limited purpose for which it was allowed into evidence. Based on the totality of circumstances, we hold that the trial court's instructions did not constitute an impermissible expression of opinion on the evidence. This assignment of error is overruled.

No error.

Judge HUNTER concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

Rule 401 of the North Carolina Rules of Evidence defines relevant evidence to be "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." Rule 402 provides that "[e]vidence which is not relevant is not admissible." Rule 403 provides for the exclusion of certain evidence despite its relevance. Rule 404(b) defines the admissibility of "[e]vidence of other crimes," while Rule 609 defines the admissibility of evidence of a *conviction*. The majority opinion rewrites the language of Rule 404(b) to now permit the introduction of the bare fact of a prior conviction to show one of the enumerated purposes under

that rule. This is a radical change in criminal law.[1] Indeed, the effect of the majority's opinion now allows for the bare fact of a prior *conviction* to be admitted under Rule 404(b) in *every* case in which the *underlying evidence* of that conviction would be admissible for one of the enumerated purposes under Rule 404(b) and where such evidence would not offend the prejudicial guards of Rule 403. The fallacy of this result is the failure to distinguish between the underlying evidence of a conviction, and the bare fact that a defendant has been convicted. In fashioning Rules 404(b) and 609, the legislature intended for the courts to recognize this distinction but today, judicially, our Court abandons that distinction.

Under Rule 404(b), "evidence of other crimes" may be admitted for certain purposes; thus, in this case the "evidence of other crimes" testimony of Prytle and Long was properly admitted in proof of an enumerated purpose under 404(b). In contrast, the bare testimony of Shelby Newcomb establishing only that defendant had been convicted of a prior crime, is not admissible under 404(b) as that bare conviction meets none of the enumerated purposes under that rule. Rather, Rule 609 allows evidence of "prior convictions" to impeach a testifying defendant. Since the defendant in this case did not testify, I believe that the trial court committed prejudicial error in allowing Shelby Newcomb's testimony of defendant's prior convictions under Rule 404(b), and that the majority's opinion blurs the distinction between Rule 404(b) and Rule 609.

First, by its plain language Rule 609 allows the admission of prior convictions while generally excluding the facts and circumstances underlying such convictions; conversely, Rule 404(b) allows the admission of "other crimes," without any mention of prior "convictions." Second, the bare fact of a defendant's prior conviction would rarely, if ever, be probative of any legitimate Rule 404(b) purpose; instead, it is the facts and circumstances underlying such a conviction which hold probative value. Third, even if a conviction, in and of itself, held a scintilla of probative value for Rule 404(b) purposes, the

1. An unchallenged basic tenet of criminal law is that the State must prove defendant's guilt beyond a reasonable doubt. Fundamentally, this means that the State may not prove such guilt by showing that because another jury found the defendant guilty of an unrelated crime in the past, he is therefore guilty in the present case. Nor may the State prove guilt by showing that the fact that an earlier jury convicted the defendant is proof of his intent, motive, knowledge, etc. under Rule 404(b); thus, such prior conviction evidence is not permitted under 404(b). Rather, the legislature chose to allow such evidence *only* to impeach the defendant's testimony under the specific limitations of Rule 609.

inherent prejudicial effect of such a conviction would substantially outweigh its probativity, mandating its exclusion under Rule 403. Finally, this Court's prior decision in *State v. Barkley*, 144 N.C. App. 514, 551 S.E.2d 131 (2001), cited by the majority in support of the admission of a defendant's prior convictions for Rule 404(b) purposes, was based on a misplaced reliance on dicta in our Supreme Court's decision in *State v. Murillo*, 349 N.C. 573, 509 S.E.2d 752 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999). The other case cited by the majority, *State v. Hipps*, 348 N.C. 377, 501 S.E.2d 625 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999), apparently did not involve the introduction of the bare fact of the defendant's prior conviction at the guilt-innocence phase, but rather involved the admission of the evidence underlying that conviction.

In this case, following testimony by Eden Police Officer Reese Pyrtle and State Bureau of Investigation Special Agent Windy Long concerning defendant's prior crimes on 15 June and 11 and 12 October 1994, Shelby Newcomb, the Deputy Clerk of the Superior Court, Rockingham County, testified that defendant had prior convictions on file in Rockingham County for (1) possession of cocaine on 15 June 1994, (2) possession with intent to sell or deliver cocaine on 11 October 1994, and (3) sale or delivery of cocaine on 11 October 1994. Following Newcomb's testimony, the trial court instructed the jury that evidence of these prior convictions was to be considered only for the limited purpose, pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999), of showing defendant's knowledge of possession and intent to sell cocaine.

Defendant argues that the introduction of the *bare fact* of a defendant's prior conviction is proper only for the purpose of impeaching a testifying defendant under N.C. Gen. Stat. § 8C-1, Rule 609(a) (1999). As I agree with this contention, I would find that the trial court committed prejudicial error in permitting the State, via Newcomb's testimony, to introduce the bare fact of defendant's prior convictions, where defendant did not testify and such evidence was not being offered under Rule 609(a) for impeachment purposes.

A comparison of the plain language of Rule 609 and Rule 404 indicates that *prior convictions* are admissible under Rule 609, while *evidence of other crimes* is admissible under Rule 404(b). Furthermore, it is clear that Rule 609 does not permit the introduction of evidence underlying the prior convictions; I believe that, similarly, Rule 404(b) generally does not permit the introduction of

prior convictions. Rule 609, entitled "Impeachment by evidence of conviction of crime," provides that:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony . . . shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

N.C. Gen. Stat. § 8C-1, Rule 609(a).

In *State v. Ross*, 329 N.C. 108, 405 S.E.2d 158 (1991), our Supreme Court stated in construing Rule 609 that "it is important to remember that the only legitimate purpose for introducing evidence of past convictions is to *impeach the witness's credibility.*" *Id.* at 119, 405 S.E.2d at 165 (citation omitted). *See also* Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 98, n. 258 (5th ed. 1998). In *State v. Carter*, 326 N.C. 243, 388 S.E.2d 111 (1990), our Supreme Court similarly stated:

> The only "legitimate purpose" for admitting a defendant's past convictions is to cast doubt upon his veracity; such convictions are not to "be considered as substantive evidence that he committed the crimes" for which he is presently on trial by characterizing him as "a bad man of a violent, criminal nature . . . clearly more likely to be guilty of the crime charged." *State v. Tucker*, 317 N.C. [532,] 543, 346 S.E.2d [417,] 423 [(1986)].

326 N.C. at 250, 388 S.E.2d at 116. In other words, Rule 609 permits the introduction of a prior conviction on the theory that such a conviction, in and of itself, bears upon the witness's veracity, and inherently impeaches the witness's character and credibility. The facts and circumstances underlying such a conviction are therefore generally irrelevant in determining the admissibility of the conviction, unless elicited by the trial court on *voir dire* to perform the required balancing test under Rule 609(b) for an older conviction. Such underlying facts and circumstances, however, are not admissible as *evidence* under Rule 609.

In contrast to Rule 609, Rule 404(b), entitled "Other crimes, wrongs, or acts," provides that evidence of other *crimes* or *acts* committed by a person may be admissible for certain purposes; notably, nowhere does the word "conviction" appear in Rule 404(b). Instead, it is precisely the facts and circumstances underlying the conviction that Rule 404(b) allows (while the same facts and circumstances are barred under Rule 609). In *State v. Barnett*, 141 N.C. App. 378, 540

S.E.2d 423 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 527, 549 S.E.2d 552 (2001), this Court discussed the relationship between Rule 609 and Rule 404(b). In *Barnett*, the defendant was tried and convicted of first-degree felony murder. The defendant testified at trial, and on cross-examination the State questioned the defendant concerning his prior convictions for possession of stolen property and forgery. The defendant admitted to these convictions, and the State further questioned the defendant concerning the purpose of his forgery activities, and whether those activities were undertaken to support the defendant's drug habit.

On appeal, the defendant argued that the State's line of questioning concerning his prior convictions was impermissible. In considering this argument, this Court stated:

> When a defendant elects to testify, evidence of prior convictions is admissible for the purpose of impeaching defendant's credibility pursuant to Rule 609 of the Rules of Evidence.
>
> . . .
>
> This rule was recently interpreted in *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993).
>
> In *Lynch*, our Supreme Court held that the State is prohibited "from eliciting details of prior convictions other than the name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a) in the guilt-innocence phase of a criminal trial." *Id.* at 410, 432 S.E.2d at 353. However, the *Lynch* Court went on to discuss certain exceptions to this exclusionary rule, including Rule 404(b) of the North Carolina Rules of Evidence.
>
> Here it is clear that the State exceeded the permissible scope of inquiry into defendant's prior criminal conviction under Rule 609(a). On cross-examination the State asked defendant whether he had been convicted of possessing stolen property and forgery. When defendant answered affirmatively, the State proceeded to delve into defendant's motivation for his "forgery activity." Thus, the State elicited "details of prior convictions other than the name of the crime and the time, place, and punishment," *id.*, allowable for *impeachment* purposes. *However, that the evidence could not be admitted pursuant to Rule 609(a) does not preclude its admission under an alternative Rule of Evidence.*

Barnett, 141 N.C. App. at 388-89, 540 S.E.2d at 430 (emphasis added). This Court then discussed Rule 404(b), noting that it states a " 'general rule of inclusion of relevant evidence of other crimes,' " *id.* at 389, 540 S.E.2d at 431 (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)), and held:

> [T]his testimony [of the facts and circumstances underlying defendant's prior conviction] was relevant on the issue of defendant's motive. . . . On cross-examination, the State further questioned defendant about his drug habit, and about his means of financing that drug habit. The evidence that defendant previously committed forgery to finance his drug habit could properly be admitted, not to show defendant had a propensity to commit forgery or other crimes, but rather to show that his need to support his drug habit and his lack of finances were the motive for the robbery and murder of the victim.
>
> . . . Here the evidence elicited on cross-examination about defendant's drug use and his prior conviction was admissible under Rule 404(b) because it permits the inference that defendant committed this robbery and murder to obtain money he needed to support his drug habit.

Barnett, 141 N.C. App. at 390, 540 S.E.2d at 431. Thus, evidence eliciting details of acts that formed the basis of prior convictions may be elicited under Rule 404(b) even though such evidence may be barred under Rule 609. *Id.* at 389, 540 S.E.2d at 430 ("that the evidence could not be admitted pursuant to Rule 609(a) does not preclude its admission under an alternative Rule of Evidence"). *Barnett* also implies that the evidence of the defendant's prior *convictions* was properly admitted under Rule 609, even though such evidence would have been improper under Rule 404(b), as the convictions themselves offered no independent insight into the defendant's motive in committing the later crime of murder.

In the instant case, Officer Pyrtle and Agent Long's testimony concerning defendant's prior crimes in June and October 1994 was admitted under Rule 404(b) to show defendant's intent and knowledge with respect to the charged drug offenses. In addition, Shelby Newcomb testified regarding defendant's prior convictions, purportedly to also show his intent and knowledge with respect to the charged drug offenses; admittedly, intent and knowledge are both proper purposes for admitting "other crimes" evidence under Rule 404(b). *See* N.C. Gen. Stat. § 8C-1, Rule 404(b). Furthermore, these

mental states are elements that must be proven by the State pursuant to N.C. Gen. Stat. §§ 90-95(a)(1) and G.S. § 90-95(h)(3) (1999). *See State v. Bunch*, 104 N.C. App. 106, 408 S.E.2d 191 (1991) (intent is the gravamen of the offense of possession with intent to sell or deliver under G.S. § 90-95(a)(1)); *State v. Weldon*, 314 N.C. 401, 333 S.E.2d 701 (1985) (felonious possession of a controlled substance under G.S. § 90-95 requires that the substance be *knowingly* possessed); *State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987) (possession of a controlled substance involves the power and *intent* to control the substance).

Thus, the *evidence underlying* defendant's prior convictions was offered by the State for proper *purposes* under Rule 404(b). In contrast, Newcomb's testimony establishing that defendant had in fact been convicted of the prior offenses was not probative on the question of defendant's intent or knowledge, and therefore should have been excluded under Rule 404(b). Indeed, one must ask whether the convictions themselves could have been admitted under Rule 404(b) absent the admission of the attendant underlying facts and circumstances via Officer Pyrtle's and Agent Long's testimony? Most assuredly not; Shelby Newcomb's testimony bore no independent relevance under Rule 404(b), and accordingly should have been excluded under Rule 402.

Even where evidence is deemed to be relevant and probative for some Rule 404(b) purpose, the ultimate test of its admissibility is whether its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (1999); *see also State v. Everhardt*, 96 N.C. App. 1, 384 S.E.2d 562 (1989), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990); *State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995). The facts and circumstances underlying the prior bad acts must be sufficiently similar and not so remote as to run afoul of the Rule 403 balancing test. *See State v. West*, 103 N.C. App. 1, 404 S.E.2d 191 (1991). "[A] prior act or crime is 'similar' if there are some unusual *facts* present indicating that the same person committed both the earlier offense and the present one." *State v. Sneeden*, 108 N.C. App. 506, 509, 424 S.E.2d 449, 451 (1993), *aff'd*, 336 N.C. 482, 444 S.E.2d 218 (1994) (emphasis added). Implicitly, Rule 403 envisions a comparison of *facts and circumstances*, rather than *charges and convictions*; that is, it is the evidence *underlying* a prior conviction that is balanced in the Rule 403 calculus, rather than the conviction itself. Otherwise, any prior conviction of the same crime as currently charged would be readily admissible under Rule 403,

based on the similarity between the prior conviction and the current charge (assuming the conviction is not too remote).

The majority cites several decisions from our courts for the general proposition that it is not error to admit the fact of a defendant's prior convictions under Rule 404(b). However, in each of those cases, it is clear that the court intended that a purpose under Rule 404(b) was satisfied by presentation of the *evidence* of the prior conviction, not the bare fact that defendant had been convicted. Thus, in *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000), the Supreme Court permitted evidence that underlaid convictions for excessive speeding and reckless driving to show the malice necessary to support a second-degree murder conviction (70 mph in a 35 mph zone; 70 mph in a 55 mph zone; reckless driving and fleeing arrest; 76 mph in a 45 mph zone; 75 mph in a 45 mph zone). *See also State v. McAllister*, 138 N.C. App. 252, 530 S.E.2d 859 (2000); *State v. Fuller*, 138 N.C. App. 481, 531 S.E.2d 861, *disc. review denied*, 353 N.C. 271, 546 S.E.2d 120 (2000); *State v. Miller*, 142 N.C. App. 435, 543 S.E.2d 201 (2001); *State v. Grice*, 131 N.C. App. 48, 505 S.E.2d 166 (1998), *disc. review denied*, 350 N.C. 102, 533 S.E.2d 473 (1999). In each case, it was the *underlying evidence* that showed the necessary malice, not the fact that a trial court convicted the defendant.

In *State v. Hall*, 85 N.C. App. 447, 355 S.E.2d 250, *disc. review denied*, 320 N.C. 515, 358 S.E.2d 525 (1987), this Court upheld the trial court's admission of the evidence underlying defendant's prior conviction for assault with intent to rape. This Court noted that:

> *In cases involving sexual offenses*, our courts have been liberal in construing the exceptions to the general rule that evidence that defendant committed another, separate offense is inadmissible. *Whether a defendant's previous conviction for a sexual offense is pertinent in his prosecution for an independent sexual crime depends on the facts in each case, and, among other things, the availability of other forms of proof.*

Id. at 450, 355 S.E.2d at 252 (emphasis added) (internal citations omitted). Thus *Hall*, limiting its application to cases involving sexual offenses, allowed limited evidence of the defendant's intent to rape the victim, as the victim escaped before the offense was completed. *Id.* Unlike *Hall*, the instant case is not a sexual offense case.

The majority also notes that this Court has held that it is proper to admit both (1) testimony of the facts and circumstances underly-

ing a defendant's prior conviction(s), as well as (2) testimony of the bare fact of the defendant's conviction(s). *See Hipps*, 348 N.C. 377, 501 S.E.2d 625; *Barkley*, 144 N.C. App. 514, 551 S.E.2d 131. In *Hipps*, our Supreme Court upheld the trial court's admission of evidence underlying the defendant's prior conviction for second-degree murder, based on the similarities between the prior crime and the current crime of first-degree murder for which the defendant was indicted. However, it is unclear from the *Hipps* opinion, and doubtful given our Supreme Court's focus on the facts and circumstances underlying the prior crime, whether the trial court admitted the *bare fact* of the defendant's prior conviction.

Barkley, also cited by the majority, cites *State v. Murillo*, 349 N.C. 573, 509 S.E.2d 752 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999), in support of the proposition that trial court did not err in admitting evidence of the defendant's prior conviction under Rule 404(b). In *Murillo*, our Supreme Court stated that "[a] prior conviction may be a bad act for purposes of Rule 404(b) if substantial evidence supports a finding that defendant committed both acts, and the 'probative value is not limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime charged.' " 349 N.C. at 595, 509 S.E.2d at 765 (quoting *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991)).

However, a closer look at *Murillo* reveals that the defendant was not challenging the introduction of his prior *conviction*, but rather was challenging the introduction of the facts and circumstances *underlying* his prior conviction. The defendant in *Murillo* was charged with the first-degree murder of his wife by shooting her. The State sought to introduce evidence that the defendant's first wife also died at his hands from a gunshot wound, as evidence that the defendant's act in shooting his later wife was not accidental. Our Supreme Court noted that "[t]he trial court . . . ruled that evidence of defendant's prior conviction was inadmissible unless [defendant] took the stand. Defendant was therefore free to argue that [his first wife's] death was purely accidental and that he was entirely free from culpability." *Id.* at 594, 509 S.E.2d at 764.

In the instant case, the trial court, by contrast, *allowed* the prior convictions even though defendant did *not* take the stand; defendant here was *not* free to argue that he was entirely free from culpability for the previous bad acts, as the earlier juries, and indeed the State itself, via the courts, had given the imprimatur of finality and validity to the prior charges.

It is clear, then, that the bare fact of defendant's prior *conviction* was *not* admitted in *Murillo* (or, at the very least, if it was admitted, it was only after the defendant testified). Thus, the statement in *Murillo* that "[a] prior conviction may be a bad act for purposes of Rule 404(b) if substantial evidence supports a finding that defendant committed both acts, and the 'probative value is not limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime charged,' " 349 N.C. at 595, 509 S.E.2d at 765 (quoting *Stager*, 329 N.C. at 303, 406 S.E.2d at 890), is merely dicta. Furthermore, in *Stager*, the defendant had not been *convicted* of the prior bad act, so *Stager* does not support the proposition for which *Murillo* cites it, i.e. *Stager* does *not* say that a prior *conviction* can be a Rule 404(b) bad act; rather, *Stager* talks of a prior "similar act." 329 N.C. at 303, 406 S.E.2d at 890.[2] Similarly, *Hipps* does *not* state that the bare fact of a defendant's prior conviction is automatically admissible in every instance where the evidence underlying that conviction is properly admitted.

Having carefully considered our applicable case law, I would hold that in a criminal prosecution, the State may not introduce prior crimes evidence under Rule 404(b) by introducing the bare fact that the defendant was previously convicted of a crime, even if the defendant's previous conviction was for the same crime for which he or she is currently charged. Indeed, any similarities between the *offense* of which defendant was previously convicted and the current charged *offense* (as opposed to similarities in the facts and circumstances underlying such offenses) manifestly *increases* the danger of unfair prejudice, further tilting the Rule 403 balance in favor of excluding the fact of the prior conviction.

Additionally, I must emphasize that the existence of other evidence of defendant's intent and knowledge in the instant case greatly reduced the probative value of defendant's prior convictions, while simultaneously increasing their prejudicial effect. *See Hall*, 85 N.C. App. at 450-51, 355 S.E.2d at 252 (emphasizing increased probativity of evidence underlying defendant's prior conviction on issue of intent on attempted rape charge, where other evidence of defendant's intent was very limited). In my view, admitting the bare fact of a defendant's

2. Arguably, under very narrow circumstances, bare evidence of a prior conviction could be probative of an enumerated purpose under 404(b); for instance, the bare fact that defendant was convicted of an offense could be probative of a defendant's motive or intent in committing a subsequent crime of assaulting a witness that helped procure the earlier conviction. Even then, the trial court would be required to assess the prejudice of allowing the bare evidence of the prior conviction under Rule 403.

prior *conviction*, except in cases where our courts have recognized a categorical exception to the general rule (e.g. admitting prior sexual offenses in select sexual offense cases, and admitting prior traffic-related convictions to prove malice in second-degree murder cases), violates Rule 404(b) (as the conviction itself is not probative for any Rule 404(b) purpose) as well as Rule 403, as the bare fact of a prior conviction is inherently prejudicial such that any probative value of the conviction is substantially outweighed by the danger of unfair prejudice.[3]

By permitting the State to introduce the bare fact of a defendant's prior conviction, we permit the jury to surmise that the defendant, having once formed the necessary intent or developed the requisite *mens rea*, undoubtedly did so again; after all, another jury has already conclusively branded the defendant a criminal. Such leaps of logic, which inescapably treat the prior conviction as propensity evidence, are prohibited by Rule 404(b); the defendant is impeached without ever taking the stand, and is ineluctably labeled a criminal by the present jury. Thus, introducing the bare fact of a prior conviction under Rule 404(b) fails to satisfy the Rule 403 balancing test, as the only fair interpretation of the purpose behind the State's introduction of such evidence is impermissible: that the evidence is being offered to show the defendant's predisposition to commit the crime charged. *See* Rule 404(b); *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 55 (1990) (prior crimes evidence must be excluded where its only probative value is to show the defendant's propensity to commit an offense of the nature of the crime charged); *Ross*, 329 N.C. at 119, 405 S.E.2d at 165 ("the only legitimate purpose for introducing evidence of past convictions is to *impeach the witness's credibility*"); *see also Carter.*

Because the jury was permitted to infer defendant's intent to sell or deliver the cocaine from the bare fact of his prior convictions, I cannot say that the introduction of those prior convictions was harmless error as to his current conviction for possession with intent to sell or deliver cocaine. Furthermore, as the jury was allowed to infer from his prior convictions defendant's knowledge of his possession of the cocaine, as well as his intent to control the cocaine, I cannot say

3. Notably, if the bare fact of a prior conviction is not *independently* relevant for some 404(b) purpose (without reference to the underlying facts and circumstances), it is not relevant for *any* purpose (assuming the defendant does not testify, making the conviction admissible under Rule 609), and is therefore inadmissible pursuant to Rule 402.

that introduction of those convictions was harmless error as to his conviction for trafficking in cocaine. *See Weldon; Rich.* The defense was inescapably tainted and unfairly prejudiced by the admission of defendant's prior convictions, despite (or indeed as a result of) the independent evidence of defendant's knowledge and intent elicited from Officer Pyrtle and Agent Long.

As I conclude that the trial court committed prejudicial error in permitting the State to introduce the bare fact of defendant's prior convictions, I would reverse and remand for a new trial. Accordingly, I respectfully dissent.

REGINALD MORTON FOUNTAIN, JR., PLAINTIFF v. CHRISTINE MAZZA FOUNTAIN, DEFENDANT

No. COA01-14

(Filed 5 February 2002)

1. Divorce— equitable distribution—classification—note receivable—separate property

The trial court did not err in an equitable distribution case by classifying the note receivable on a Cessna Citation Jet as plaintiff husband's separate property even though the payments on the jet came out of an account containing marital funds, because plaintiff met his burden of showing the monies used to pay for the jet were separate monies derived from his separate property.

2. Divorce— equitable distribution—classification—funds in bank account—separate property

The trial court did not err in an equitable distribution case by classifying the funds on deposit in the pertinent bank account on 2 September 1998 as plaintiff husband's separate property, because plaintiff met his burden of showing the monies were acquired from his separate property.

3. Divorce— equitable distribution—classification—increase in value of grocery store—separate property

The trial court did not err in an equitable distribution case by classifying the increase in value of the pertinent grocery store as plaintiff husband's separate property, because: (1) plaintiff met

his burden of showing the increase was passive; and (2) defendant wife abandoned her argument that the monies received from a life insurance loan used to renovate the grocery store building was marital property since she failed to argue it in her brief as required by N.C. R. App. P. 28(a).

4. Divorce— equitable distribution—valuation method—stock options

The trial court did not err in an equitable distribution case by adopting the intrinsic value method and by failing to apply the Black-Scholes Stock Option Pricing Model as the sole method to value the 480,000 stock options owned by plaintiff husband, because: (1) the trial court's valuation method will be accepted by the Court of Appeals if it is a sound valuation method based on competent evidence and is consistent with N.C.G.S § 50-21(b); and (2) the intrinsic value method is an acceptable method for reasonably approximating the value of stock options.

5. Divorce— equitable distribution—vested stock options—full ownership retained by owner spouse

The trial court did not abuse its discretion in an equitable distribution case by awarding all the pertinent vested stock options to plaintiff husband with defendant wife receiving a larger portion of other assets instead of defendant receiving a portion of the vested stock options if and when plaintiff exercised those options.

6. Divorce— equitable distribution—distributional factor—surgeries

The trial court erred in an equitable distribution case by considering defendant wife's breast implants, liposuction, and cosmetic nose surgeries as a distributional factor, because: (1) the mere fact that defendant lived a portion of the last few years of the marriage in Maryland rather than in the marital home with plaintiff husband in North Carolina is not sufficient evidence to support a determination the parties were experiencing marital breakdown or that the surgeries were in anticipation of separation; and (2) the evidence established that the parties were still engaged in a marital relationship and plaintiff had encouraged defendant to have the second breast implant surgery performed.

7. Divorce— equitable distribution—distributional factors—place of residence during marriage

The trial court erred in an equitable distribution case by considering the decision of defendant wife to primarily reside in Maryland while the marital home was in North Carolina and plaintiff husband's decision to travel to Maryland to attempt to keep the marriage afloat as distributional factors, because: (1) although defendant's actions may have contributed to the demise of the marriage, marital fault alone is not sufficient to support a distributional factor; and (2) the costs involved of living in Maryland and traveling to that state to visit were incurred for marital purposes in an attempt to make the marriage work and not for non-marital purposes.

Appeal by defendant from judgment filed 19 April 2000 by Judge Jerry F. Waddell in Carteret County District Court. Heard in the Court of Appeals 4 December 2001.

Charles William Kafer, for plaintiff-appellee.

Lea, Clyburn & Rhine, by J. Albert Clyburn and James W. Lea, III, for defendant-appellant.

GREENE, Judge.

Christine Mazza Fountain (Defendant) appeals an equitable distribution judgment and order filed 19 April 2000.

Reginald Morton Fountain, Jr. (Plaintiff) and Defendant were married on 21 April 1993 and separated on 2 September 1998 (the period between 21 April 1993 and 2 September 1998 will be referred to as "the marriage"). No children were born during the marriage. The parties lived together continuously in North Carolina from 21 April 1993 until early 1994, when Defendant moved back to the home of her parents on Kent Island, Maryland. From 1994 through 1998, Defendant spent very little time in the marital home, but Plaintiff made serval trips to Maryland for the purpose of visiting Defendant during this time. On 3 September 1998, Plaintiff filed a complaint seeking a divorce from bed and board and equitable distribution. Defendant, however, did not file an answer to Plaintiff's complaint and default was entered against Defendant on 21 October 1998. Subsequently, Plaintiff was granted a divorce from bed and board on 26 October 1998. On 30 September 1999, Defendant filed a complaint praying for equitable distribution, along with other re-

lief. On 23 November 1999, the trial court dismissed most of Defendant's claims but preserved and consolidated her claim for equitable distribution.

The trial on the issue of equitable distribution began on 14 February 2000 and lasted approximately eleven days. The property to be classified, valued, and distributed included, in pertinent part: 480,000 stock options (the FPB stock options) received from Plaintiff's employer Fountain Powerboats, Inc. (FPB); Plaintiff's checking account (the First Citizens Account); Defendant's checking accounts; Eastbrook Apartments; Fairview Shopping Center Realty (Fairview); Fairview Foods (Piggly Wiggly); and a note receivable on a Cessna Citation Jet (the FPB note). During the course of the trial, Plaintiff offered his testimony along with seventeen other witnesses and Defendant offered her testimony along with nine other witnesses.

The issues are: (I) the marital property classification of: (A) the FPB note; (B) the funds on deposit in the First Citizens Account; and (C) the post-marriage increase in value of Piggly Wiggly; (II) (A) the proper method for classifying stock options; (B) the proper method for valuing stock options; and (C) the proper distribution of stock options; and (III) the use of the following, as distributional factors: (A) Defendant's surgeries; and (B) Defendant's place of residence during the marriage.

I

Classification of Property

In equitable distribution actions, the trial court is required to classify, value, and distribute marital property, including marital debt, and divisible property, including divisible debt. N.C.G.S. § § 50-20(a), 50-20(b)(4)(d) (1999); *Byrd v. Owens*, 86 N.C. App. 418, 423, 358 S.E.2d 102, 106 (1987). A "party claiming that property is marital has the burden of proving beyond a preponderance of the evidence" that the property was acquired: by either or both spouses; during the marriage; before the date of separation; and is presently owned.[1] *Lilly v. Lilly*, 107 N.C. App. 484, 486, 420 S.E.2d 492, 493 (1992). "If the party meets this burden, then 'the burden shifts to the party claiming the

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1. With respect to debt, the burden is on the party claiming the debt to be marital to show it was "incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210, *disc. review denied*, 336 N.C. 605, 447 S.E.2d 392 (1994).

property to be separate to show by a preponderance of the evidence that the property meets the definition of separate property.' " *Id.* (citation omitted). If both parties meet their burdens, the property is considered separate property. *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 466, 409 S.E.2d 749, 752 (1991). Separate property includes

> [1] all real and personal property acquired by a spouse before marriage[;] . . . [2] [p]roperty acquired in exchange for separate property[; and] . . . [3] increase[s] in value of separate property and income derived from separate property . . . .

N.C.G.S. § 50-20(b)(2) (1999). If, however, the separate property enjoys an increase in value "attributable to the [substantial] financial, managerial, and other contributions of the marital estate" (an active increase), any increase in value would be marital property. *Ciobanu*, 104 N.C. App. at 465, 409 S.E.2d at 751; *O'Brien v. O'Brien*, 131 N.C. App. 411, 421, 508 S.E.2d 300, 307 (1998), *disc. review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999). If a passive increase in separate property occurs, i.e. inflation, that increase would remain separate property. *Wade v. Wade*, 72 N.C. App. 372, 379, 325 S.E.2d 260, 268, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Commingling of separate property with marital property, occurring during the marriage and before the date of separation, does not necessarily transmute separate property into marital property. *O'Brien*, 131 N.C. App. at 419, 508 S.E.2d at 306; *Lilly*, 107 N.C. App. at 487, 420 S.E.2d at 494. Transmutation would occur, however, if the party claiming the property to be his separate property is unable to trace the initial deposit into its form at the date of separation. *O'Brien*, 131 N.C. App. at 419, 508 S.E.2d at 306.

A

The FPB Note

[1] Defendant first argues the Cessna Citation I (the Cessna), acquired by Plaintiff after marriage and before the date of separation, was marital property and thus the FPB note taken by Plaintiff when he sold the Cessna, which had a value of approximately $315,000.00 at the time of separation, is marital property. This argument is based on her claim that the monies used to pay for the Cessna came out of the First Citizens Account that contained marital funds, and to the extent the Cessna was paid for from this account, it (and the FPB note given in exchange for the Cessna) is marital property. Plaintiff admits the funds used to make the payments on the Cessna mortgage

came out of the First Citizens Account and that the account contained marital funds, but he contends the monies used to pay for the Cessna were separate monies and the commingling of these separate monies in the First Citizens Account did not transmute all the monies in that account into marital property. Plaintiff argues the monies placed in the First Citizens Account to cover the Cessna mortgage payments came from a lease of the Cessna and, because the Cessna was obtained in exchange for the Piper Cheyenne I (the Piper) and the Piper was his separate property, the lease monies put into the First Citizens Account were his separate monies. It follows, he contends, the Cessna was his separate property, as was the FPB note received in exchange for the sale of the Cessna. We agree with Plaintiff.

In this case, Plaintiff acquired the Piper prior to the marriage and gave a lien on the Piper to secure a note (the Piper note) in the amount of $444,005.70. After the purchase of the Piper, Plaintiff leased it to FPB and the lease payments were used to make the payments on the Piper note. Early in the marriage, the Piper lease payments were placed in the First Citizens Account and the Piper note payments were made from this account. The lease income was in an amount sufficient to make the Piper note payments and also to cover the maintenance expenses of the aircraft. In 1996, Plaintiff traded the Piper for the Cessna, which was titled in Plaintiff's name, and he gave a lien on the Cessna to secure a note (the Cessna note). The Cessna was also leased to FPB and the lease payments were placed into the First Citizens Account and payments were made on the Cessna note from that account. The lease income from the Cessna was in an amount sufficient to make the Cessna note payments and also to cover the maintenance expenses of the aircraft. In 1997, Plaintiff sold the Cessna to FPB and he received in exchange for that sale the FPB note in the amount of $415,820.57.

As Plaintiff owned the Piper prior to the marriage, it was Plaintiff's separate property and thus the income received from the lease of the Piper after the marriage remained Plaintiff's separate property.[2] N.C.G.S. § 50-20(b)(2). The deposit of that income into an account containing marital funds (a commingling) required Plaintiff, in order to preserve the separate classification of these monies, to trace those deposits into the payments on the Piper note. The record

2. As the income was received during the marriage and before the date of separation, Defendant met her burden of showing the income was marital property. Plaintiff, however, met his burden of showing the income was his separate property, as it was derived from his separate property.

shows Plaintiff satisfied this burden.[3] When Plaintiff exchanged the Piper for the Cessna, the Cessna became Plaintiff's separate property since the Piper remained Plaintiff's separate property at the time of the transfer.[4] N.C.G.S. § 50-20(b)(2). The payments Plaintiff received for the lease of the Cessna were commingled with marital funds in the First Citizens Account, but again, the record shows Plaintiff met his burden of tracing those account funds into the payments on the Cessna note.[5] Thus, the Cessna remained Plaintiff's separate property entirely,[6] and when it was sold and Plaintiff received the FPB note in exchange, that note was properly classified by the trial court as Plaintiff's separate property.

B

The First Citizens Account

[2] Defendant next argues the funds on deposit in the First Citizens Account on 2 September 1998 should have been classified as marital property. We disagree.

We have determined the FPB note represents "separate property" and was correctly classified as Plaintiff's separate property. Thus, the proceeds from any payments on that note were Plaintiff's separate property.[7] On 2 September 1998 (the day the parties separated), a payment was deposited into the First Citizens Account on the FPB note in the amount of $157,910.98. The only other monies in that account on the date of separation were $16,877.55, which represented income from a separate property belonging to Plaintiff.[8] That income was

3. At trial, Plaintiff presented detailed records of every deposit into the First Citizens Account, showing the source of the funds, and every payment from that account, showing the purpose of the payment.

4. If marital funds had been used to make the Piper note payments, the equity established in the Piper as a result of those marital payments would have constituted marital property.

5. At trial, Plaintiff presented detailed records of every deposit into the First Citizens Account, showing the source of the funds, and every payment from that account, showing the purpose of the payment.

6. If marital funds had been used to make the Cessna note payments, the equity established in the Cessna as a result of those marital payments would have constituted marital property.

7. As the proceeds from the FPB note were received during the marriage and before the date of separation, Defendant met her preliminary burden of showing these proceeds were marital. Plaintiff, however, met his burden of showing the proceeds to be his separate property, as it was income derived from his separate property.

8. The undisputed testimony is that the $16,877.55 in the account represented income from Eastbrook Apartments. The trial court classified these apartments as

also Plaintiff's separate property. N.C.G.S. § 50-20(b)(2). Accordingly, the funds in the First Citizens Account were properly classified by the trial court as Plaintiff's separate property.

C

Piggly Wiggly

[3] Defendant contends the trial court erred in finding Piggly Wiggly "contains no marital component." We disagree.

In this case, Plaintiff acquired a 75% interest in Piggly Wiggly prior to marriage, and his share in the value of Piggly Wiggly on the date of marriage was $62,102.29. At the time of the separation, Plaintiff's share of Piggly Wiggly was worth $77,352.00, indicating an increase in value during the marriage of $15,249.71.[9] Defendant does not contest the classification of the Plaintiff's interest in Piggly Wiggly as Plaintiff's separate property, but instead contends the trial court erred in classifying the increase in the value of that asset as Plaintiff's separate property.

The evidence shows Piggly Wiggly was managed by the 25% owner and Plaintiff had no involvement in the operations of the business. In 1996-97, renovations were made to the Piggly Wiggly building and Plaintiff paid his share of the cost of those renovations from monies received from a personal loan from First Citizens Bank, monies received from a loan from his Northwestern Life Insurance policies (the Northwestern policies) in the amount of $514,707.00, and monies received from his margin account at Wheat First Securities. Defendant makes no argument in her brief to this Court that the monies received from the Wheat First Securities account or received from First Citizens Bank were marital property. She does argue, however, that the monies received from the Northwestern policies did constitute marital property because the funds used to pay the premiums on the Northwestern policies over the course of the marriage came from the First Citizens Account. The trial court, however, found the cash value in various life insurance policies, including the Northwestern policies, was Plaintiff's separate property. Although

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Plaintiff's separate property and although Defendant assigned error to this classification, the issue was not addressed in her brief to this Court and is thus abandoned. *See* N.C.R. App. P. 28(a).

9. At trial, Defendant offered testimony that Plaintiff's share of the increase was in the amount of $280,981.50. The trial court rejected this testimony and although Defendant assigned error to this, she did not argue the matter in her brief to this Court. Accordingly, she has abandoned this issue. *See* N.C.R. App. P. 28(a).

Defendant assigned error to this finding, the argument was not addressed in her brief to this Court and is thus abandoned. *See* N.C. R. App. P. 28(a). It thus follows Defendant cannot now argue the monies received from the life insurance loan used to renovate the Piggly Wiggly building were marital. Accordingly, the trial court correctly classified the entire post-marriage increase in the value of Piggly Wiggly as Plaintiff's separate property.[10]

II

A

Classification of Stock Options

As a general proposition, stock options can be vested or nonvested, matured or non-matured, and restricted or unrestricted.[11] *Equitable Distribution of Stock Options*, 17 Equitable Distribution Journal 85, 86 (Aug. 2000). Like retirement benefits,[12] stock options are a salary substitute or a deferred compensation benefit and if received during the marriage and before the date of separation and acquired as a result of the efforts of either spouse during the marriage and before the date of separation, stock options are properly classified as marital property, even if they cannot be exercised until a date after the parties divorce. If the stock options are "acquired as a result of the efforts of either spouse during the marriage and before the date of separation" and "received after the date of separation but before the date of distribution," the options are properly classified as di-

10. As the increase in value of Piggly Wiggly occurred during the marriage and before the date of separation, Defendant met her burden of proving the increase was marital. Plaintiff, however, met his burden of showing the increase was his separate property by showing the increase was passive.

11. In this case, the stock options were vested, matured, and restricted. Firstly, they were vested because the right to exercise the options could not be canceled. Secondly, they were matured because the right to exercise the options was exercisable before the date of separation. Finally, they were restricted because they could not be transferred, except upon Plaintiff's death.

12. Most states treat stock options, vested and nonvested, "in a manner analogous to the treatment" of retirement benefits. *Equitable Distribution of Stock Options*, 17 Equitable Distribution Journal at 87. This Court has previously held that "consistent with North Carolina's equitable distribution statutes," only vested stock options could be classified as marital property. *Hall v. Hall*, 88 N.C. App. 297, 307, 363 S.E.2d 189, 195 (1987). At the time of *Hall*, our equitable distribution statutes allowed only vested pensions to be treated as marital property. Since *Hall*, however, our equitable distribution statutes have been amended to define marital property to include vested and nonvested pensions. N.C.G.S. § 50-20(b)(1) (1999). Thus, a correct and current reading of our equitable distribution statutes is that marital property includes vested and nonvested stock options.

visible property. N.C.G.S. § 50-20(b)(4)(b) (1999). If the options are received during the marriage before the date of distribution and not in consideration for services rendered during the marriage and before the date of separation, the options are neither marital nor divisible.[13] In this case, Plaintiff does not contest the marital classification of the vested and matured FPB stock options.

B

Valuation of the Stock Options

[4] Defendant argues the trial court erred "by failing to apply the Black[-]Scholes Stock Option Pricing Model to value the 480,000 [FPB] stock options" owned by Plaintiff, suggesting this should be the sole method for determining value.[14] We disagree.

If there is "no single best approach to valuing" an asset, "[t]he task of [this Court] on appeal is to determine whether the approach used by the trial court reasonably approximated" the value of the asset at the date of separation. *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985); N.C.G.S. § 50-21(b) (1999) (marital property to be valued "as of the date of the separation of the parties, and evidence of . . . post-separation occurrences or values is competent as corroborative evidence"). If it appears "the trial court reasonably approximated the net value of the [asset] . . . based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed." *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272. Further, the trial court's findings concerning valuation are binding on this Court if supported by competent evidence. *Patton v. Patton*, 78 N.C. App. 247, 255, 337 S.E.2d 607, 612 (1985), *reversed in part on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986).

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13. If the stock options are received during the marriage and before the date of separation, the spouse claiming the options to be marital has met her burden of proof. The spouse claiming the options to be nonmarital has the burden of showing they were acquired (in whole or in part) as the result of services to be rendered beyond the date of separation. *See* N.C.G.S. § 50-20.1(d) (1999) (method for determining the proportion of the pension, retirement, or deferred compensation benefits properly classified as marital or divisible).

14. Defendant, in her oral argument to this Court, contended the trial court erred in excluding testimony of her Black-Scholes expert on the value of the FPB stock options held by Plaintiff. There is no assignment of error or argument in her brief to this Court to support this contention. Accordingly, we do not address the question of whether the trial court erred in excluding the testimony in this case. *See* N.C. R. App. P. 10(a).

This Court has not adopted an approach for valuing stock options.[15] Therefore, the trial court's valuation method will be accepted by this Court if it is a sound valuation method, based on competent evidence, and is consistent with section 50-21(b). In this case, the trial court adopted the "intrinsic value method," which is an acceptable method for reasonably approximating the value of stock options, and valued Plaintiff's FPB stock options by taking the difference between the market price of FPB stock at the date of separation and the stock option price held by Plaintiff. The trial court, thus, did not err in failing to adopt the Black-Scholes Method for valuing the FPB stock options.

C

Distribution of Stock Options

[5] As a general rule, it is presumed that an "in-kind distribution of marital or divisible property is equitable."[16] N.C.G.S. § 50-20(e) (1999). When, however, the property is an interest in a closely held corporation, this in-kind presumption may be rebutted. *Id.* In any event, the trial court may provide for a distributive award, N.C.G.S. § 50-20(b)(3) (1999), to effectuate the distribution, N.C.G.S. § 50-20(e). Specifically, with respect to "pension[s], retirement, or other deferred compensation benefits," the methods of distribution are limited. N.C.G.S. §§ 50-20.1(a)-(b) (1999). Unless the parties agree on the distributional method, the trial court must order the owner of the benefit to pay a prorated portion of the benefit to the non-owner spouse at the time he receives the benefit. *Id.* (vested and nonvested benefits). This is known as a deferred distribution. *Bishop v. Bishop*, 113 N.C. App. 725, 731-32, 440 S.E.2d 591, 596 (1994). If the benefit is vested, the trial court may instead elect, in its discretion, to award a "larger portion of [the] other assets to the party not receiving the

15. "[A]ccording to *Harvard Business Review* author Brian J. Hall, writing the March-April 2000 issue, the value of an option is typically measured with the 'Black-Scholes pricing model or some variation.' This method takes into account the stock price, the exercise price, the maturity date, the prevailing interest rates, the volatility of the company's stock, and the company's dividend rate." *Equitable Distribution of Stock Options*, 17 Equitable Distribution Journal at 89. Another accepted method of valuing stock options is known as the "intrinsic value method" which determines value by subtracting the option price from the fair market value of the stock. *Id.*; *see Richardson v. Richardson*, 659 S.W.2d 510, 513 (Ark. 1983).

16. Marital stock, as opposed to marital stock options, is subject to an in-kind distribution and unless specifically provided for, any restriction on the transfer of that stock does not apply to court ordered interspousal transfers. *See Bryan-Barber Realty, Inc. v. Fryar*, 120 N.C. App. 178, 182, 461 S.E.2d 29, 32 (1995).

benefit[]" and allow the owner spouse to retain full ownership of the benefit. N.C.G.S. § 50-20.1(a)(4) (1999). Stock options are within the scope of "other deferred compensation" and fall within the scope of section 50-20.1, thus, in-kind distributions under section 50-20(e) are not permitted. Because of their nature, however, a deferred distribution of stock options presents some complex issues, including: who will supply the funds used to purchase the stock; what are the tax consequences of the purchase and transfer of the stock; and if the stock increases in value after the date of separation and before the date of exercise, is any increase the result of the owner spouse's efforts or the result of inflation. A trial court may avoid these complications by distributing vested stock options under section 50-20.1(a)(4). If the stock options are not vested, the trial court has no choice but to distribute under section 50-20.1(b)(3) (1999) (by "appropriate domestic relations order"), although it may choose to place conditions on the distribution, i.e. require non-owner spouse to provide the funds to the owner spouse to make the purchase or non-owner spouse to save owner spouse harmless from any tax liability incurred as a consequence of purchase. *See Callahan v. Callahan*, 361 A.2d 561, 564 (N.J. Super. Ct. Ch. Div. 1976).

In this case, the trial court rejected Defendant's argument that she should receive a portion of the vested FPB stock options if and when Plaintiff exercised those options.[17] The trial court instead chose, in its discretion, to award all the FPB stock options to Plaintiff with Defendant receiving a larger portion of the other assets.[18] We discern no abuse of discretion.

III

Distributional Factors

The trial court is required to divide marital and divisible property equitably. N.C.G.S. § 50-20(a). In determining an equitable distribu-

17. Defendant also argues the trial court erred in not imposing a constructive trust for her benefit on the FPB stock options. We reject this argument. A constructive trust is based on the same principles as a deferred distribution, giving the non-owner spouse an interest in the stock options when and if they are exercised by the owner spouse. In rejecting the imposition of a constructive trust, the trial court noted it would constitute an award to Defendant for work done by Plaintiff "after the marriage." This is an appropriate consideration.

18. Of the 480,000 stock options, 30,000 were awarded to Plaintiff without any compensation to Defendant because the trial court found that 30,000 of the stock options had expired and were worthless at the time of its order.

tion, the trial court is to consider those factors set out in section 50-20(c). N.C.G.S. § 50-20(c) (1999). Under the catch-all provision of section 50-20(c), the trial court is permitted to consider "[a]ny . . . factor which [it] finds to be just and proper." N.C.G.S. § 50-20(c)(12) (1999). A factor is just and proper, within the meaning of section 50-20(c)(12), if it is an action related "to the economic condition of the marriage." *Smith v. Smith*, 314 N.C. 80, 87, 331 S.E.2d 682, 687 (1985). Thus, the expenditure of "marital assets for non-marital purposes by either spouse *in anticipation of separation*" is properly considered as a distributional factor under section 50-20(c)(12).[19] *Lawrence v. Lawrence*, 100 N.C. App. 1, 22, 394 S.E.2d 267, 278 (1990) (Greene, J., concurring) (emphasis added). Marital fault, without economic consequences, is not properly considered as a distributional factor. *Smith*, 314 N.C. at 87, 331 S.E.2d at 687.

Defendant contends the trial court erred in considering the following as distributional factors: (A) Defendant's breast implants, liposuction, and cosmetic nose surgeries which she would "take[] . . . with her," performed during the marriage and before the date of separation and paid for by Plaintiff; and (B) Defendant's choice to live in Maryland, instead of in North Carolina with her husband, and the cost incurred by Plaintiff in trying to keep the marriage "afloat" by traveling to Maryland to visit with Defendant.

A

Defendant's Surgeries

[6] Sometime after Defendant began living more in Maryland than she was living in the marital home in North Carolina, she had two breast implant surgeries, a liposuction surgery performed on her hips, and "several nose jobs." Plaintiff noticed all of Defendant's surgeries while visiting her in Maryland. The charges for Defendant's surgeries were paid for by a credit card supplied to Defendant and paid for by Plaintiff. Defendant testified Plaintiff was "very pleased" with her breast implant surgeries and had encouraged her to have the second surgery.

In this case, assuming without deciding the various surgeries were for non-marital purposes, there is no indication in this record

19. To include as a distributional factor any expenditure of marital funds for a non-marital purpose occurring at any point in the marriage simply would not be workable and, in any event, is not consistent with the concept of the equitable distribution statute which primarily focuses on the events surrounding the dissolution of the marriage.

that the surgeries occurred contemporaneous with marital breakdown or in anticipation of separation. The mere fact Defendant lived a portion of the last few years of the marriage in Maryland, rather than in the marital home with Plaintiff in North Carolina, which is unsupported by any explanation in the record, is simply not sufficient to support a determination the parties were experiencing marital breakdown. Indeed, the evidence establishes Plaintiff and Defendant were still engaged in a marital relationship and Plaintiff had encouraged Defendant to have the second breast implant surgery performed. Accordingly, as there is no evidence the surgeries took place during a period of marital breakdown or in anticipation of separation, the trial court erred in considering the surgeries as a distributional factor.

B

Defendant's Residence During the Marriage

[7] The decision of Defendant to primarily reside in Maryland and Plaintiff's decision to travel to Maryland to attempt to keep the marriage "afloat" are not proper distributional factors. Defendant's actions may have contributed to the demise of the marriage, but marital fault alone is not sufficient to support a distributional factor. The costs involved of living in Maryland and traveling to that state to visit were incurred for marital purposes in an attempt to make the marriage work and not for non-marital purposes.

Therefore, because we cannot determine the weight assigned by the trial court in its consideration of these inappropriate distributional factors, this case must be reversed and remanded to the trial court "for a reassessment of its decision to order an unequal division without considering the improper factor[s]." *Becker v. Becker*, 127 N.C. App. 409, 412, 489 S.E.2d 909, 912 (1997).

Affirmed in part, reversed and remanded in part.[20]

Judges McCULLOUGH and CAMPBELL concur.

20. We do not address Defendant's remaining assignments of error as she has failed to present any arguments in her brief to this Court relating to those assignments of error. *See* N.C. R. App. P. 28(a).

STATE OF NORTH CAROLINA v. DEMETRI GEORGE DEMOS

No. COA00-1233

(Filed 5 February 2002)

1. Evidence— written out-of-court statement by victim's father—corroboration

The trial court did not err in a prosecution for the murders of defendant's estranged wife and her boyfriend by admitting the written out-of-court statement made by the boyfriend's father recapitulating the father's testimony in court and adding that during a phone conversation with defendant husband shortly before the shooting that defendant said several times he could kill his wife, because: (1) a witness's unsworn out-of-court statement is admissible to corroborate the witness's sworn testimony in court, provided the statement is consistent with his trial testimony; (2) prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness's in-court testimony; and (3) the evidence includes many instances of threatening or abusive statements or behavior by defendant that evince actual malice towards his victim wife.

2. Evidence— written out-of-court statement by victim's father—failure to give a limiting instruction—no plain error

The trial court did not commit plain error in a prosecution for the murders of defendant's estranged wife and her boyfriend by failing to give the jury a limiting instruction at the time the written out-of-court statement by the boyfriend's father, revealing that during a phone conversation with defendant shortly before the shooting that defendant said several times he could kill his wife, was admitted into evidence because: (1) the evidence was admissible for a proper purpose; and (2) any error in instructing the jury was not so fundamental as to have a probable impact on the verdict.

3. Jury— viewing of exhibits—no consent by all parties—harmless error

Although the trial court erred in a prosecution for the murders of defendant's estranged wife and her boyfriend by allowing the jury to review the written statement by the boyfriend's father

in the jury room without defendant husband's consent as required by N.C.G.S. § 15A-1233(b), the error was harmless because: (1) defendant admitted shooting the victims; (2) the testimony of other witnesses provided ample basis to support a finding of defendant's malice towards his victim wife including evidence of prior threats, abusive and vulgar language towards her, and statements expressing a desire to harm or kill her; and (3) there is no reasonable possibility that this error affected the outcome of the proceedings.

4. Criminal Law— jury instructions—failure to give limiting instruction about exhibit

The trial court did not err in a prosecution for two murders by failing to give the jury a limiting instruction at the time the written statement by one victim's father was taken into the jury room, because: (1) the trial court properly instructed the jury on this issue earlier as part of its general jury instructions; and (2) defendant has cited no authority in support of his contention that the trial court was required to re-instruct the jury.

5. Evidence— relationship of defendant with victim—sustained objections—malice

The trial court did not abuse its discretion in a murder case by sustaining objections to certain defense questions posed to the victim wife's aunt concerning defendant husband's relationship with his wife and whether defendant acted with malice, because: (1) the witness had ample opportunity to testify concerning defendant and his wife's behavior, demeanor, and apparent attitude towards each other; and (2) there was more than sufficient evidence of actual malice before the jury.

6. Evidence— testimony—defendant's feelings of remorse

The trial court did not abuse its discretion in a murder case by allegedly denying defendant an opportunity to testify concerning his feelings of remorse for the shooting, because defendant was given sufficient opportunity to present a defense including evidence of remorse.

7. Sentencing— aggravating factor—two homicides—course of conduct

The trial court did not err in sentencing defendant for second-degree murder and voluntary manslaughter by aggravating defendant's sentence for each homicide with his conviction

of the other homicide on the basis that each was part of a course of conduct in which he killed the other victim, because the Structured Sentencing Act in effect at the time defendant was sentenced allowed a sentence to be aggravated by evidence necessary to prove elements of contemporaneous convictions provided the evidence is not also necessary to prove the subject conviction.

8. Sentencing— aggravating factor—knowingly creating a great risk of death to more than one person

The trial court did not err by aggravating defendant's sentences for second-degree murder and voluntary manslaughter based upon its finding under N.C.G.S. § 15A-1340.16(d)(8) that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, because: (1) the type of bullet fired and the semi-automatic handgun used would normally be hazardous to the lives of more than one person; (2) defendant's actions towards each victim created a risk of death to the other victim, to people in the adjoining trailers, or those who may have been standing nearby in the dark; (3) defendant fired more shots than were necessary to kill the victims; (4) defendant, an expert marksman, shot the victims from close range; and (5) the jury's finding of malice was not dependent upon an inference arising from his use of the weapon.

Appeal by defendant from judgment entered 6 May 1997 by Judge Forrest A. Ferrell in Buncombe County Superior Court. Heard in the Court of Appeals 28 September 2001.

Attorney General Roy Cooper, by Assistant Attorney General K.D. Sturgis, for the State.

Belser & Parke, P.A., by David G. Belser for defendant-appellant.

BIGGS, Judge.

Demetri Demos (defendant) was tried in Buncombe County for the first degree murder of his estranged wife, Theresa Demos (Theresa), and Robert McCracken (Robert), with whom Theresa had a romantic relationship. Defendant was convicted of second degree murder in the death of Theresa, and voluntary manslaughter in the death of Robert. He received active sentences of 237 to 294 months,

and 36 to 53 months, to be served consecutively. From these judgments and sentences, defendant appeals.

The evidence presented at trial tended to show the following: Defendant and Robert grew up together in Buncombe County, and were lifelong friends. In 1986 defendant enlisted in the Marines and served two tours of duty, during which time he became an expert marksman. Defendant and Theresa met in high school, and later married and had two sons. Defendant left the Marines in 1995, and returned to Asheville. In the fall of 1995, defendant and Theresa began to experience marital difficulties; in October 1995, they separated, but continued to share responsibility for their sons, and to see each other socially.

After the separation, defendant was sometimes threatening or abusive towards Theresa. On one occasion, he approached Theresa in a restaurant, and engaged in vulgar, aggressive threats, and on the day of the shooting, Theresa called a friend and discussed her fear of defendant. Also after their separation, defendant bought the .40 caliber semiautomatic handgun later used to shoot Theresa and Robert. Several months after Theresa moved out of defendant's house, she and Robert began a romantic and sexual relationship, which they concealed from defendant. However, the day before the shooting, a friend told defendant that Theresa and Robert were romantically involved; defendant became upset, and called both Robert and Theresa. The night before the shooting, Theresa called her father, Nick Daniels (Daniels), at around midnight, crying and upset because defendant had called and threatened to kill her. Daniels brought Theresa and her sons to his house; later that night defendant called Daniels's house, and called Theresa a "liar, a bitch, and a whore." The shootings occurred late the following night.

Defendant and Theresa spoke on the phone the morning of the shooting, and after defendant promised to stop threatening her, Theresa returned to her trailer. During the day, defendant told Theresa's Aunt Judy that it had occurred to him to kill Theresa, and said to Tami Atkins, Theresa's cousin, that Theresa would "not be around anymore." Defendant began drinking around noon, and by nightfall he was intoxicated. He telephoned Robert's house several times, and talked with Robert's father, David McCracken (McCracken). Later that night, McCracken drove defendant to Theresa's trailer. Defendant told McCracken that he was not bringing a gun, and promised there would be no trouble. In fact, defendant had

concealed two firearms under his clothes. As they neared Theresa's driveway, defendant jumped out of the car and ran towards the trailer. When he got closer, he saw Theresa and Robert embracing in the dark. Defendant testified that upon seeing his wife kissing his best friend, he was overcome by emotion, and immediately began firing his gun. He also testified that he had not planned to shoot anyone, and did not remember how many shots he fired.

Theresa and Robert fell to the ground, killed instantly. Defendant told Theresa's grandmother, who lived next door, to call the police. He waited for the arrival of law enforcement officers, and turned himself in.

I.

[1] On appeal, defendant first argues that the trial court erred in admitting the written out-of-court statement made by McCracken. We disagree.

At trial, McCracken testified at length to the events surrounding the homicide. Following his testimony, the State introduced, over defendant's objection, McCracken's written out-of-court statement as corroborative evidence. The written statement recapitulated McCracken's testimony in court, and added that during their phone conversations shortly before the shooting, defendant said several times that he "could kill that b----." This specific statement was not part of McCracken's trial testimony. Defendant argues that because these alleged threats were not included in McCracken's trial testimony, the statement containing them was not corroborative, and thus was inadmissible.

A witness's unsworn out-of-court statement is admissible to corroborate the witness's sworn testimony in court, provided the statement is consistent with his trial testimony. *State v. Beane*, 146 N.C. App. 220, 552 S.E.2d 193 (2001). "Corroborative evidence need not mirror the testimony it seeks to corroborate, and may include new or additional information as long as the new information tends to strengthen or add credibility to the testimony it corroborates." *State v. McGraw*, 137 N.C. App. 726, 730, 529 S.E.2d 493, 497, *disc. review denied*, 352 N.C. 360, 544 S.E.2d 554 (2000) (citation omitted). If the out-of-court statement adds weight or credibility to the witness's sworn testimony, it may be admissible, notwithstanding its inclusion of facts not elicited from the witness in court. *State v. Coffey*, 345 N.C. 389, 480 S.E.2d 664 (1997).

Defendant correctly points out that "the State may not introduce as corroborative evidence prior statements of a witness that directly contradict the witness's trial testimony." *State v. Guice*, 141 N.C. App. 177, 201, 541 S.E.2d 474, 490 (2000), *remanded on other grounds*, 353 N.C. 731, 551 S.E.2d 112 (2001). However, "prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony[,]" *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992) (citation omitted), and the trial court has "wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes." *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998) (citation omitted).

In the present case, the written statement includes McCracken's assertion that defendant said "I could kill that b----," a phrase not included in McCracken's trial testimony. However, although McCracken's written statement includes the additional phrase, it otherwise corroborates McCracken's in-court testimony. Moreover, McCracken's testimony contained several references to defendant's calling Theresa "a b----." We conclude that the witness's statement was sufficiently corroborative to be admissible.

Further, we conclude that defendant's assertion that the written statement was inadmissible because it supplied the only evidence of actual malice towards Theresa is meritless. The record evidence includes many instances of threatening or abusive statements or behavior by defendant that evince actual malice towards Theresa.

[2] Defendant also contends that the trial court erred by failing to give the jury a limiting instruction at the time the statement was admitted into evidence, notwithstanding the limiting instruction delivered during the trial judge's charge to the jury. The record shows that the defendant did not request an instruction when the statement was introduced. The North Carolina Supreme Court has held previously that failure to request a limiting instruction when evidence is introduced bars later consideration of the issue:

> At no time after the trial court made its ruling and the jury was returned to the courtroom did the defendant request that the trial court give the jury a limiting instruction with regard to the evidence in question. The defendant, having failed to specifically request or tender a limiting instruction at the time the evidence

was admitted, is not entitled to have the trial court's failure to give limiting instructions reviewed on appeal.

State v. Stager, 329 N.C. 278, 310, 406 S.E.2d 876, 894 (1991) (citations omitted). Accordingly, we review only for plain error. Under the plain error rule, the defendant " 'must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.' " *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)), *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000). This Court has often noted that the plain error rule applies only where "the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odum*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982)). Defendant has failed to demonstrate plain error. "Since defendant did not request such a limiting instruction and since this evidence was admissible for a proper purpose, any error in instructing the jury was not so fundamental as to have a probable impact on the verdict." *State v. Sneeden*, 108 N.C. App. 506, 511, 424 S.E.2d 449, 452 (1993) (citations omitted).

We conclude that McCracken's written statement was admissible, and that the trial court did not commit plain error by failing to give a limiting instruction at the time it was introduced into evidence. Accordingly, this assignment of error is overruled.

II.

[3] Defendant argues next that the trial court erred in allowing the jury to review McCracken's written statement in the jury room without defendant's consent, and also erred by denying his request to issue a limiting instruction to the jury at the time that the statement was taken to the jury room.

Under N.C.G.S. § 15A-1233(b) (1999), the trial court may allow exhibits into the jury room "[u]pon request, . . . and with consent of all parties[.]" In the present case, defendant objected to the jury's having the statement available in the jury room during their deliberations. We conclude, therefore, that allowing the statement in the jury room was error. *State v. Flowe*, 107 N.C. App. 468, 420 S.E.2d 475, *disc. review denied*, 332 N.C. 669, 424 S.E.2d 412 (1992) (error, harmless in light of abundant evidence of guilt, for trial court to allow jury to view exhibit over defendant's objection).

However, an error not arising under the U.S. or State Constitution is not reversible absent evidence that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[.]" N.C.G.S. § 15A-1443(a). *Gardner v. Harriss*, 122 N.C. App. 697, 700, 471 S.E.2d 447, 450 (1996) (although trial court erred by permitting the jury to view exhibits without consent of the parties, defendant "is not entitled to a new trial absent a showing that the error was prejudicial"). In the instant case, defendant admitted shooting the victims. The testimony of other witnesses provided ample basis to support a finding of defendant's malice towards Theresa, including evidence of prior threats, abusive and vulgar language towards her, and statements expressing a desire to harm or kill her. We conclude that there is no reasonable possibility that this error affected the outcome of the proceedings.

[4] Further, defendant argues that the court erred by not giving the jury a limiting instruction at the time the statement was taken to the jury room. The court had properly instructed the jury on this issue earlier, as part of its general jury instructions. Defendant has cited no authority in support of his contention that the trial court was required to re-instruct the jury.

We conclude that the trial court committed harmless error by allowing the jury to review the statement in the jury room over defendant's objection. We also conclude that the trial court did not err by failing to deliver a second limiting instruction when the jury took the statement to the jury room. Consequently, this assignment of error is overruled.

III.

[5] In his next assignment of error, defendant argues that the trial court erred by sustaining objections to certain defense questions posed to Theresa's aunt, Judy Davis (Davis). Defendant contends that Davis would have testified about defendant's demeanor on the day of the shooting, and would also have testified that Theresa was not frightened of defendant. He argues that this evidence was necessary in order for defendant to rebut other testimony that defendant had threatened to kill Theresa.

North Carolina Rules of Evidence, Rule 611, provides in part as follows:

> Rule 611. Mode and order of interrogation and presentation. (a) *Control by court.* The court shall exercise reasonable control

> over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

N.C.G.S. § 8C-1, Rule 611(a) (1999). The determination of how best to accomplish the aims of Rule 611(a) rests in the trial court's discretion. *State v. Allen*, 90 N.C. App. 15, 367 S.E.2d 684 (1988). "Because the manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge, his control of the case will not be disturbed absent a manifest abuse of discretion." *State v. Harris*, 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986).

In the present case, Davis testified about defendant and Theresa, and offered her observations of their relationship. She testified, *inter alia*, that Theresa seemed happy with defendant, that defendant cared for his son, and that they spent some nights together, even after separating; and that defendant was "depressed" and "devastated" about Theresa's relationship with Robert. Davis also testified that, on the evening of the homicide, she spoke with defendant, who denied calling Theresa and threatening her, but indicated to Davis that he had thought about killing Theresa. Davis's testimony was lengthy, occupying over fifty transcript pages. The trial court sustained objections to only a few questions asked of this witness, on the grounds that they were leading, or called for speculation. We note that defendant neither made an offer of proof, nor attempted to rephrase his questions. We conclude that Davis had ample opportunity to testify concerning defendant and Theresa's behavior, demeanor, and apparent attitude towards each other. We further conclude that the trial court did not abuse its discretion in sustaining objections to several defense questions.

Defendant further argues that the trial court's evidentiary rulings acted to exclude testimony that was pivotal to the jury's determination of malice. We disagree. The State presented evidence of defendant's anger towards Theresa and Robert, of his behavior in the days surrounding the shooting, and of prior threats against Theresa. In conjunction with defendant's own testimony, this evidence provided ample additional basis for the jury to conclude that defendant acted with malice.

Defendant contends that the fact that the jury had some questions during deliberations supports his argument the jury was deprived of

"critical" evidence that they needed to resolve the issue of malice. We find that the length of time that the jury deliberated, and the questions they submitted to the court, reflect the complex task they faced. However, there is no evidence that the jury was unable to accomplish their task. Moreover, the fact that the jury returned different verdicts in the two cases indicates that they were able to evaluate the separate evidence of malice in regards to each victim. We conclude that there was more than sufficient evidence of actual malice before the jury.

For the reasons discussed above, this assignment of error is overruled.

IV.

[6] Defendant next argues that the court erred by denying him an opportunity to testify concerning his feelings of remorse for the shooting. This argument is without merit. Defendant testified for almost two hundred transcript pages concerning, *inter alia*, his life story, his relationships with Theresa and with Robert, his affection for both of them, the events surrounding the homicides, and the details of the shootings. He also testified to remorse, including the following dialogue

> ATTORNEY: And have you been sorry that you've done that for the last eleven months?
>
> DEFENDANT: It's the worst thing that's happened in my life, yes sir. I'll never have my wife. I'll never have my best friend. Casey won't have her dad. My boys won't have their mom. Nick and Brenda won't have their daughter. And David and Kay won't have their son. I am very sorry.

Defendant's assignment of error relates to several leading questions to which the trial court sustained objections. Defense counsel did not attempt to rephrase the questions. Moreover, the defendant was able to present essentially the same evidence to the jury at other points in his testimony.

We find no abuse of discretion in the trial court's rulings on the challenged defense questions, and conclude that defendant was given sufficient opportunity to present a defense, including evidence of remorse. Accordingly, we overrule this assignment of error.

V.

[7] Defendant argues next that the trial court erred by aggravating his sentence for each homicide with his conviction of the other homicide, on the basis that each was part of a "course of conduct" in which he killed the other victim. Defendant contends that a defendant's sentence may never be aggravated by his contemporaneous conviction of a joined offense. However, the cases cited by defendant in support of his argument all predate our current sentencing law. Under the Structured Sentencing Act, in effect at the time defendant was sentenced, a sentence may be aggravated by evidence necessary to prove elements of contemporaneous convictions, provided the evidence is not also necessary to prove the subject conviction. *State v. Ruff*, 349 N.C. 213, 217, 505 S.E.2d 579, 581 (1998) ("[s]o long as [the aggravating factor] is not an essential element of the underlying felony for which defendant is sentenced" defendant's sentence may be aggravated by evidence necessary to prove contemporaneous conviction). Accordingly, this assignment of error is overruled.

VI.

[8] Defendant's final argument is that the trial court erred by aggravating his sentence based upon its finding that "defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C.G.S. § 15A-1340.16(d)(8) (1999). We disagree.

Aggravating factors must be found by a preponderance of the evidence. *State v. Baldwin*, 139 N.C. App. 65, 532 S.E.2d 808, *disc. review denied*, 352 N.C. 677 545 S.E.2d 430 (2000). To determine whether the aggravating factor at issue has been proven, the trial court considers evidence regarding both (1) the nature of the weapon used, and (2) the risk of death to more than one person. *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984) (trial court should consider extent of risk of death created, and also the nature of the weapon used). "The legislature intended this aggravating factor to be limited to those weapons or devices which are indiscriminate in their hazardous power." *State v. Bethea*, 71 N.C. App. 125, 129, 321 S.E.2d 520, 523 (1984).

Defendant argues that the evidence did not support the trial court's finding of this aggravating factor. We disagree. The evidence was uncontradicted that Theresa and Robert were killed by Speer

Gold Dot 155-grain jacketed hollow-point rounds, fired from a Ruger .40 caliber Smith & Wesson semi-automatic handgun. The type of bullet, fired from this type of weapon, comprises a weapon that "would normally be hazardous to the lives of more than one person." *State v. Bruton*, 344 N.C. 381, 393, 474 S.E.2d 336, 345 (1996) ("semi-automatic pistol is normally used to fire several bullets in rapid succession and in its normal use is hazardous to the lives of more than one person"); *State v. Evans*, 120 N.C. App. 752, 463 S.E.2d 830 (1995), *cert. denied*, 343 N.C. 310, 471 S.E.2d 78 (1996) (semi-automatic handgun normally hazardous to the lives of more than one person); *State v. Antoine*, 117 N.C. App. 549, 451 S.E.2d 368, *disc. review denied* 340 N.C. 115, 456 S.E.2d 320 (1995) (holding that semi-automatic handgun is type of weapon contemplated by statute defining aggravating factors). We conclude that the weapon employed by defendant was of a type that in its normal use is hazardous to the lives of more than one person.

In its determination of whether this aggravating factor is applicable, the trial court also considers whether the manner in which defendant used the gun created a great risk of death to more than one person. The evidence was that the defendant fired eleven shots in quick succession, any one or two of which would have been fatal to either victim. The shooting took place in the dark, in a residential neighborhood; near neighbors testified about hearing sounds, and coming outside to investigate. Defendant testified that he did not aim, but fired repeatedly in response to overwhelming feelings he experienced upon seeing Theresa and Robert embracing. Under these facts, defendant's actions towards each victim created a risk of death to the other victim, and to people in the adjoining trailers, or who may have been standing nearby in the dark. We conclude that the evidence supported the trial court's finding of this aggravating factor.

Defendant also contends that since each of his convictions required proof that he fired the same weapon, use of that weapon cannot aggravate his sentences. Defendant cites N.C.G.S. § 15A-1340.16(d) (1999) in support of his position. The statute states:

> Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under G.S. 14-2.2 may not be used to prove any factor in aggravation.

Defendant argues that because his shooting the victims with the .40 caliber Ruger was an element of the State's case, his use of the weapon cannot aggravate his sentence, citing N.C.G.S. § 15A-1340.16(d). We do not agree.

The evidence shows that defendant fired more shots than were necessary to kill the victims. The evidence was that defendant, an expert marksman, shot the victims from close range. Rather than aiming, he fired eleven times in their general direction, firing more shots than were necessary to kill Theresa and Robert. These additional shots, each carrying a bullet that could penetrate a trailer wall and "explode" inside a victim, created a great risk of injury or death to others.

Nor do we agree with defendant that evidence that he fired additional shots, beyond those needed to cause death, was required for the State to prove malice on his part. Trial witnesses provided testimony regarding defendant's previous threats of violence against Theresa, from which the jury could find that the defendant had actual ill will and spite towards her. Therefore, the jury's finding of malice was not dependent upon an inference arising from his use of the weapon.

We conclude that the defendant used a weapon with the characteristics, and in the manner, so as to create a great risk of death to more than one person. We further conclude that evidence of the type of weapon employed and the way in which it was used was not required to prove an element of the charged offense, and that the trial court properly found this factor in aggravation. Accordingly, this assignment of error is overruled.

For the reasons discussed above, we conclude that the defendant had a fair trial, free from prejudicial error.

No error.

Judges McGEE and TIMMONS-GOODSON concur.

TAMMY MICHELE ADAMS, PLAINTIFF v. JEFFERSON-PILOT LIFE INSURANCE COMPANY, CHARLES ERIC ADAMS, APRIL ADAMS GARDIN, AND KELLY ADAMS HONEYCUTT, DEFENDANTS

No. COA00-1484

(Filed 5 February 2002)

Insurance— life—rightful beneficiary—change of beneficiary form—doctrine of substantial compliance

The trial court did not err by granting summary judgment in favor of plaintiff second wife in an action to determine the rightful beneficiary of the pertinent life insurance policy when the insured executed a change of beneficiary form that was not received by the insurance company's home office prior to his death, because: (1) although the parties disagree on the legal significance of the established facts, the facts themselves are not in dispute; (2) a change of beneficiary is given effect on the date that the policy owner completes and signs a life insurance change of beneficiary form, provided that the insured is alive on the date of the written request; (3) the equitable doctrine of substantial compliance applies since the insured returned the completed change of beneficiary form to his insurance agent and it only remained for office administrators to complete the filing and endorsement of the change of beneficiary form; and (4) the insured's knowledge of company procedures has no bearing on the question of whether he has complied with his own responsibilities in the matter.

Appeal by defendants from judgment entered 19 September 2000 by Judge J. Marlene Hyatt, in McDowell County Superior Court. Heard in the Court of Appeals 10 October 2001.

Adams, Hendon, Carson, Crow & Saenger, P.A. by George Ward Hendon for plaintiff-appellee.

Morris, York, Williams, Surles & Barringer, L.L.P. by Gregory C. York and Keith B. Nichols for Jefferson-Pilot Life Insurance Company.

Floyd & Jacobs, L.L.P. by Robert V. Shaver, Jr. for defendant-appellants Charles Eric Adams, April Adams Gardin, and Kelly Adams Honeycutt.

BIGGS, Judge.

Charles Edward Adams (Adams) died on 25 November 1999, in possession of a $300,000 life insurance policy. This appeal arises from a dispute over who is the rightful beneficiary of this policy. Adam's children, Charles Eric Adams, April Adams Gardin, and Kelly Adams Honeycutt (defendants), appeal from a summary judgment order entered in favor of Adams's second wife, Tammy Michele Adams (plaintiff). We affirm the trial court.

The facts are as follows: In 1983, Adams purchased a $100,000 life insurance policy with Jefferson-Pilot Life Insurance Company (Jefferson-Pilot), naming Jacqueline Adams, to whom he was then married, as the beneficiary. In 1988, he increased the policy's value to $300,000. In 1997, following his divorce from Jacqueline, Adams executed a change of beneficiary which designated defendants as primary beneficiaries. In 1999, after marrying plaintiff, Adams executed another change of beneficiary, and named plaintiff as the primary beneficiary.

To accomplish the 1999 change of beneficiary, Adams contacted Rebecca Lytle (Lytle), an agent of Jefferson-Pilot. Adams and Lytle met at a local restaurant owned by plaintiff, where Lytle provided Adams with a Jefferson-Pilot form for change of beneficiary. Adams read the form, signed it in the presence of Lytle and four restaurant employees, and then returned the form to Lytle. Lytle later testified that this completed Adams's responsibilities with regard to effecting a change of beneficiary.

Jefferson-Pilot's usual practice is for the insurance agent to deliver the completed change of beneficiary form to the office administrator of the local branch office. The administrator forwards the form to the company's home office in Greensboro, where it is endorsed and filed in the company's permanent records. In this case, when Lytle submitted Adams's completed form to her branch office, the office administrator pointed out that Lytle had used a form which, in addition to changing the beneficiary, also stated that the settlement would be paid in installments unless otherwise indicated. This was an official Jefferson-Pilot form, approved for use by the company; thus, it could have been filed immediately with the home office. However, the office administrator suggested that Lytle might call Adams, and confirm that he had intended the default settlement payout option as indicated on the change of beneficiary form. Lytle called Adams several times during the following three weeks, but did not reach him.

Lytle and Adams had no further communication, and when Adams died on 25 November 1999, Lytle still had not mailed the form to the home office. The form was sent to the home office after Adams's death.

On 26 January 2000, plaintiff filed a complaint against Jefferson-Pilot and defendants, seeking to recover the proceeds of the life insurance policy. On 3 April 2000, defendants filed an answer, counterclaim, and cross claim, asserting that they were the rightful beneficiaries of the life insurance policy. Plaintiff amended her complaint on 2 May 2000, and added a claim of negligence against Jefferson-Pilot. Both parties also filed summary judgment motions, each claiming to be the rightful beneficiary as a matter of law.

The trial court entered summary judgment in favor of plaintiff on 19 September 2000. Its order stated that:

> [T]his Judgment determines that the October 27, 1999, Change of Beneficiary was effective to name Plaintiff as the beneficiary of the insurance policy on the life of Charles Edward Adams issued by Defendant Jefferson-Pilot Life Insurance Company which is the subject of this action[.]

Defendants appealed from this order on 10 October 2000. Defendant Jefferson-Pilot did not appeal, and has filed a brief in support of plaintiff's position.

Defendants argue that the trial court erred by granting summary judgment in favor of plaintiff. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.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). "[T]he party moving for summary judgment has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). Furthermore, "the evidence presented by the parties must be viewed in the light most favorable to the nonmovant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Therefore, on appeal:

> [i]t is well established that the standard of review of the grant of a motion for 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.'

Von Viczay v. Thoms, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001) (citations omitted).

We first examine whether the record presents genuine issues of material fact. Both parties moved for summary judgment on the issue of their respective claims to the proceeds of Adams's life insurance policy. Each party based its claim upon the same sequence of events: Adams's 1997 designation of defendants as beneficiaries; Adams's 1999 execution of a change of beneficiary form naming plaintiff; and Lytle's failure to send the form to Jefferson Pilot's home office before Adams's death. Neither party has challenged the accuracy or authenticity of the documents establishing the occurrence of these events. Although the parties disagree on the legal significance of the established facts, the facts themselves are not in dispute. Consequently, we conclude that "there is no genuine issue as to any material fact" surrounding the trial court's summary judgment order.

We next consider whether the trial court correctly determined that plaintiff "is entitled to a judgment as a matter of law." In the instant case, defendants do not dispute that Adams desired to change beneficiaries, nor that he signed a Jefferson-Pilot form intended to memorialize this change. However, defendants contend that they are the rightful beneficiaries of Adams's life insurance policy because, although Adams executed a change of beneficiary form, it was not received by Jefferson-Pilot's home office prior to Adams's death. We disagree with this contention.

A beneficiary's interest vests upon the death of the insured. *Fertilizer Co. v. Godley*, 204 N.C. 243, 167 S.E. 816 (1933); *Smith v. Principal Mut. Life Ins. Co.*, 131 N.C. App. 138, 505 S.E.2d 586 (1998), *cert. denied*, 350 N.C. 99, 533 S.E.2d 470 (1999). Defendants argue that their interest in the policy vested when Adams died, notwithstanding Adams's attempted change of beneficiary. In support of their position, defendants cite language in the policy stating that "t]he Beneficiary may be changed by written request satisfactory to the Company filed at its home office. Any change will take effect on the date of the written request if the Insured is alive at that time."

Defendants first contend that the phrase "alive at that time" can only refer to the date on which the home office endorses the request for change of beneficiary, and that because Adams was not alive on the date that Jefferson Pilot endorsed and filed the form, the change of beneficiary did not take effect on the date of Adams's written request. Defendants argue that "any Insured is always alive at the time of *signing* such a form." However, this argument assumes that the insured is also the policy's owner, which is not always the case. *See Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 348 S.E.2d 794 (1986) (insured lacked authority to designate change of beneficiary where policy was owned by bank, not by insured). Defendant cites no authority for this Court to alter the plain meaning of the disputed language and we find no such authority. Thus we conclude that the change of beneficiary is given effect on the date that the policy owner completes and signs a Jefferson Pilot change of beneficiary form, provided that the insured is alive on the date of the written request. In this case, Adams was both the owner and the insured, and clearly was alive at the time he executed the change of beneficiary form. Therefore, this policy language supports giving effect to the change of beneficiary as of the date he signed the Jefferson Pilot form provided by Lytle.

Defendants also point to language in the change of beneficiary form stating that a change is "effected by recordation by the Company in its Home Office." They contend that Lytle's failure to send the completed form to the home office prevented the company from executing the filing and recordation procedures for a change of beneficiary before Adams's death. They argue that the company's delay in completing the administrative procedures associated with such a change defeated Adams's efforts to change the beneficiary. The resolution of this issue requires our consideration of the equitable doctrine of "substantial compliance." This doctrine has evolved over time to address situations such as the present one, in which an insured completes a change of beneficiary form, only to die before recordation and filing of the document is completed. The doctrine of substantial compliance has been expressed thusly:

> It is now considered that an insurance company may make reasonable rules and regulations by which the insured may change the beneficiary named in the policy. . . . [I]f the insured has done substantially what is required of him, or what he is able to do, to effect a change of beneficiary, and all that remains to be done are ministerial acts of the association, the change will take effect,

> though the formal details are not completed before the death of the insured. It must be understood, however, that some affirmative act on the part of the insured to change the beneficiary is required, as his mere unexecuted intention will not suffice to work such a change.

Teague v. Insurance Co., 200 N.C. 450, 455-56, 157 S.E. 421, 424 (1931) (quoting *Wooten v. Odd Fellows*, 176 N.C. 52, 96 S.E. 654 (1918)).

Several criteria must be met before the doctrine of substantial compliance is applicable. First, only the owner of a life insurance policy may change the beneficiary. *See Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 348 S.E.2d 794 (1986) (insured lacked authority to designate change of beneficiary where policy was owned by bank). Secondly, the insured must himself take affirmative steps to effect a change of beneficiary, and may not rely solely on the efforts of others. *Suarez v. Food Lion, Inc.*, 100 N.C. App. 700, 398 S.E.2d 60 (1990) (change of beneficiary not accomplished where insured's wife signs form, rather than the insured).

Additionally, the attempt to change beneficiary must comply in significant measure with the company's procedures. This may be accomplished by an insured who has "expressed a clear, unequivocal intent to change the beneficiary" and "performed every act in his power to perform." *Sudan Temple v. Umphlett*, 246 N.C. 555, 558, 99 S.E.2d 791, 793 (1957) (where insured has done all he can do, attempted change is given effect despite insurer's failure to follow their own rules regarding change of beneficiary). *See also Wooten v. Order of Odd Fellows*, 176 N.C. 52, 96 S.E. 654 (1918) (insured has substantially complied with change of beneficiary requirements where he submits form to insurer, who then discovers that policy has been lost but does not issue duplicate policy until after insured's death); *English v. English*, 34 N.C. App. 193, 237 S.E.2d 555, *disc. review denied*, 293 N.C. 740, 241 S.E.2d 513 (1977) (where group life insurance policy requires "written notice" for change of beneficiary, insured sufficiently complies by indicating in writing his desire to effect a change, although he died before completing an official change of beneficiary form).

The insured has substantially complied with change of beneficiary requirements if "all that remains to be done are ministerial acts[.]" *Teague v. Insurance Co.*, 200 N.C. 450, 456, 157 S.E. 421, 424

(1931). "Where the law prescribes and defines a duty with such certainty as to leave nothing to the exercise of judgment or discretion the act is ministerial[.]" *Midgette v. Pate*, 94 N.C. App. 498, 503, 380 S.E.2d 572, 576 (1989) *See also* Black's Law Dictionary 996 (6th ed. 1990) (defining a 'ministerial act' as "[t]hat which involves obedience to instructions, but demands no special discretion, judgment, or skill"). In the instant case, after Adams returned the completed change of beneficiary form to Lytle, it only remained for office administrators to complete the filing and endorsement of the change of beneficiary form. There is no evidence that any discretionary decisions were involved in these administrative procedures. We conclude that only ministerial acts remained in order to finalize Adams's change of beneficiary.

Defendants have argued that the extent of Adams's knowledge regarding the procedures for a change of beneficiary form to be recorded in the home office creates a material issue of fact regarding Adams's substantial compliance with the requirements for a change of beneficiary. We find no merit in this contention, as Adams' knowledge of company procedures has no bearing on the question of whether he has complied with his own responsibilities in the matter.

Additional criteria are: (1) that the insured must communicate his wish to change beneficiaries to the insurance company; and (2) that he must do so prior to his death. The required communication with the insurance company may be accomplished by the insured's communication with an agent for the company. *Norburn v. Mackie*, 262 N.C. 16, 24, 136 S.E.2d 279, 285 (1964) ("principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority"); *Jay Group Ltd. v. Glasgow*, 139 N.C. App. 595, 534 S.E.2d 233, *disc. review denied*, 353 N.C. 265, 546 S.E.2d 100 (2000) (knowledge of agent or president of corporation imputed to corporation itself). In addition, the insured's communication with the insurance company or with its agent regarding his intent to change beneficiaries must occur prior to his death. *Daughtry v. McLamb*, 132 N.C. App. 380, 383, 512 S.E.2d 91, 92 (1999) ("When no attempt is made during the decedent's lifetime to change the beneficiary, the named beneficiary has acquired vested rights to the policy benefits").

Defendants cite *Smith v. Principal Mut. Life Ins. Co.*, 131 N.C. App. 138, 505 S.E.2d 586 (1998), in support of their claim to the pro-

ceeds of Adams's life insurance policy, arguing that the trial court's summary judgment order "directly contravenes the controlling authority of [*Smith.*]" We disagree. Defendants correctly cite *Smith* for the proposition that "substantial compliance can only be applied to those changes attempted during the insured's lifetime, before the original beneficiary's interest vests." *Smith* at 140, 505 S.E.2d at 588. However, a key factual difference distinguishes the present case from *Smith.* In *Smith* the insured never submitted a change of beneficiary form to the insurer during his lifetime. Instead, after his death, his mother "submitted to [insurer] a change of beneficiary form purportedly executed by the decedent prior to his death." *Id.* at 139, 505 S.E.2d at 586. In contrast, Adams completed, signed, and delivered to the company's agent a change of beneficiary form while alive. Thus, his change of beneficiary was "attempted during the insured's lifetime." Therefore, we conclude that *Smith* supports plaintiff's position, rather than that of defendants, and thus that defendants' reliance is misplaced.

Teague v. Insurance Co., 200 N.C. 450, 157 S.E. 421 (1931), on the other hand, presents a fact situation analogous to the instant case. In *Teague*, the insured held a life insurance policy whose terms provided that the insured could change the designated beneficiary by submission of notice in writing to the company, with the change to be effective "only when endorsed hereon by the company." The insured submitted written documents changing the beneficiary of his life insurance policy, and these documents were forwarded from the local agency to the home office. However, they were neither received by the home office, nor endorsed by the company, before the insured's death. The North Carolina Supreme Court held that there had been substantial compliance by the insured, and that the change of beneficiary would be given effect.

To summarize, before the doctrine of substantial compliance may be applied, the policy owner must himself take affirmative steps to change the beneficiary, must substantially fulfill the actions required on his part to accomplish the change, must communicate these efforts to an agent of the insurer, and must do so in his lifetime.

We conclude that Adams, the policy owner, delivered a completed and signed change of beneficiary form to an insurance agent during his lifetime. We further conclude that there was nothing further that Adams might do to accomplish a change of beneficiary, and that the acts remaining to finalize the change were ministerial. Accordingly,

we hold that Adams substantially complied with the procedural requirements for change of beneficiary, and that Adams's change of beneficiary should be given effect.

For the reasons discussed above, we hold that the trial court did not err in its grant of summary judgment in favor of the plaintiff, and, accordingly, we affirm the trial court's order awarding summary judgment in her favor.

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

SHARN M. JEFFRIES, PLAINTIFF-APPELLANT v. TATJANA THOMAS MOORE AND CARL JONATHAN MOORE, JR., DEFENDANTS-APPELLEES

No. COA00-1292

(Filed 5 February 2002)

Child Support, Custody, and Visitation— custody—legitimacy presumption when child born during marriage

The trial court erred in a child custody case by dismissing plaintiff alleged father's case under N.C.G.S. § 1A-1, Rule 12(b)(6) that challenged the presumption of legitimacy which attaches when a child is born during a marriage union, because: (1) plaintiff ex-boyfriend and the child's mother regularly engaged in unprotected sexual intercourse surrounding the time of conception; (2) the trial court could not determine whether the mother and her husband, the presumed father, were continuously separated surrounding the time of conception; (3) plaintiff rebutted the presumption by showing the minor child appears to be of mixed ancestry including African-American ancestry resembling plaintiff alleged father, whereas the mother and her husband are Caucasian; (4) no North Carolina cases have established an absolute prohibition against an alleged parent's ability to challenge the presumption of legitimacy that attaches when a child is born during a marriage union, although one case placed a restriction upon an alleged parent's ability to compel blood testing of a presumed father as a means of challenging the presumption of legitimacy under N.C.G.S. § 8-50.1 as the statute read when the

action originated; and (5) the trial court determined that plaintiff was the biological father.

Judge GREENE concurring in a separate opinion.

Appeal by plaintiff from order entered 1 June 2000 by Judge Alonzo B. Coleman, Jr. in Orange County District Court. Heard in the Court of Appeals 11 September 2001.

Loftin & Loftin, P.A., by John D. Loftin, for plaintiff-appellant.

No brief filed for defendants-appellees Tatjana Thomas Moore and Carl Jonathan Moore, Jr.

BRYANT, Judge.

Plaintiff Sharn M. Jeffries commenced this appeal seeking review of the trial court's dismissal of his complaint for custody of minor child MiKayla Li Moore—whom plaintiff claims is his natural child.

Defendants Tatjana Thomas Moore and Carl Jonathan Moore, Jr. were married on 18 November 1995 and remained married throughout the course of this litigation. Defendants separated on or around 20 April 1997, and Tatjana began having sexual relations with plaintiff in May 1997. From August 1997 to August 1998, Tatjana spent an average of four nights per week with plaintiff. During the overnight stays, plaintiff and Tatjana engaged in sexual intercourse without the use of contraceptives.

On 25 January 1999, Tatjana gave birth to minor child MiKayla. The conception date was approximated as 21 April 1998—eight months after Tatjana began staying overnight with plaintiff. It could not be ascertained whether Tatjana was continuously separated from her husband surrounding the time of conception.

On 28 May 1999, plaintiff filed a complaint against Tatjana for custody of MiKayla. In addition, on 7 June 1999 plaintiff filed a motion to compel DNA testing to determine parentage. Tatjana filed a motion to dismiss the case pursuant to North Carolina Rules of Civil Procedure 12(b)(6) and 19(a), or in the alternative, change venue to Harnett County. By court order filed 29 July 1999, husband Carl was joined as a necessary party to the action.

The trial court found that Carl claimed to be the natural father of MiKayla. MiKayla was born during the marriage of Tatjana and Carl.

In addition, Carl signed MiKayla's birth certificate, thus acknowledging paternity. Based on the decision announced in *Johnson v. Johnson*, 120 N.C. App. 1, 461 S.E.2d 369 (1995), *rev'd by*, 343 N.C. 114, 468 S.E.2d 59 (1996) (per curiam), the trial court granted the motion to dismiss. Plaintiff gave notice of appeal on 28 June 2000.

On appeal, plaintiff assigns as error the trial court's dismissal of the case pursuant to Rule 12(b)(6).[1] Specifically, plaintiff argues that our State's public policy against illegitimizing children born to a marriage is inapplicable to the facts in this case. This Court finds the dispositive issue to be whether *Johnson* prohibits an alleged parent from challenging the presumption of legitimacy which attaches when a child is born during a marriage union. Based on the following reasons, we reverse the decision of the trial court and remand with instructions.

" '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.' " *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999) (citation omitted). In *Eubanks v. Eubanks*, 273 N.C. 189, 197, 159 S.E.2d 562, 568 (1968), our Supreme Court stated that when a child is born in wedlock, the law presumes the child to be legitimate, and this presumption can only be rebutted by facts and circumstances that show the presumed father (husband) could not be the natural father.

Examples of facts and circumstances that would show the presumed father could not be the natural father include when the presumed father is impotent or does not have access to the mother. *See Wright v. Wright*, 281 N.C. 159, 171, 188 S.E.2d 317, 325 (1972) ("Impotency and nonaccess are set out therein as *examples* of types of evidence that would 'show that the husband could not have been the father.' "). *But see Wake County v. Green*, 53 N.C. App. 26, 30, 279 S.E.2d 901, 904 (1981) (proving literal impossibility of access of husband to the mother at time of conception is not required to rebut presumption of legitimacy; but where the spouses are living apart, the presumption of legitimacy will be rebutted unless there is a fair and reasonable basis in light of experience and reason to find the husband and mother were engaging in sexual relations).

1. As plaintiff has not assigned as error whether his motion for blood group testing should have been granted, this Court will not address that concern on appeal. Based on the record, it appears that the trial court did not rule on the motion but instead granted Tatjana's motion to dismiss.

Other examples that would show the presumed father could not be the natural father include evidence that the mother is notoriously living in adultery—supporting a claim of nonaccess between husband and mother, *see Ray v. Ray*, 219 N.C. 217, 220, 13 S.E.2d 224, 226 (1941); evidence of perceived racial differences between the mother, presumed father and child, *see Wright*, 281 N.C. at 172, 188 S.E.2d at 325; and evidence based on blood group testing results, *see Wright*, 281 N.C. at 172, 188 S.E.2d at 325-26.

In the case at bar, the trial court found that the plaintiff and mother regularly engaged in unprotected sexual intercourse surrounding the time of conception. The trial court also found that the minor child was born during the marriage of husband and mother, and husband acknowledged paternity of the minor child. It appears from the record that the issue of inaccessibility between the husband and mother was addressed by the trial court. The trial court, however, could not determine whether the mother and husband were continuously separated surrounding the time of conception.

The trial court did find that from August 1997 to August 1998, the mother was spending an average of four nights per week with plaintiff. The trial court also made the finding that the husband and mother "both have very white skin and appear to be Caucasian." "Plaintiff has dark brown skin with very black, extremely curly hair and appears to be of mixed ancestry, including African American ancestry," the trial court found. In addition, the trial court found, "[t]he minor child, Mikala [sic], appears to be [of] a mixed ancestry, including African-American ancestry. Mikala [sic] resembles the Plaintiff and does not resemble Defendant Carl Moore, Jr."

Plaintiff moved for the trial court to order blood group testing as to himself, the mother and minor child pursuant to N.C.G.S. § 8-50.1(b1); and testing of the husband pursuant to Rule 35 of the North Carolina Rules of Civil Procedure. Plaintiff's motion to compel DNA testing was apparently dismissed along with his complaint for custody. The trial court made the finding that plaintiff was the biological father and concluded that it was "in the best interest of the minor child to visit with her biological father, the Plaintiff in this action." However, pursuant to *Johnson v. Johnson*, 120 N.C. App. 1, 461 S.E.2d 369 (1995), *rev'd by*, 343 N.C. 114, 468 S.E.2d 59 (1996) (per curiam), the trial court determined that it was under mandate to dismiss plaintiff's complaint.

In *Johnson*, a husband filed a complaint in July 1992 seeking a divorce from the mother and temporary custody of a minor child born during the marriage. *Johnson*, 120 N.C. App. at 3, 461 S.E.2d at 370. The mother answered and counterclaimed alleging in part that the husband was not the natural father and requested the trial court to order blood group testing as to herself, the husband, and the minor child pursuant to N.C.G.S. § 8-50.1(b). *Id.* She subsequently filed a separate action against her boyfriend alleging the boyfriend was the minor child's natural father and moved that the trial court order blood group testing as to herself, the boyfriend, and the minor child. *Johnson*, 120 N.C. App. at 4, 461 S.E.2d at 370. Shortly thereafter, the boyfriend filed an acknowledgment of paternity alleging he was the natural father of the minor child at issue. *Id.* The trial court consolidated these actions. *Johnson*, 120 N.C. App. at 4, 461 S.E.2d at 371. The boyfriend then filed a crossclaim against the husband for a determination of paternity. *Johnson*, 120 N.C. App. at 5, 461 S.E.2d at 371.

After consolidation, the mother moved the trial court to require the husband to submit to blood group testing to determine parentage. The mother's motion was denied by order entered on 22 October 1992. *Johnson*, 120 N.C. App. at 4, 461 S.E.2d at 371. Although the boyfriend was named as a party to the consolidated action prior to the hearing on the mother's motion, the boyfriend was neither served by either party nor did he attend the hearing on the mother's motion. *Id.*

On 19 November 1992, the boyfriend moved for a new trial and relief from the 22 October 1992 order pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure, respectively. *Id.* The trial court granted the motion for a new trial and relief on 10 November 1993. *Id.* Thereafter, the boyfriend moved for blood and DNA testing pursuant to N.C.G.S. § 8-50.1(b) and Rule 35 of the North Carolina Rules of Civil Procedure. *Johnson*, 120 N.C. App. at 6, 461 S.E.2d at 372. On 19 January 1994, the trial court entered an order compelling all parties, including the husband, to submit to blood group testing pursuant to N.C.G.S. § 8-50.1(b). *Johnson*, 120 N.C. App. at 7, 461 S.E.2d at 373. The husband appealed. *Johnson*, 120 N.C. App. at 8, 461 S.E.2d at 373.

On appeal, the husband argued *inter alia* that the boyfriend did not have standing to rebut the marital presumption pursuant to N.C.G.S. § 8-50.1(b). *Johnson*, 120 N.C. App. at 8, 461 S.E.2d at 373. The majority on appeal disagreed.

N.C.G.S. § 8-50.1(b)[2] as construed by the *Johnson* Court read:

> (b) In the trial of any civil action in which the question of parentage arises, the court before whom the matter may be brought, upon motion of the plaintiff, alleged-parent defendant, or other interested party, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage.

Johnson, 120 N.C. App. at 9, 461 S.E.2d at 374. The majority reasoned that the boyfriend was an interested party as that term was used in N.C.G.S. § 8-50.1(b), and therefore had standing to move for blood group testing. *Id.* A dissent was filed questioning whether the boyfriend had standing to compel the husband to submit to blood group testing pursuant to N.C.G.S. § 8-50.1(b).

On appeal from the decision of the Court of Appeals, the Supreme Court of North Carolina stated the genuine issue as:

> Does the language of N.C.[G.S.] § 8-50.1 in effect when this action originated confer standing upon an alleged natural parent such as Mr. Meehan [the boyfriend] to compel a presumed father such as Mr. Johnson [the husband] to submit to a blood test to determine the paternity of a child born during the marriage of the presumed father to the natural mother?

Johnson v. Johnson, 343 N.C. 114, 114-15, 468 S.E.2d 59, 60 (1996). The Supreme Court reversed and stated that "the question should be answered in the negative." *Johnson*, 343 N.C. at 115, 468 S.E.2d at 60.

In reviewing the case at bar, this Court finds that the holding in *Johnson*, as articulated by our Supreme Court, is not dispositive of whether an alleged parent is prohibited from challenging the presumption of legitimacy which attaches when a child is born during a

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2. N.C.G.S. § 8-50.1(b) was repealed by session laws 1993, c. 333 § 2 effective 1 August 1994. The dissent cited to a 1986 version of the statute. *See Johnson*, 120 N.C. App. at 18, 461 S.E.2d at 379. The majority did not specify what version of the statute it was construing.

> The version of N.C.G.S. § 8-50.1(b1) applicable to the case *sub judice* reads, "In the trial of any civil action in which the question of parentage arises, the court shall, on motion of a party, order the mother, the child, and the alleged father-defendant to submit to one or more blood or genetic marker tests, to be performed by a duly certified physician . . . ." N.C.G.S. § 8-50.1(b1) (1999).

marriage union. The *Johnson* Court enunciated a very narrow holding: the language of N.C.G.S. § 8-50.1, in effect when that action originated, did not confer standing upon an alleged parent to compel a presumed father (husband) to submit to a blood test to determine the parentage of a child born during the marriage of the husband and mother. Neither *Johnson* nor any other North Carolina cases that we have reviewed, have established an absolute prohibition against an alleged parent's ability to challenge the presumption of legitimacy that attaches when a child is born during a marriage union. The decision in *Johnson* merely placed a restriction upon an alleged parent's ability to compel blood testing of a presumed father as a means to challenge the presumption of legitimacy pursuant to N.C.G.S. § 8-50.1—as the statute read when the action originated.

In the case *sub judice*, the presumption of legitimacy is challenged by other facts and circumstances. Here, the trial court made findings of perceived racial differences between the mother, father and child. *See Wright*, 281 N.C. at 172, 188 S.E.2d at 325. The trial court found that plaintiff and mother engaged in sexual intercourse about and around the time of conception. The trial court, however, could not determine whether the husband and mother were continuously separated about and surrounding the time of conception. Moreover, the trial court found plaintiff to be the biological parent of the minor child at issue. Based on these findings the trial court concluded that although it was "in the best interest of the minor child to visit with her biological father, the Plaintiff in this action," the *Johnson* decision mandated the dismissal of this action.

As we previously stated, the holding in *Johnson* as articulated by our Supreme Court was very narrow. We therefore reverse the decision of the trial court dismissing this action based on the holding announced by our Supreme Court in the *Johnson* case. In addition, we find that the trial court has already determined that plaintiff has rebutted the presumption of legitimacy, and indeed has found and concluded that plaintiff is the biological father of the minor child. The trial court determined that it would be "in the best interest of the minor child to visit with her biological father, the Plaintiff in this action." Therefore, we remand this case with instructions for the trial court to resolve a visitation schedule for the parties involved.

Reversed and remanded.

Judge CAMPBELL concurs.

Judge GREENE concurs in a separate opinion.

GREENE, Judge, concurring.

I agree with the majority that *Johnson v. Johnson*, 343 N.C. 114, 468 S.E.2d 59 (1996) (per curiam) does not hold a putative father is precluded from "challenging the presumption of legitimacy which attaches when a child is born during a marriage union," but write separately to address the statutory basis for allowing the putative father to challenge this presumption. Our statutes specifically provide that "[t]he putative father of a child born to a mother who is married to another man may file a special proceeding to legitimate the child," N.C.G.S. § 49-12.1(a) (1999), and the marital "presumption of legitimacy can be overcome by clear and convincing evidence," N.C.G.S. § 49-12.1(b) (1999). Furthermore, actions to establish paternity may be brought by "[t]he mother, the father, the child, or the personal representative of the mother or the child." N.C.G.S. § 49-16(1) (1999). Thus, our statutes authorize actions by putative fathers where a child is born during wedlock to a mother married to another man.

Johnson addressed only the right of a party to compel a person to submit to a blood test and it held the putative father of a child has no standing to compel the husband of the mother of the child born during wedlock to submit to a blood test. *Johnson*, 343 N.C. at 115, 468 S.E.2d at 60. The statute relied on by *Johnson*, N.C. Gen. Stat. § 8-50.1(b), has been repealed by our legislature and replaced by N.C. Gen. Stat. § 8-50.1(b1). This new statute grants standing to any "party" in a civil action to establish parentage to compel "the mother, the child, and the alleged father-defendant" to submit to "one or more blood or genetic marker tests." N.C.G.S. § 8-50.1(b1) (1999). Section 8-50.1(b1) does not appear to authorize an order compelling the husband of a mother of a child born during wedlock to submit to a blood or genetic marker test, unless he is a defendant in a parentage case who is alleged to be the father of the child.[3]

Thus, in this case, the trial court erred in holding *Johnson* precluded plaintiff from bringing his action to establish paternity and

3. If there is no authority to order a husband to submit to a blood or genetic marker test under section 8-50.1(b1), there appears to be authority under Rule 35 of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 35(a) (1999) (when the "blood group" of "a party" is in controversy, a trial court "may order the party to submit" to the test). Rule 35 applies without regard to whether the husband is alleged to be the father of the child, as long as he is a party to the parentage action. *See id.*

seek custody of the minor child. Accordingly, I agree with the majority that the order of the trial court must be reversed and this case remanded to the trial court to resolve a visitation schedule for the parties involved.

BARBARA ANN CULLER, PLAINTIFF v. STACEY POTEAT HAMLETT, HOUSTON GWYNN HAMLETT, JR., AND ANTHONY DALE GREEN, DEFENDANTS

No. COA00-1110

(Filed 5 February 2002)

1. **Motor Vehicles— contributory negligence—pedestrian injured crossing road—directed verdict**

The trial court did not err in an action arising out of an automobile accident by directing verdict in favor of defendants based on plaintiff injured pedestrian's contributory negligence as a matter of law while she was crossing the road at night, because: (1) the record is replete with mostly uncontradicted evidence of plaintiff's own contributory negligence; and (2) if plaintiff's own negligence is one proximate cause of her own injury, she is precluded from recovery irrespective of the acts of others.

2. **Motor Vehicles— last clear chance—pedestrian injured crossing road—directed verdict**

The trial court did not err in an action arising out of an automobile accident by directing verdict in favor of defendants even though plaintiff injured pedestrian presented evidence on the doctrine of last clear chance, because: (1) plaintiff's evidence failed to establish that she was either in helpless or inadvertent peril; (2) in spite of plaintiff's knowledge that defendants' vehicle was steadily approaching, plaintiff chose to ignore the dangers from which she had the power to extricate herself; and (3) while defendants may have had the last possible chance to avoid the injury, defendant driver had neither the time nor the means to have the last clear chance to entitle the submission of the question to the jury.

Appeal by plaintiff-appellant from a judgment entered 8 March 2000 by Judge David Q. LaBarre in Caswell County Superior Court. Heard in the Court of Appeals 28 September 2001.

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

Burton & Sue, L.L.P., by Walter K. Burton, for defendants-appellee Hamlett.

Teague, Rotenstrich and Stanaland, L.L.P. by Stephen G. Teague, for defendant-appellee Green.

BIGGS, Judge.

Plaintiff appeals the trial court's order granting directed verdict in favor of defendants, Stacy and Houston Hamlett, in an action for personal injuries. In addition to the Hamletts, plaintiff sued a third defendant, Anthony Dale Green. The trial against defendant, Green, was severed from the trial against the Hamletts and reported in a separate opinion. For the reasons herein, we affirm the trial court's grant of directed verdict in favor of the Hamletts.

The evidence at trial tended to show the following: On 30 June 1993, at approximately 3:00 a.m., plaintiff left work in Greensboro, North Carolina and started driving home to Providence, North Carolina. Plaintiff described the traveling conditions as slightly foggy and dark. She was driving a 1984 Ford Escort that she planned to purchase from a relative of co-defendant, Anthony Green. Plaintiff explained that she had not had any past mechanical problems with the vehicle; however, while driving easterly on the highway, plaintiff began to experience problems when the vehicle's stick shift kept "popping out of gear". After crossing Highway 86 onto Park Springs Road, the vehicle became disabled forcing her to stop on the side of the two-lane road.

Shortly thereafter, plaintiff saw a vehicle approaching from the opposite direction and recognized the vehicle as belonging to Anthony Green. Green, who was traveling westerly on the highway, slowed down, pulled his vehicle onto the shoulder of the roadway and parked it partially on the roadway in the lane opposite of plaintiff's disabled vehicle. Plaintiff emerged from her car and walked across the roadway to Green's car, while he remained seated with the driver's door open and his engine running.

While engaged in conversation with Green, plaintiff saw the headlights of defendants' vehicle from approximately "300 yards away". The defendants, like Green, were traveling in a westerly direction on

the roadway; Stacey Hamlett was driving. After telling Green that a car was approaching, plaintiff then turned away and began to walk back across the roadway towards her vehicle. Defendants' vehicle collided first with Green's vehicle, then struck and injured plaintiff, before colliding with plaintiff's vehicle. Plaintiff sustained a fractured left femur which required surgery.

Plaintiff filed an action on 30 October 1998, against defendants and Green for the injuries she suffered when she was struck while crossing the roadway. More specifically, plaintiff alleges that defendant, Stacey Hamlett, was negligent in the operation of her vehicle. Defendants filed a reply denying any negligence and alleged contributory negligence of plaintiff. Plaintiff then filed a reply alleging last clear chance. The trial involving defendants was conducted before a jury.

On 8 March 2000, after plaintiff rested her case, the trial court entered an order granting a directed verdict in favor of defendants, finding that the plaintiff was contributorily negligent as a matter of law and further finding the doctrine of last clear chance inapplicable. From the entry of the directed verdict and dismissal of her action, plaintiff gave notice of appeal to this Court.

The sole issue for appellate review is whether the trial court erred in directing a verdict in favor of defendants.

Our standard of review on the grant of a motion for directed verdict is "whether, upon examination of all the evidence in the light most favorable to the nonmoving party [with this] party be[ing] given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury." *Fulk v. Piedmont Music Center*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000) (citing *Abels v. Renfro Corp.*, 335 N.C. 209, 214-15, 436 S.E.2d 822, 825 (1993)). A directed verdict should be granted in favor of the moving party only where " 'the evidence so clearly establishes that fact in issue that no reasonable inferences to the contrary can be drawn,' and 'if the credibility of the movant's evidence is manifest as a matter of law.' " *Law Offices of Mark C. Kirby, P.A. v. Industrial Contractors, Inc. and Buddy Harrington*, 130 N.C. App. 119, 123, 501 S.E.2d 710, 713 (1998) (quoting *Lassiter v. English*, 126 N.C. App. 489, 493, 485 S.E.2d 840, 842-43, *disc. review denied*, 347 N.C. 137, 492 S.E.2d 22 (1997)) (citation omitted).

I.

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

In *Wolfe v. Burke*, 101 N.C. App. 181, 185, 398 S.E.2d 913, 915 (1990), this Court outlined the common law and statutory duty of a pedestrian in crossing a road:

> In North Carolina, a pedestrian has 'a common law duty to exercise reasonable care for his own safety by keeping a proper lookout for approaching traffic before entering the road and while on the roadway'. Further, N.C. Gen. Stat. § 20-174(a) (1989) provides that a pedestrian 'crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.' (internal citations omitted).

Wolfe, 101 N.C. App. at 185, 398 S.E.2d at 915.

This Court noted in *Wolfe* that a plaintiff's failure to yield a right-of-way in violation of N.C.G.S. § 20-174(a) is not contributory negligence *per se*, but that such failure is " 'evidence of negligence to be considered with other evidence in the case in determining whether the plaintiff is chargeable with negligence which proximately caused or contributed to his injury.' " *Wolfe* at 186, 398 S.E.2d at 916 (quoting *Dendy v. Watkins*, 288 N.C. 447, 456, 219 S.E.2d 214, 220 (1975)). "Even though failing to yield the right-of-way to an automobile is not contributory negligence *per se*, it may be contributory negligence as a matter of law." *Id.* at 186, 398 S.E.2d at 916 (citing *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E.2d 47 (1985), *aff'd*, 315 N.C. 383, 337 S.E.2d 851 (1986)). The trial court must direct a verdict for the defendants "when all the evidence so clearly establishes [plaintiff's] failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible." *Ragland v. Moore*, 299 N.C. 360, 364, 261 S.E.2d 666, 668 (1980) (quoting *Blake v. Mallard*, 262 N.C. 62, 65, 136 S.E.2d 214, 216 (1964)); *see also, e.g. Brooks v. Francis*, 57 N.C. App. 556, 291 S.E.2d 889 (1982) (judgment as a matter of law proper where uncontroverted evidence shows that plaintiff's failure to use due care was at least one proximate cause of plaintiff's injuries).

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

This Court in *Meadows* found significant that "between the time [defendants'] car turned onto the highway and the time of the collision, [plaintiff] took one or two steps towards the center of the road." *Id.* Noting that it was the "plaintiff's duty to look for approaching traffic before she attempted to cross the highway, this Court stated:

> The courts of this State have, on numerous occasions, applied the foregoing standard of due care when the plaintiff was struck by a vehicle while crossing a road at night outside a crosswalk. If the road is straight, visibility unobstructed, the weather clear, and the headlights of the vehicle in use, a plaintiff's failure to see and avoid defendant's vehicle will consistently be deemed contributory negligence as a matter of law.

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

In *Price v. Miller*, 271 N.C. 690, 696, 157 S.E.2d 347, 351-52 (1967), our Supreme Court held that the plaintiff's intestate was contributorily negligent as a matter of law where the evidence showed that the decedent was crossing the road at night and without the benefit of a crosswalk. The defendant's vehicle was approaching the decedent at a rate of 60 miles per hour in a 55 mile per hour zone, on a straight stretch of road, and with the vehicle headlights shining. *Price*, 271 N.C. at 696, 157 S.E.2d at 350. In holding that any liability for defendant's negligence was precluded by the plaintiff's own negligence, our Supreme Court stated in *Price*:

> If defendant were negligent in not seeing plaintiff's intestate, who was dressed in dark clothes, in whatever length of time he might have been in the vision of her headlights, then plaintiff's intestate must certainly have been negligent in not seeing defendant's vehicle as it approached, with lights burning, along the straight and unobstructed highway. We must conclude that plaintiff's intestate

> saw defendant's automobile approaching and decided to take a chance of getting across the road ahead of it, or in the alternative, that he not only failed to yield the right of way to defendant's automobile, but by complete inattention started across the highway without looking. In any event . . . plaintiff's intestate's negligence was at least a proximate cause of his death.

Price, 271 N.C. at 696, 157 S.E.2d at 351-52.

In the case *sub judice*, we hold that the evidence establishes that plaintiff's own negligence was *at least one* proximate cause of her injuries. The plaintiff's own testimony reveals the following: while talking with defendant Green, plaintiff saw headlights from defendant Hamletts' car approaching from approximately 300 yards away; that even though she knew she was in an unsafe position standing in the roadway, she walked back across the road to her car; that nothing prevented her from running or stepping quickly to her car nor did anything prevent her from moving to the other side of Green's car away from the roadway; there was nothing to prevent her from keeping a continuous lookout as she crossed the roadway but she failed to do so; she knew her car and defendant Green's car were blocking part of their respective lanes of travel; and that visibility was poor in that it was dark and foggy. Our Supreme Court in *Anderson v. Carter*, 272 N.C. 426, 431, 158 S.E.2d 607, 611 (1968), stated the following rule regarding pedestrians:

> Ordinary care surely requires a . . . man, under no disability, who observes that he is in the path of an automobile approaching . . . to do more for his own protection than merely walk at the same pace across the path of the automobile . . . ordinary care requires the man to jump or run from the path of danger, even though there may be some risk or loss of dignity in that process.

Id.

Plaintiff contends that she assumed that Mrs. Hamlett was going to stop and not collide with the automobile and that she assumed that Mrs. Hamlett was not going to cross over the center line of the highway and attempt to drive between the two automobiles. This Court has held that "the existence of contributory negligence does not depend on the injured party's subjective appreciation of the danger; rather the standard of ordinary care is an objective one—the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *William v. Odell*, 90 N.C. App. 699, 702, 370 S.E.2d 62, 64 (1988). Moreover, we need not discuss whether

any or all of the defendants were negligent in that, under the law of this state, if plaintiff's own negligence is one proximate cause of her own injury, she is precluded from recovery irrespective of the acts of others.

We conclude as did the trial court that "the record is replete with mostly uncontradicted evidence of plaintiff's own contributory negligence." Accordingly, we hold that plaintiff was contributorily negligent as a matter of law and the trial court did not err in directing a verdict in favor of defendant on that issue.

II.

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

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

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

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

The issue of last clear chance, "[m]ust be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine." *Kenan v. Bass*, 132 N.C. App. 30, 32-33, 511 S.E.2d 6, 7 (1999) (quoting *Trantham v. Sorrells*, 121 N.C. App. 611, 468 S.E.2d 401, *disc. review denied*, 343 N.C. 311, 471 S.E.2d 82 (1996)).

Moreover, unless all the necessary elements of the doctrine of last clear chance are present, the case is governed by the ordinary rules of negligence and contributory negligence. *Clodfelter v. Carroll*, 261 N.C. at 634, 135 S.E.2d at 638. The doctrine contemplates a last "clear" chance, not a last "possible" chance, to avoid the injury; it must have been such as would have enabled a reasonably prudent man in like position to have acted effectively. *Grant v. Greene*, 11 N.C. App. 537, 541, 181 S.E.2d 770, 772 (1971); *accord*, *Battle v. Chavis*, 266 N.C. 778, 781, 147 S.E.2d 387, 390 (1966).

In situations where this doctrine applies, the focus is not on the preceding negligence of the defendant or the contributory negligence of the plaintiff which would ordinarily defeat recovery. *See generally*, *Clodfelter*, 261 N.C. 630, 135 S.E.2d 636 (1964) (citation omitted). Rather, the doctrine, as discussed above, "contemplates that if liability is to be imposed the defendant must have a last 'clear' chance to avoid injury. *Grant*, 11 N.C. App. at 541, 181 S.E.2d at 772.

The first element is satisfied by a showing that "plaintiff's countributory negligence ha[d] placed [her] in a position from which [she was] powerless to extricate [her]self." *Nealy v. Green*, 139 N.C. App. 500, 505, 534 S.E.2d 240, 243 (quoting *Williams v. Odell*, 90 N.C. App. 699, 704, 370 S.E.2d 62, 66, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 557 (1988)).

In *Vancamp v. Burgner*, we noted that a pedestrian who is attempting to walk across a street, and is about to walk in front of an oncoming vehicle, is "obviously in peril before she steps directly in front of the car." 99 N.C. App. 102, 104, 392 S.E.2d 453, 455 (1990), *aff'd*, 328 N.C. 495, 402 S.E.2d 375 (1991). To invoke the doctrine of last clear chance such peril must be helpless or inadvertent. *Williams*, 90 N.C. App. at 704, 370 S.E.2d at 65 (1988). Helpless peril arises when a person's prior contributory negligence has placed her in a position from which she is powerless to extricate herself; while inadvertent peril focuses on failure to focus on one's surroundings

and discover her own peril. *Id.* The doctrine is, however, "inapplicable where the injured party is at all times in control of the danger and simply chooses to take the risk." *Id.*

In the case *sub judice*, plaintiff's evidence fails to establish that she was either in helpless or inadvertent peril. Quite to the contrary, in spite of her knowledge that defendants' vehicle was steadily approaching, plaintiff chose to ignore the dangers from which she had the power to extricate herself. When asked during the deposition if there was anything that prevented her from running or stepping quickly to her car, she responded, "No, other than I didn't think I needed to run to my car."

Moreover, while the defendants may have had the last *possible* chance to avoid the injury, defendant had neither the time nor the means to have the last *clear* chance to entitle the submission of the question to the jury. Plaintiff's evidence tended to show that the weather was foggy and dark; defendant had just round a curve before approaching the point of the accident and her vision would have been obstructed by the curve itself; plaintiff's vehicle and the vehicle driven by co-defendant Green were blocking portions of the roadway such that there was no place for another car to pull over; and the plaintiff's headlights were shining in the direction of defendants' approach. We find the doctrine of last clear chance inapplicable on the facts before us.

The trial court did not error in granting directed verdict in favor of the defendants in that plaintiff was contributorily negligent as a matter of law and further the doctrine of last clear chance was inapplicable on the facts of this case.

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

DAVID POLLOCK, EMPLOYEE, PLAINTIFF v. WASPCO CORPORATION, EMPLOYER, SELF-INSURED, KEY RISK MANAGEMENT SERVICES, CARRIER, DEFENDANTS

No. COA01-136

(Filed 5 February 2002)

1. **Workers' Compensation— average weekly wage—income more than pre-injury wages**

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff employee earned an income greater than the average weekly wage at the time of injury, because plaintiff's own admissions, both from discovery responses and his testimony, support the deputy commissioner's findings that plaintiff earned more than his pre-injury wages.

2. **Workers' Compensation— permanent partial disability—presumption of disability rebuttable**

The Industrial Commission did not err in a workers' compensation case by relieving defendant employer of its obligation to pay workers' compensation based on the deputy commissioner's opinion and award for permanent partial disability, because defendant rebutted the presumption of disability by using plaintiff's testimonial evidence showing that plaintiff returned to work earning wages equal to or greater than his pre-injury wages after 1 July 1996.

3. **Workers' Compensation— sanctions—penalty for unpaid installments**

The Industrial Commission erred in a workers' compensation case by failing to sanction defendant employer ten percent for its willful noncompliance of two out of four of the deputy commissioner's compensation awards in violation of N.C.G.S. § 97-18, because no good faith justification existed to prevent defendant paying awards one and four since defendant possessed all the information needed to calculate plaintiff's payment under those two awards when the deputy commissioner's opinion and award was issued.

Appeal by employee-plaintiff from the North Carolina Industrial Commission's ("Commission") opinion and award entered 2 October 2000. Heard in the Court of Appeals 28 November 2001.

Brent Adams & Associates, by Brenton D. Adams, for plaintiff-appellant.

Young Moore and Henderson, P.A., by Jeffrey T. Linder and Zachary C. Bolen, for defendants-appellees.

TYSON, Judge.

David Pollock ("plaintiff") appeals from an opinion and award of the Commission which (1) denied plaintiff's request for additional compensation based upon a change of condition, (2) relieved Waspco Corporation (employer "defendant") of its obligation to pay plaintiff based on a previous opinion and award dated 9 May 1997, (3) denied plaintiff's request for penalties pursuant to G.S. § 97-18(g), and (4) required defendant to pay plaintiff limited future medical treatments. We affirm the Commission's opinion and award in part and reverse and remand in part.

I. Facts

Defendant employed plaintiff as a drywall finisher. Plaintiff injured his back on 20 June 1994 while lifting a 50 to 70 pound bucket of drywall compound. Plaintiff's salary averaged $394.68 per week at the time of the injury.

On 27 June 1994, defendant filed Form 19, "Employer's Report of Injury to Employee," with the Commission reporting plaintiff's injury. On 7 December 1994, the Commission approved a Form 21, "Agreement for Compensation for Disability," whereby defendant agreed to pay plaintiff $236.01 per week for 13 weeks of total disability beginning 20 June 1994, subject to verification of wages. This amount was based on an erroneous average weekly wage of $354.00. The form also indicated that plaintiff had returned to work for defendant on 19 September 1994. Plaintiff visited many health care providers and worked for numerous employers after 1994.

Sometime after 22 June 1995, plaintiff filed Form 18, "Notice of Accident to Employer," with the Commission seeking further indemnity benefits. On 17 July 1995, defendant filed Form 61, "Denial of Workers' Compensation Claim," stating that plaintiff had "claimed a change of condition . . . . Employee [plaintiff] claims recurrence of pain while working June 23, 1995. Our denial is based on the fact that there was no change of condition but a new and separate incident . . . ." On 10 August and 6 October 1995, plaintiff filed two Form 33's, "Request that Claim be Assigned for Hearing." Plaintiff asserted

that defendant denied his claim and requested compensation benefits from 20 June 1994 to the "current date."

Deputy Commissioner Lawrence B. Shuping, Jr. ("Deputy Shuping") conducted a hearing on 22 July 1996. Deputy Shuping filed an opinion and award on 9 May 1997. The award granted plaintiff compensation for (1) corrected "temporary total disability," (2) adjusted "temporary partial disability," (3) additional "temporary total disability," (4) "permanent partial disability," under G.S. § 97-30, (5) reasonable attorney fees, and (6) medical expenses.

First, the corrected "temporary total disability" required defendant to pay $27.12 per week covering periods 20 June 1994 through 18 September 1994 and 6 October 1994 through 16 October 1994. These amounts were ordered to correct the "underpayment of temporary total disability benefits based on an incorrect average weekly wage . . . ," which resulted from an incorrect average weekly wage reported on Form 21 filed 7 December 1994.

Second, the adjusted "temporary partial disability" award ordered defendant to pay compensation from 20 October 1994 to 26 December 1994 based on "two-thirds of the difference between the $394.68 average weekly wage that plaintiff earned at time of injury and the reduced average weekly wage that he was able to earn during that period . . . ." Deputy Shuping was unable to determine, however, how much plaintiff was earning at that time. He presumed that plaintiff and defendant would "agree to the appropriate additional amount of compensation due without the necessity of a supplemental Opinion and Award or further hearing."

Third, the additional "temporary total disability" totaled $236.13 per week from 22 June 1995 through 16 October 1995. This benefit was based on a "substantial change for the worse in [plaintiff's] condition subsequent to the Industrial Commission's last Award . . . ." This award was to be reduced pursuant to G.S. § 97-42.1 for unemployment benefits plaintiff received from the Virginia Employment Security Commission. Deputy Shuping's award presumed that plaintiff and defendant could "obtain the specific amount and period of unemployment compensation benefits from the Employment Security Commission and agree to the appropriate credit without the necessity of a supplemental Opinion and Award or further hearing."

Fourth, the "permanent partial disability" required defendant to pay $183.13 per week pursuant to G.S. § 97-30. This award was based

on Deputy Shuping's finding and conclusion that plaintiff had reached maximum medical improvement on 3 October 1995. Plaintiff retained a permanent back injury and "was no longer capable of engaging in the type of heavy work required by drywall finishing; but rather, was only capable of lighter work earning less wages . . . ." Payments were required from 1 November 1995 to the scheduled hearing date of 22 July 1996, "and thereafter continuing at the same rate so long as he [plaintiff] remains partially disabled, subject to a change of condition, medical or employment." This award was not offset by plaintiff's wages or unemployment benefits.

The opinion and award also granted plaintiff reasonable attorney's fees and all plaintiff's reasonable and necessary medical expenses.

Neither defendant nor plaintiff appealed from Deputy Shuping's opinion and award.

On or about 16 September 1997, plaintiff filed a "Motion for Order to Show Cause and Motion to Compel Payments of Compensation Benefits." The record does not contain the disposition of these motions. Plaintiff filed Form 33, "Request that Claim be Assigned for Hearing," and a "Motion for Review and Modification of Prior Opinion and Award Based upon a Change in Claimant's Condition for the Worse Pursuant to N.C.G.S. § 97-47" on 16 January 1998. On 24 January 1998, plaintiff filed a "Motion to Compel Payment for Medical Expenses Pursuant to N.C.G.S. § 97-25."

Defendant executed a "Response to Request that Claim be Assigned for Hearing" on 4 March 1998, stating that: "[w]e have received no information regarding any alleged change of condition since the Opinion and Award . . . filed May 9, 1997 and the same is therefore denied; no physician has diagnosed any change in plaintiff's physical condition; any alleged diminishment in plaintiff's wage earning capacity is not related to his compensable injury."

Plaintiff and defendant entered into a pre-trial agreement on 1 October 1998. Deputy Commissioner W. Bain Jones, Jr. ("Deputy Jones") convened a hearing that day. Deputy Jones halted the hearing and issued an order on 2 October 1998 requiring plaintiff to document his sources of income for all relevant periods. The hearing resumed on 18 November 1998. Deputy Jones stated that "there is still outstanding information needed . . . . Plaintiff's counsel is allowed seven days from this hearing . . . to contact the . . . Virginia Unemployment

Commission . . . relating to benefits . . . paid to plaintiff and ask that those records be certified and then provided to me."

On 30 August 1999, Deputy Jones filed an opinion and award. He found that (1) "[b]ased on the inconsistencies in plaintiff's testimony and other credible evidence, and based upon plaintiff's demeanor at hearing . . . plaintiff has failed to meet his burden of proof that he was partially disabled at any time after July 1, 1996," (2) defendant had paid all benefits due and payable under Deputy Shuping's opinion and award, and (3) circumstances beyond defendant's control caused defendant to pay plaintiff late. The opinion and award obviated defendant's obligation under Deputy Shuping's opinion and award after 22 July 1996, denied plaintiff's request for additional benefits, and directed defendant to pay all of plaintiff's medical expenses.

Plaintiff appealed to the Commission on 9 September 1999. After review on 22 May 2000, the Commission filed an opinion and award on 2 October 2000 affirming Deputy Jones' opinion and award. Plaintiff appeals.

II. Issues

Plaintiff assigns as error the Commission's (1) finding that plaintiff earned an income greater than the average weekly wage at the time of injury, (2) relieving defendant of its obligation to pay worker's compensation based on Deputy Shuping's opinion and award, and (3) failing to sanction defendant for its willful noncompliance with Deputy Shuping's opinion and award.

III. Plaintiff's Wage

[1] Plaintiff argues that there is no evidence to support a finding that plaintiff earned wages greater or equal to $394.68 per week subsequent to 20 June 1994, and that it was error to relieve defendant of its obligation to pay plaintiff pursuant to Deputy Shuping's order and award. We disagree.

Our review of an opinion and award is limited to "whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law. *Lineback v. Wake County Bd. of Comm'rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997) (citation omitted). Findings of fact are conclusive upon appeal if supported by competent evidence, even if there is evidence to support a contrary finding.

Morrison v. Burlington Indus., 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981) (citations omitted).

The Commission found that (1) "plaintiff began working for Thomas Brown at $12.00 per hour . . . on July 1, 1996," (2) plaintiff worked for employer Joe Roper as a drywall finisher from February 1997 to May 1997, and (3) plaintiff had returned to work after 1 July 1996 at wages greater than he earned before his injury on 20 June 1994.

Plaintiff's own admissions, both from discovery responses and his testimony, support Deputy Jones' findings that plaintiff earned more than his pre-injury wages. At the 1 October 1998 hearing the following exchange occurred on cross-examination:

> DEFENSE COUNSEL: It [discovery request] says you worked for him [Thomas Brown] from July of 1996 to December of 1996, isn't that right. That's what it says, right?
>
> PLAINTIFF: That's what it says, yes.
>
> DEFENSE COUNSEL: And you were earning $12 an hour for Mr. Brown.
>
> PLAINTIFF: Yes, that's what—
>
> DEFENSE COUNSEL: That's more than you were earning with Waspco, isn't that right?
>
> PLAINTIFF: That's correct.

Plaintiff also disclosed that he was earning more than his pre-injury wage at the 18 November 1998 hearing.

> DEFENSE COUNSEL: All right. What did you do for Mr. Roper?
>
> PLAINTIFF: Same thing, drywall finishing. I worked with him from—I think it's from February to May, around the end of May, I believe . . . .
>
> DEFENSE COUNSEL: How much did you make?
>
> . . . .
>
> PLAINTIFF: With Mr.—I can't remember what he paid me—Mr. Roper. To be honest I don't—I don't remember exactly. Eleven—

We hold that there was competent evidence to support the Commission's finding of fact that plaintiff earned wages greater than or equal to his pre-injury average weekly wage.

IV. Defendant's Duty to Pay

[2] " 'If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work . . . .' " *In re Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997) (quoting *Watkins v. Central Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971)). "However, as stated in Rule 404(1) of the Workers' Compensation Rules of the North Carolina Industrial Commission, this presumption of continued disability is rebuttable." *Id.*

Plaintiff entered the hearing before Deputy Jones with a presumption of disability that attached based upon Deputy Shuping's opinion and award of 19 May 1997. Defendant rebutted that presumption using plaintiff's testimonial evidence showing that plaintiff returned to work earning wages equal to or greater than his pre-injury wages after 1 July 1996. We conclude that this finding rebutted plaintiff's presumption. We hold that this finding, which is supported by competent evidence, relieves defendant of its obligation to pay plaintiff pursuant to Deputy Shuping's opinion and award for "permanent partial disability," under G.S. § 97-30. This assignment of error is overruled.

We note that Deputy Shuping's award, by its own terms, awarded plaintiff benefits up to the date of the hearing on 22 July 1996, as well as benefits thereafter subject to any "change of condition, medical or employment." Defendant never appealed from that opinion and award. Deputy Jones found subsequently that plaintiff's employment condition improved on 1 July 1996. This finding cannot affect that portion of Deputy Shuping's award requiring payment through the hearing date certain of 22 July 1996. Defendant is therefore only entitled to cease paying after 22 July 1996 pursuant to Deputy Jones' award. This date should be modified upon remand.

V. Sanctions

[3] Plaintiff contends the Commission erred by failing to impose a 10% penalty for violation of N.C. Gen. Stat. § 97-18 (1998). Deputy Shuping awarded plaintiff four separate compensation awards. We agree with regards to Deputy Shuping's awards one and four as outlined above.

G.S. § 97-18(e) requires the Commission to assess a 10% penalty for an unpaid installment if the payment is not made withing 14 days after it becomes due. *Tucker v. Workable Company*, 129 N.C. App. 695, 703, 501 S.E.2d 360, 366 (1998); *Bostick v. Kinston-Neuse Corp.*, 145 N.C. App. 102, 110, 549 S.E.2d 558, 563 (2001). The Commission concluded that plaintiff was not entitled to penalties for receiving late payments. In support of this conclusion it found that:

> The amount of the benefits due plaintiff as awarded in Deputy Commissioner Shuping's May 9, 1997 Opinion and Award was intentionally left uncertain due to a lack of information. Deputy Commissioner Shuping . . . instructed 'the parties' to ascertain the exact amounts owed subsequent to his decision. The sources of information that were available to the Commission and the parties subsequent to that Opinion and Award and could clarify the exact amounts owed plaintiff were: plaintiff's Virginia unemployment records, plaintiff's tax returns, plaintiff's testimony, and plaintiff's answers to interrogatories. These sources are inconsistent, incomplete, and incongruous with each other. The problems surrounding the procurement of correct wage information were beyond defendant's control. Given the resulting good-faith disputes arising from these issues, plaintiff has produced insufficient evidence from which the Full Commission can award penalties pursuant to N.C. Gen. Stat. § 97-18.

We have reviewed the entire record and conclude that competent evidence only supports this finding with respect to Deputy Shuping's awards two and three. Awards two and three were subject to plaintiff's cooperation; awards one and four were not. We conclude that no good faith justification existed to prevent defendant paying awards one and four. Defendant possessed all the information needed to calculate plaintiff's payment pursuant to those two awards when Deputy Shuping's opinion and award issued. "Because the provisions of G.S. § 97-18(g) are mandatory ('there *shall* be added'), we are compelled to conclude that a 10% penalty is due." *Bostick*, 145 N.C. App. at 110, 549 S.E.2d at 563 (citing *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 83, 476 S.E.2d 434, 440 (1997)). We affirm the opinion and award in part and reverse and remand in part.

Affirmed in part, reversed and remanded in part.

Judges TIMMONS-GOODSON and HUDSON concur.

BARBARA ANN CULLER, PLAINTIFF v. STACEY POTEAT HAMLETT, HOUSTON GWYNN HAMLETT, JR., AND ANTHONY DALE GREEN, DEFENDANTS

No. COA00-1212

(Filed 5 February 2002)

Collateral Estoppel and Res Judicata— res judicata—contributory negligence—summary judgment

The trial court did not err in an action arising out of an automobile accident by granting summary judgment in favor of defendant based on its ruling in a separate case involving the other defendants that plaintiff pedestrian was contributorily negligent as a matter of law when crossing the road at night, because: (1) the doctrine of res judicata precludes a relitigation of whether plaintiff was contributorily negligent as a matter of law since both lawsuits arose out of a single action, involved the same set of facts, and involve identical issues related to plaintiff's contributory negligence; and (2) plaintiff has failed to offer any evidence or counter-affidavits contesting the grounds for summary judgment set forth by defendant.

Appeal by plaintiff-appellant from a judgment entered 8 March 2000 by Judge David Q. LaBarre in Caswell County Superior Court. Heard in the Court of Appeals 28 September 2001.

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

Teague, Rotenstrich and Stanaland, L.L.P., by Stephen G. Teague, for defendant-appellee Green.

BIGGS, Judge.

Plaintiff appeals an order granting summary judgment in favor of defendant, Anthony Green in an action for personal injuries. In addition to defendant, plaintiff sued Stacey and Houston Hamlett. The trial against the Hamletts was severed from the trial against Green and reported in a separate opinion. For the reasons herein, we affirm the trial court's grant of summary judgment in favor of Green.

The evidence at trial tended to show the following: On 30 June 1993, at approximately 3:00 a.m. plaintiff was traveling easterly en route home to Providence, North Carolina from work in Greensboro, North Carolina. She described the traveling conditions as slightly

foggy and dark. She was driving a 1984 Ford Escort that she planned to purchase from a relative of defendant, Anthony Green. Plaintiff explained that she had not had any past mechanical problems with the vehicle; however, while driving easterly on the highway, plaintiff began to experience problems when the vehicle's stick shift kept "popping out of gear[.]" After crossing Highway 86 onto Park Springs Road, the vehicle became disabled forcing her to stop on the side of the two-lane road.

Shortly thereafter, plaintiff saw a vehicle approaching from the opposite direction and recognized the vehicle as belonging to defendant. Defendant, who was traveling westerly on the highway, slowed down, pulled his vehicle onto the shoulder of the roadway and parked it partially on the roadway in the lane opposite plaintiff's disabled vehicle. Plaintiff emerged from her car and walked across the roadway to defendant's car, while defendant remained seated with the driver's door open and the engine running.

While engaged in conversation with defendant, plaintiff saw the headlights of Stacey and Houston Hamlett's vehicle coming from around the corner and approaching the roadway from approximately "300 yards away[.]" The Hamletts, like defendant, were traveling westerly on the highway. After telling defendant that a car was approaching, plaintiff turned away and began to walk back across the roadway towards her vehicle. The Hamletts' vehicle collided first with defendant's vehicle, then struck and injured plaintiff, before colliding with plaintiff's vehicle. Plaintiff sustained a fractured left femur which required surgery.

Plaintiff filed an action on 30 October 1998, against defendant and the Hamletts for the injuries she suffered when she was struck while crossing the roadway. In her complaint, plaintiff alleged the following with respect to the defendant: (1) he was negligent in that he parked, or left standing, his motor vehicle that was not disabled on a public highway in violation of N.C.G.S. § 20-161(a) (1999); (2) he operated his vehicle in willful or wanton disregard of the rights or safety of others, in violation of N.C.G.S. § 20-140(a) (1999); and (3) the negligence of defendant was concurrent and joined with the negligence of the Hamletts.

On 8 March 2000, the trial involving the Hamletts took place. The trial court entered an order granting a directed verdict in favor of the Hamletts, finding that the plaintiff was contributorily negligent as a matter of law. The trial court thereafter dismissed plaintiff's action

against the Hamletts. From the entry of the directed verdict and dismissal of her action against the Hamletts, plaintiff gave notice of appeal to this Court, which is now pending in a separate action (COA00-1110).

Following the dismissal of plaintiff's action against the Hamletts, on 3 April 2000, defendant moved for summary judgment and for judgment on the pleadings. On 1 May 2000, the trial court granted defendant's motion for summary judgment based on its ruling in the Hamlet's trial that plaintiff was contributorily negligent as a matter of law. Plaintiff filed notice of appeal on 31 May 2000.

Plaintiff's sole assignment is that the trial court erred in granting defendant's motion for summary judgment in that there were existing genuine issues of material fact regarding the negligence of defendant and the contributory negligence, if any, of plaintiff. We disagree.

Summary judgment is proper when

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C.G.S. § 1A-1, Rule 56(c) (1999); *DiOrio v. Penny*, 331 N.C. 726, 417 S.E.2d 457 (1992). The party moving for summary judgment "assumes the burden of positively and clearly showing there is no genuine issue as to any material fact." *Lewis v. Blackman*, 116 N.C. App. 414, 417, 448 S.E.2d 133, 135 (1994). The record will be reviewed in the light most favorable to the non-movant, and all inferences will be drawn against the movant. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). In a ruling on a motion for summary judgment, the trial court does not resolve issues of fact. *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980). Summary judgment is improper if any material fact is subject to dispute. *Id.*

To prevail on a motion for summary judgment, the defendant must show either that: (1) an essential element of the plaintiff's claim is nonexistent; or (2) the plaintiff is unable to produce evidence that supports an essential element of his claim; or, (3) the plaintiff cannot overcome affirmative defenses raised against him. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). To survive a summary judgment motion, an adverse party may not rest upon the mere allegation of its pleadings. *Nicholson v. County of Onslow*, 116 N.C. App.

439, 441, 448 S.E.2d 140 (1994); *see also*, N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). A response, by affidavits or as otherwise provided by Rule 56, must set forth specific facts showing that there is a genuine issue for trial. *Id.* Our Supreme Court in *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992), held that once the defendant shows the plaintiff's inability to prove an element, the burden shifts to the plaintiff for a contrary showing. *Id.* at 64, 414 S.E.2d at 342. If the plaintiff does not meet this burden, summary judgment is proper. *Nicholson*, 116 N.C. at 441, 448 S.E.2d at 141.

In the instant case, defendant contends that he is entitled to summary judgment in that the trial court in plaintiff's action against the Hamletts ruled that plaintiff was contributorily negligent as a matter of law and that the doctrine of *res judicata* precludes her for relitigating that issue. Under the doctrine of *res judicata*, when a court of competent jurisdiction has reached a decision on facts in issue, neither of the parties are allowed to call that decision into question and have it tried again. *Green v. Dixon*, 137 N.C. App. 305, 308, 528 S.E.2d 51, 53 (2000). The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier lawsuit; (2) identity of the cause of action in the prior suit and the later suit; and (3) an identity of the parties or their privies in both suits. *Green*, 137 N.C. App. 305, 528 S.E.2d 51; *see also*, *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 135, 337 S.E.2d 477, 482 (1985).

In the case *sub judice*, plaintiff filed a complaint arising out of the 30 June 1993 accident alleging negligence on the part of defendant and the Hamletts. The matter was calendared for trial, however due to a delay in the provision of discovery, the Court granted a continuance of the trial as to defendant Green, and severed issues as to co-defendants Hamletts. The claim against the Hamletts proceeded to jury trial before the Honorable David LaBarre. At the close of plaintiff's evidence, the court directed a verdict against the plaintiff and concluded, in part, that plaintiff was contributorily negligent as a matter of law. Defendant Green then filed his motion for summary judgment based on the trial court's ruling that plaintiff was contributorily negligent as a matter of law. We conclude that the doctrine of *res judicata* does preclude a re-litigation of whether plaintiff was contributorily negligent as a matter of law in that both lawsuits arose out of a single action, involved the same set of facts and involve identical issues related to plaintiff's contributory negligence.

Our Supreme Court reached a similar conclusion in *Stancil v. McIntyre*, 237 N.C. 148, 74 S.E.2d 345 (1953). In that case a truck and automobile were involved in an accident resulting in the death of a passenger in the automobile. The driver of the automobile was denied recovery because she was found to have been contributorily negligent. In a subsequent suit for wrongful death against the truck driver, he filed a claim for contribution against the driver of the automobile. The Court held that the earlier judgment was *res judicata* on the issue of the automobile driver's negligence. Morever, the Court held that it was not necessary that precisely the same parties were plaintiffs and defendant in the two suits. Lastly, a cause of action determined by an order for directed verdict is a final judgment on the merits. *See generally, Evan v. Cowan*, 122 N.C. App. 181, 183, 468 S.E.2d 575, 577, *aff'd per curiam*, 345 N.C. 177, 477 S.E.2d 926 (1996) (citation omitted).

Having determined that the doctrine of *res judicata* precludes the re-litigation of the issue of plaintiff's contributory negligence, defendant has met its burden to prevail on his motion for summary judgment. To survive the motion, the burden shifts to plaintiff to show that there is a genuine issue for trial. Plaintiff has failed to offer any evidence or counter-affidavits contesting the grounds for summary judgment set forth by defendant. The trial court was left with the bare allegations of plaintiff's complaint and such inferences as could be gathered for the court's adverse examination offered by the defendant. While we recognize that summary judgment is an extreme remedy and rarely granted in negligence actions, we hold that the trial court did not err in granting defendant's motion based on the facts of this case.

Accordingly, we affirm the trial court's grant of summary judgment in favor of defendant.

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

JAMES STEPHEN BENSON, PLAINTIFF v. MICHAEL S. BAREFOOT AND WIFE, FRANKIE BAREFOOT, DEFENDANTS

No. COA01-288

(Filed 5 February 2002)

Statutes of Limitation and Repose— motion to dismiss—judgment on the pleadings—statute of limitations

The trial court erred in an action arising out of a loan transaction by granting defendants' motion for judgment on the pleadings based on the statute of limitations, because: (1) although plaintiff alleges that he made payments to defendants which defendants wrongfully converted to their own use, neither the complaint nor the answer divulges the dates on which these payments were allegedly made and it is not possible to tell from the pleadings alone whether the payments were made within the limitations period; and (2) judgment on the pleadings was not proper since all the facts necessary to establish the limitation are not alleged or admitted.

Appeal by Plaintiff from order entered 27 November 2000 by Judge Jack Thompson in Johnston County Superior Court. Heard in the Court of Appeals 9 January 2002.

Brent Adams & Associates, by Brenton D. Adams and Shirl J. Rice, for plaintiff-appellant.

Law Office of James M. Johnson, by James M. Johnson, for defendant-appellees.

HUDSON, Judge.

Plaintiff appeals from an order of the superior court granting defendants' motion to dismiss. For the reasons given below, we reverse and remand for further proceedings.

The facts alleged in the complaint and procedural history that are pertinent to this appeal are as follows. On 12 November 1990, Plaintiff borrowed money from William D. Johnson, Jr., who is not a party to this action. To secure repayment of the loan, Plaintiff executed and delivered to Johnson a deed for a tract of land in Johnston County. Pursuant to the agreement between Plaintiff and Johnson, Johnson was to reconvey the property to Plaintiff once Plaintiff had repaid the loan.

On 4 January 1993, Johnson transferred the loan and security to F & M Farms, Inc., on the condition that when Plaintiff had repaid the loan in full, F & M Farms would reconvey the property to Plaintiff. Michael S. Barefoot, one of the defendants in this action, owned and controlled F & M Farms. Plaintiff began making payments to Michael S. Barefoot and his wife, Frankie Barefoot, who is also a defendant in this action. In his complaint, Plaintiff alleged that he made payments to Defendants in the amount of $42,350, which Defendants converted to their own use, instead of applying the payments towards Plaintiff's debt.

On 11 December 1995, Plaintiff filed suit against F & M Farms. F & M Farms moved for summary judgment on the ground that there was no issue of material fact shown by the pleadings, and on 13 March 1997, the trial court, in an order for judgment on the pleadings, ordered that the action be dismissed.

On 27 May 1997, Plaintiff filed suit against the same defendants that have been named in this action, and on 16 November 1998, voluntarily dismissed the action without prejudice. On 8 November 1999, Plaintiff filed this action. In their answer, Defendants alleged that the action was barred by the statute of limitations, because "any alledged [sic] actions of the defendants occurred from the years 1990 through January, 1993 and no further activity or actions alledged [sic] in the complaint have occurred since then." Both parties agree that, for the purpose of determining whether the statute of limitations has run, the claim was filed on 27 May 1997. Defendants argue that the limitations period is three years, pursuant to N.C. Gen. Stat. § 1-52 (1999). Plaintiff argues that the period is ten years, pursuant to N.C. Gen. Stat. § 1-56 (1999). In light of the disposition we reach below, we need not and do not decide which statute governs Plaintiff's claim.

On 28 January 2000, Defendants filed three separate motions to dismiss, on the basis of the statute of limitations, res judicata, and failure to state a claim. After the court heard arguments on the motion based on the statute of limitations, the court issued its order dismissing the action. The record on appeal does not contain a transcript of the hearing on this motion to dismiss. It consists primarily of the pleadings, motions, and orders in the actions discussed above.

Defendants contend that the trial court converted Defendants' motion to one for summary judgment. The court states in its order dismissing the action that it "examin[ed] the exhibits introduced to

the Court, to wit: the verified complaint and other evidence." Neither the complaint nor the answer in the record on appeal is verified. It is not clear what constitutes the "other evidence" referenced by the trial court, and, with the exception of a notice of *lis pendens*, nothing in the record on appeal has been sworn. With no affidavits, answers to interrogatories, or other evidence in the record before us, we must treat the motion as one for judgment on the pleadings. *See* N.C. R. Civ. P. 12(c); *Reichler v. Tillman*, 21 N.C. App. 38, 40, 203 S.E.2d 68, 70 (1974).

Because a judgment on the pleadings is a summary procedure resulting in a final judgment, a motion for judgment on the pleadings must be "carefully scrutinized." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). A motion for judgment on the pleadings is not favored by the courts, and the pleadings of the nonmovant will be liberally construed. *See RGK, Inc. v. Guaranty Co.*, 292 N.C. 668, 674, 235 S.E.2d 234, 238 (1977). "The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. The movant must show that there are no issues of material fact and that it is clear he is entitled to judgment. *See id.* "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Id.* In particular, a judgment on the pleadings in favor of a defendant "who asserts the statute of limitations as a bar is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted." *Flexolite Electrical v. Gilliam*, 55 N.C. App. 86, 87-88, 284 S.E.2d 523, 524 (1981).

Here, Plaintiff alleges that he made payments to Defendants, which Defendants wrongfully converted to their own use. Neither the complaint nor the answer divulges the dates on which these payments were allegedly made. Thus, it is not possible to tell from the pleadings alone whether the payments were made within the limitations period. Defendants correctly state that once the statute of limitations has been raised, the plaintiff has the burden to prove that his action was timely filed, *see, e.g., Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974). However, burdens of proof have no place in a motion for judgment on the pleadings, a motion which is ruled upon in the absence of any evidence; on a motion for judgment on the pleadings, dismissal is proper only if it appears on the face of the

complaint that the plaintiff filed outside the limitations period. *See Ports Authority v. Roofing Co.*, 294 N.C. 73, 80, 240 S.E.2d 345, 349 (1978) (explaining that although the burden is on plaintiff to prove that his action was brought within the limitations period, plaintiff has "the right to offer such proof").

Even if the trial court considered the earlier pleadings in its ruling, these pleadings support our holding. In the complaint naming F & M Farms as the defendant, filed in 1995, Plaintiff alleged that he had paid $36,400 towards his debt. In the complaints against Defendants, the first of which was filed in 1997, Plaintiff alleged that he had paid $42,350 to Defendants, to be applied towards his debt. Thus, it appears from the face of these pleadings that the amount Plaintiff paid increased after the first complaint was filed in 1995. These allegations, in the light most favorable to Plaintiff, give rise to an inference that the statute of limitations had not run in 1997.

Because it is not the case that "all the facts necessary to establish the limitation are alleged or admitted," *Gilliam*, 55 N.C. App. at 88, 284 S.E.2d at 524, judgment on the pleadings was not proper. Accordingly, we reverse and remand to the trial court for further proceedings.

Reversed and remanded.

Judges WYNN and THOMAS concur.

WILLIE BARNES, PLAINTIFF v. CHARLES LEE TAYLOR, AND WIFE, AMY SHIVERS TAYLOR, DEFENDANTS v. ART DELLANO D/B/A CALVARY HOMES OF WASHINGTON, AND, BANK OF AMERICA, THIRD-PARTY DEFENDANTS

No. COA00-1480

(Filed 5 February 2002)

Civil Procedure— Rule 60(b) motion—standing—trial court can set aside judgment on own initiative

The trial court did not abuse its discretion by setting aside a judgment that was entered against defendant individuals directing them to remove their trailer from the pertinent subdivision that was in violation of a restrictive covenant even though the trial court extended relief to defendant individuals under defend-

ant home corporation's N.C.G.S. § 1A-1, Rule 60(b) motion when defendant individuals did not make a request, because: (1) defendant home corporation had standing to move for relief under Rule 60(b); and (2) even if defendant home corporation did not have standing, the trial court had authority to set aside its earlier judgment on its own initiative.

Appeal by plaintiff from judgment entered 17 July 2000 by Judge G.K. Butterfield in Pitt County Superior Court. Heard in the Court of Appeals 7 November 2001.

Mattox, Davis, & Barnhill, P.A., by Fred T. Mattox and Amy A. Edwards, for plaintiff-appellant.

The Law Office of Earl T. Brown, P.C., by Earl T. Brown, for defendant and third-party plaintiff-appellees.

THOMAS, Judge.

Plaintiff, Willie Barnes, appeals the trial court's order setting aside a judgment earlier entered against defendants, Charles Lee Taylor, and wife, Amy Shivers Taylor.

After the trial court had entered its first order directing defendants to remove their trailer from a subdivision, only third-party defendant Calvary Homes, Inc. (Calvary), erroneously designated as Art Dellano d/b/a Calvary Homes of Washington, filed a motion seeking relief. Plaintiff contends the trial court erred in extending relief under Calvary's Rule 60(b) motion to defendants since they had made no request. We agree with the trial court.

The action was initiated by plaintiff seeking a mandamus be issued directing defendants to remove a trailer from the Greenfield Terrace Subdivision. Plaintiff alleged that defendants had placed a trailer on the property in violation of a restrictive covenant.

In their answer, defendants claimed that they owned a modular home, not a trailer, and therefore were not in violation of the covenant. Defendants later filed a third-party complaint against the seller of the home, Calvary. They alleged misrepresentation, breach of warranty, and unfair and deceptive trade practices in that Calvary had represented the structure to be a modular home. Defendants also requested that Calvary indemnify them for any relief granted to plaintiff.

The trial court entered judgment on 8 October 1997 in favor of plaintiff, finding the home to be a trailer, and ordering defendants to remove it from the subdivision lot. Calvary then filed a motion on 5 November 1997 to set aside the judgment under N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (1999), based on *Briggs v. Rankin*, 127 N.C. App. 477, 491 S.E.2d 234 (1997), *aff'd*, 348 N.C. 686, 500 S.E.2d 663 (1998). The *Briggs* opinion had been filed on 7 October 1997, one day before the trial court entered judgment here. In *Briggs*, this Court sets forth the factors to be used in determining if a structure is a modular or trailer home. Based on the factors, the trial court determined that "it is clear that [defendants'] home does not violate the restrictive covenants of Greenfield Terrace Subdivision and, therefore, the October 8, 1997 ruling was erroneous."

The trial court granted Calvary's motion requesting relief from judgment on 17 July 2000. The trial court stated in its order:

> [A]lthough [defendants] did not file a written motion under Rule 60(b), nor gave notice of appeal to the North Carolina Court of Appeals in this matter, justice requires that any ruling on [Calvary's] motion for relief be extended to [defendants]. [Defendants] participated in subsequent hearings in connection with the Rule 60(b) motion.

We note initially that relief under N.C. Gen. Stat. § 1A-1, Rule 60(b) is within the discretion of the trial court, and such a decision will be disturbed only for an abuse of discretion. *Harrington v. Harrington*, 38 N.C. App. 610, 612, 248 S.E.2d 460, 461 (1978).

By plaintiff's only assignment of error, he argues that the trial court erred in granting relief to defendants on two bases: (1) Calvary had no standing to request that the earlier order be set aside; and (2) defendants did not request any relief. Since defendants filed no motion, he contends, the first order could not be changed by the trial court no matter how erroneous.

First, we reject plaintiff's contention that Calvary lacked standing to request affirmative relief. "Standing" refers to the issue of whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter. *Sierra Club v. Morton*, 405 U.S. 727, 732, 31 L. Ed. 2d 636, 641 (1972). In general, only a party or his legal representative has standing to request that an order be set aside under Rule 60(b); a stranger to the action may not request such relief. *Bowling v. Combs*, 60 N.C. App.

234, 239, 298 S.E.2d 754, 757, *disc. review denied*, 307 N.C. 696, 301 S.E.2d 389 (1983).

Here, Calvary and defendants were full participants in the entire trial and hearing process, including being parties to the stipulation of facts upon which the court based its first order. There was no motion to prevent Calvary's active involvement, the trial court's initial judgment exposed it to liability, and jurisdiction was retained to later determine defendants' claims. Calvary, therefore, has standing to move for relief under Rule 60(b).

Even if Calvary did not have standing, the trial court had authority to set aside its earlier judgment on its own initiative. *See Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 717, 220 S.E.2d 806, 811 (1975), *disc. review denied*, 289 N.C. 619, 223 S.E.2d 396 (1976) (in granting relief from judgment, a court is not restricted to acting on motion, but may also act on its own initiative). Under Rule 60(b), the court may relieve a party from a final judgment for reasons named in the rule such as mistake, newly discovered evidence, and fraud. N.C. Gen. Stat. § 1A-1, Rule 60(b)(1)-(3) (1999). The court may also grant relief for "[a]ny other reason justifying relief form the operation of judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (1999). Thus, the Rule has been described as a " 'grand reservoir of equitable power' by which a court may grant relief from a judgment whenever extraordinary circumstances exist and there is a showing that justice demands it." *Dollar v. Tapp*, 103 N.C. App. 162, 163-64, 404 S.E.2d 482, 483 (1991).

In the present case, the *Briggs* opinion had been filed a mere day prior to the trial court's first order. Under Rule 60(b)(1)-(3), a party must make the motion for relief within one year. N.C. Gen. Stat. § 1A-1, Rule 60(b). Under Rule 60(b)(6), a party must make the motion "within a reasonable time." *Id.* Here, less than thirty days after the trial court's decision, this Court's holding in *Briggs* was brought to the trial court's attention through the motion of a party to the action.

The *Briggs* opinion clearly showed that the trial court had earlier erred in requiring defendants to move a structure, their home, from their own property. Due to the extraordinary circumstances present here, we reject plaintiff's contention that the trial court lacked authority to act on its own initiative in order to accomplish justice.

Under the facts of this case, the trial court could have corrected the earlier judgment either on its own motion or the motion of Calvary. The order of the trial court is affirmed.

AFFIRMED.

Judges WYNN and WALKER concur.

BUNCOMBE COUNTY, ON BEHALF OF ANGELIA A. FRADY, PLAINTIFF v. DAVID B. ROGERS, DEFENDANT

No. COA01-129

(Filed 5 February 2002)

1. **Child Support, Custody, and Visitation— support—voluntary payment—no deduction from monthly gross income**

The trial court did not abuse its discretion in a child support case by failing to deduct from defendant's monthly gross income the amount of child support he voluntarily pays each week on behalf of one of his four minor children, because: (1) defendant does not make child support payments on behalf of that child pursuant to a court order or settlement agreement; (2) defendant was given credit for supporting this child as a minor child living with defendant; and (3) defendant's monthly adjusted gross income is consistent with the Child Support Guidelines and defendant did not file a motion to deviate from the Guidelines.

2. **Child Support, Custody, and Visitation— support—procurement of health insurance**

The trial court failed to make proper findings in a child support case under N.C.G.S. § 50-13.11(a1) regarding whether insurance was available to defendant and whether it was available at a reasonable cost when it ordered defendant to pay health insurance costs for one of his four minor children, and the case is remanded for further findings of fact.

Appeal by Defendant from judgment entered 4 August 2000 by Judge Robert Harrell in Buncombe County District Court. Heard in the Court of Appeals 28 November 2001.

Buncombe County Child Support Enforcement Agency, by Susan E. Wilson, for plaintiff-appellee.

Michael E. Casterline, for defendant-appellant.

HUDSON, Judge.

Defendant appeals from an order requiring him to pay child support and procure health insurance, if it is available to him through his employment, for his minor child, Alexandria Frady. We affirm in part and vacate in part and remand for further proceedings.

Defendant is the natural father of four daughters: Savannah, Stephanie, Alexandria, and Lisa, each of whom has a different mother. Defendant is under a current court order to pay child support in the amount of $143.00 per month for Savannah. Stephanie's mother testified that she and Defendant have an agreement, which is not part of a court order, pursuant to which Defendant pays Stephanie's mother $54.00 per week, or $216.00 per month, for Stephanie's support; Stephanie lives with Defendant on the weekends. Support for Alexandria is the subject of the current action. Lisa, a newborn, and Lisa's mother currently reside with Defendant. Defendant testified that he has signed an agreement, which was "submitted to Haywood County" to be "signed by a judge," pursuant to which he will pay $121.00 per month for health insurance for Lisa. The record does not reflect the source of this insurance.

Kelly Williams, a child support worker, completed Worksheet A of the North Carolina Child Support Guidelines to be used at the hearing before the district court. *See* Annotated Rules of North Carolina 46-47 (2001). According to Worksheet A, at the time of the hearing, Defendant's gross monthly income was $1,386.56. Defendant was credited with $197.88 for support of two children living in his home; this amount, together with $143.00, Defendant's court-ordered support payment for Savannah, was subtracted from Defendant's gross monthly income, resulting in a monthly adjusted gross income of $1,045.68. Using the Child Support Schedule, Williams calculated $193.12 as the child support obligation amount, and she entered $193.00 as the recommended child support order.

Defendant did not file a motion for deviation from the Guidelines. The court ordered Defendant to pay $193.00 per month. Additionally, the order provided: "Defendant to maintain insurance when available through employment." Defendant appeals this order.

[1] Defendant first contends that the district court erred in failing to deduct from his monthly gross income the amount of child support he voluntarily pays each week on behalf of his minor child, Stephanie. We disagree.

Child support payments are required "to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c) (1999). When the court orders payments that are consistent with the North Carolina Child Support Guidelines (the "Guidelines"), these payments are presumed to "meet the reasonable needs of the child and [to be] 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). The trial court may deviate from the Guidelines upon a timely request by one of the parties, after engaging in a four-step process. *See id.*

The Guidelines provide that "[t]he amount of child support payments actually made by a party under any pre-existing court order(s) or separation agreement(s) should be deducted from the party's gross income." Ann. R. N.C., at 35. There is no provision for deducting the amount of voluntary child support payments.

Here, Defendant does not make child support payments for Stephanie pursuant to a court order or settlement agreement. Moreover, Defendant was given credit for supporting Stephanie as a minor child living with Defendant. The amount the court used for Defendant's monthly adjusted gross income, which resulted in an amount of $193.00 as his child support obligation for Alexandria, is thus consistent with the Guidelines. Defendant did not file a motion to deviate from the Guidelines. Hence, we find no abuse of discretion in this part of the court's order.

[2] Defendant next argues that the trial court erred in ordering him to pay health insurance costs for Alexandria. Specifically, he argues that the court failed to make findings of fact regarding whether insurance was available at a reasonable cost. We agree with Defendant that the court erred in failing to make proper findings in this regard.

By statute, the court must order

> the parent of a minor child or other responsible party to maintain health insurance for the benefit of the child when health insur-

> ance is available at a reasonable cost. As used in this subsection, health insurance is considered reasonable in cost if it is employment related or other group health insurance, regardless of service delivery mechanism.

N.C. Gen. Stat. § 50-13.11(a1) (1999). Pursuant to this statute, insurance that can be obtained through employment is presumptively reasonable in cost. However, the statute anticipates that a party may have access to insurance that is reasonable in cost, other than insurance that is available through employment. Before ordering a party to obtain health insurance, the trial court must make the determination whether insurance is available to the party at a reasonable cost. *See Jackson*, 138 N.C. App. at 291, 531 S.E.2d at 245.

Here, as in *Jackson*, the trial court made no findings at all as to whether insurance was available to Defendant, and, if so, at what cost. The court's order does not address whether Defendant had access to insurance outside of his employment, but provides only: "Defendant to maintain insurance when available through employment." This is a conditional order: if the Defendant has access to insurance through his employment, then he is ordered to obtain insurance for Alexandria. It leaves it to the parties to make the determination whether Defendant has access to insurance through his employment.

It is the court's responsibility to make the factual finding that Defendant does or does not have access to insurance through his employment. Additionally, if Defendant does not have access to insurance through his employment, then the court must determine if Defendant can procure insurance for his minor child in some other way at a reasonable cost. Accordingly, we remand for further findings of fact regarding whether Defendant is able to obtain health insurance for Alexandria at a reasonable cost.

Affirmed in part, vacated in part and remanded.

Judges TIMMONS-GOODSON and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 JANUARY 2002

IN RE ZEHNER No. 01-12	Cleveland (00J86)	No error
STATE v. JOHNSON No. 00-1326	Scotland (96CRS5393) (99CRS8815) (99CRS8820) (96CRS8409) (99CRS1898) (99CRS4337)	No error; new sentencing hearing in 99CRS8820
STATE v. KNOWLES No. 00-1380	Guilford (99CRS109254) (99CRS109255) (99CRS109256) (99CRS109257)	No error
STATE ex rel. UTILS. COMM'N v. N.C. PAYPHONE ASS'N No. 00-718	Utils. Comm'n (P-100, SUB84B)	Reversed and remanded

FILED 5 FEBRUARY 2002

ADAMS v. BARCALOUNGER No. 01-200	Ind. Comm. (I.C. #628007)	Affirmed
ALLGOOD v. PARSONS TRUCKING CO. No. 01-517	Ind. Comm. (I.C. #633701)	Affirmed
BASS v. JOBBERS OF RALEIGH No. 01-53	Ind. Comm. (I.C. #227755)	Affirmed
CONTINENTAL CAS. CO. v. BOWER No. 01-43	Cleveland (98CVS2338)	Affirmed
EASTON v. J.D. DENSON MOWING CO. No. 01-263	Ind. Comm. (I.C. #743687)	Affirmed
FORD MOTOR CREDIT CO. v. DEAN No. 01-609	Mecklenburg (00CVD933)	Appeal dismissed; plaintiff's motion for sanctions denied
HARDIN v. DON LOVE, INC. No. 01-379	Ind. Comm. (I.C. #553290)	Dismissed
IN RE CARPENTER No. 01-696	Wake (99J753)	Affirmed

LAMBERTH v. McDANIEL No. 01-203	Iredell (96CVD449)	Affirmed
LIBERTY OIL CO. v. HILDRETH No. 01-272	Randolph (99CVS860)	No error
MEJIA v. PATEL No. 01-276	Mecklenburg (98CVD311)	Affirmed in part, reversed in part, and remanded
MONEY v. MONEY No. 00-1393	Forsyth (99CVD4166)	Dismissed in part, affirmed in part
PAGE v. CANOUTAS No. 00-1199	New Hanover (99CVS2157)	Affirmed
SCHLITT v. SCHLITT No. 01-280	Wake (00CVD2120)	Affirmed
SIDES v. GUILFORD CTY. SCH. BD. No. 01-298	Guilford (98CVS11711)	Affirmed
SMITH v. SMITH No. 01-407	Forsyth (00CVD5072)	Affirmed in part; reversed and remanded in part
STATE v. ANDERSON No. 00-1483	Mecklenburg (95CRS52610)	Judgment arrested and order vacated
STATE v. BROWN No. 01-438	Guilford (00CRS87331)	No error
STATE v. COLEMAN No. 01-615	Mecklenburg (00CRS116880) (00CRS116881)	No error
STATE v. COLPAERT No. 01-132	Sampson (99CRS52200) (99CRS52202)	No prejudicial error
STATE v. DAVIS No. 01-498	Rowan (95CRS1321) (95CRS1323) (95CRS1735)	No error
STATE v. DRUMMOND No. 01-408	Forsyth (99CRS53783) (00CRS12499)	Affirmed
STATE v. EPPS No. 01-812	Wake (00CRS55659) (00CRS57809)	No error

STATE v. GETZ No. 01-179	Mecklenburg (98CRS19481)	Motion to dismiss allowed; appeal dismissed
STATE v. GOODE No. 01-573	Rutherford (00CRS2094)	No error
STATE v. HATCHER No. 01-520	Robeson (99CRS10572)	No error
STATE v. JOHNSON No. 00-1336	Alamance (99CRS56417)	No error
STATE v. JOHNSON No. 00-1468	Johnston (98CRS21813) (99CRS2799)	No error
STATE v. LEE No. 01-469	Buncombe (99CRS58365)	No error
STATE v. MARTINEZ No. 01-593	Catawba (00CRS6301)	No error
STATE v. McNEIL No. 01-616	Durham (99CRS63955)	No error
STATE v. MILLS No. 01-405	Buncombe (99CRS67178) (99CRS67178(A))	Affirmed
STATE v. MORGAN No. 01-576	Forsyth (00CRS13413) (00CRS30015)	No error
STATE v. TAYBRON No. 01-356	Wilson (99CRS53475)	No error
STATE v. WESTMORELAND No. 01-230	Stokes (99CRS4651) (00CRS274)	Remanded for resentencing
STATE v. WILLIAMSON No. 00-1482	Davidson (98CRS12971)	No error
TISE v. YATES CONSTR. CO. No. 01-500	Forsyth (94CVS4289)	Affirmed
TRAFT v. AMERICAN THRESHOLD INDUS., INC. No. 01-10	Buncombe (98CVS4365) (98CVS05283)	Dismissed
TRAFT v. AMERICAN THRESHOLD INDUS., INC. No. 01-11	Buncombe (98CVS05283) (98CVS4365)	Dismissed
WHISNANT v. IMAGES SIGN SERV. No. 01-289	Ind. Comm. (I.C. #852673)	Affirmed

FRED BAARS AND CAROLE BAARS, PLAINTIFFS v. CAMPBELL UNIVERSITY, INC., NORMAN A. WIGGINS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF GLADYS CAMPBELL, DECEASED AND WILLIAM A. JOHNSON, DEFENDANTS

No. COA01-60

(Filed 5 February 2002)

1. **Statute of Limitations and Repose— wills—inter vivos transfers—constructive fraud—legal malpractice—fraud—breach of fiduciary duty**

The trial court did not err in an action challenging both inter vivos transfers made by decedent to defendant university and the underlying will by dismissing the case under N.C.G.S. § 1A-1, Rule 12(b)(6) based on the statute of limitations, because: (1) plaintiffs' complaint does not satisfy the elements of constructive fraud to allow a ten-year statute of limitations under N.C.G.S. § 1-56; (2) plaintiffs' cause of action against defendant university counsel for legal malpractice was barred by the three-year statute of limitations under N.C.G.S. § 1-15 since the last act performed by defendant is the deed of transfer he prepared in November 1990 and the lawsuit was filed in June 2000; (3) plaintiffs' cause of action alleging fraud is barred by the three-year statute of limitations under N.C.G.S. § 1-52(9) since it was filed four years and one month beyond the statute of limitations; and (4) plaintiffs' causes of action construed as a breach of fiduciary duty by defendants were governed by three-year statutes of limitations, and plaintiffs' complaint was not timely as to the remaining causes of action.

2. **Wills— subject matter jurisdiction—caveat proceeding—inter vivos transfers—validity of will—undue influence**

The trial court did not err in an action challenging both inter vivos transfers made by decedent to defendant university and the underlying will by dismissing the case under N.C.G.S. § 1A-1, Rule 12(b)(6) based on a lack of subject matter jurisdiction, because: (1) an attack on the validity of the will should have been raised in the caveat proceeding rather than this lawsuit; (2) plaintiffs' allegations of undue influence by defendants upon decedent should also have been made in the caveat proceeding rather than in this complaint; and (3) the caveat proceeding was still pending when the complaint in this case was filed.

3. Parties— university president—suit in individual capacity

The trial court did not err in an action challenging both inter vivos transfers made by decedent to defendant university and the underlying will by dismissing the case under N.C.G.S. § 1A-1, Rule 12(b)(6) based on plaintiffs' failure to allege a cause of action against defendant university president in his individual capacity, because: (1) defendant university president did not derive any personal benefit from his actions with respect to decedent; (2) the fact that defendant university president was decedent's alternative attorney-in-fact does not mean that he can be sued individually unless plaintiffs show he committed some wrongdoing as her attorney-in-fact; and (3) plaintiffs have failed to show that either defendant university president or defendant university acted in a fiduciary relationship to decedent.

4. Wills— undue influence—unauthorized practice of law by a corporation—violation of Rules of Professional Conduct

The trial court did not err in an action challenging both inter vivos transfers made by decedent to defendant university and the underlying will by dismissing the case under N.C.G.S. § 1A-1, Rule 12(b)(6) based on the fact that plaintiffs' claim that defendants allegedly violated the Revised Rules of Professional Conduct by exercising undue influence over decedent and that defendants engaged in the unauthorized practice of law were not cognizable causes of action, because: (1) a breach of a provision of the Code of Professional Responsibility is not in and of itself a basis for civil liability and evidence of purported rules violations is properly excluded when a case is subject to dismissal; (2) N.C.G.S. § 84-5 prohibiting the unauthorized practice of law by a corporation does not provide a private cause of action, and plaintiffs are private citizens; and (3) the clerk of court's issuance of letters testamentary invokes a presumption of validity until a reviewing court states otherwise, and therefore, the 1988 will and the 1990 codicil are treated as the valid last will of decedent until such time as it is overturned by a reviewing court.

Appeal by plaintiffs from orders entered 7 November 2000 by Judge E. Lynn Johnson in Harnett County Superior Court. Heard in the Court of Appeals 17 October 2001.

Everett and Everett, by Robinson O. Everett; and Everett, Gaskins, Hancock & Stevens, by Hugh Stevens, for plaintiff appellants.

Adams Kleemeier Hagan Hannah & Fouts, by Daniel W. Fouts and Margaret Shea Burnham; and Stott, Hollowell, Palmer & Windham, LLP, by James C. Windham, Jr., for Norman A. Wiggins and Campbell University, Inc., defendant appellees.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Ronald C. Dilthey and Charles George, for William A. Johnson defendant appellee.

McCULLOUGH, Judge.

This case concerns the will of Gladys Campbell, who died on 16 May 1996 at the age of eighty-seven. At the time of her death, Mrs. Campbell was a widow with no children. Plaintiffs are brother and sister, respectively, and a nephew and niece of Mrs. Campbell. On 6 June 1984, Mrs. Campbell executed a will in Florida which gave most of her estate to two charities, her brother-in-law, and several of her nieces and nephews. This will remained in effect until 1988. In 1986, Mrs. Campbell responded to a fundraising campaign by Campbell University, located in Buies Creek, North Carolina. Mrs. Campbell attended the school from 1923-24, though she was not related to the Campbells for whom the school was named. Mrs. Campbell made a $10,000.00 donation to the school's scholarship fund, and during the next two years, officials from Campbell University visited her in Florida on numerous occasions.

In early 1988, University officials personally moved Mrs. Campbell to a neighborhood near the campus, and thereafter she signed several legal documents which transferred the bulk of her sizeable estate to Campbell University. On 25 January 1988 defendant William A. Johnson (Johnson), counsel for Campbell University, drafted a new will for Mrs. Campbell. The will contained bequests to Mrs. Campbell's nieces and nephews, two charities, and Campbell University, as well as a provision naming defendant Norman A. Wiggins (Wiggins), in his capacity as President and Chief Executive Officer of the named executor, Campbell University, the executor of her estate. Mrs. Campbell executed a codicil to her 1988 will on 11 January 1990. The codicil bequeathed $100,000.00 to Campbell University's law school building fund. That sum had previously been designated for one of Mrs. Campbell's sisters, but she passed away shortly after the 1988 will was drafted.

Due to the amounts and the nature of Mrs. Campbell's assets, her estate plan was intricate. In addition to the 25 January 1988 will and the 11 January 1990 codicil, Mrs. Campbell made several *inter vivos*

transfers. On 10 March 1988, Mrs. Campbell executed two documents: (1) a Contract and Agreement, in which Mrs. Campbell agreed to move to Buies Creek, North Carolina, and Campbell University agreed to long-term care for her; and (2) a Charitable Remainder Annuity Trust Agreement. Mrs. Campbell then executed a Revocable Asset Management Trust Agreement, dated 1 April 1988. On 7 April 1989, Mrs. Campbell executed a Power of Attorney, in which Wiggins obtained a power of attorney from Mrs. Campbell for Frank Upchurch, Campbell University's Vice President of Advancement; Wiggins was named in the alternative. The power of attorney was activated on 30 June 1993. On 28 November 1990, Mrs. Campbell executed a Deed Reserving a Life Estate for her home in North Carolina. All these documents were prepared by defendant Johnson and executed by defendant Wiggins. Finally, in 1993, Mrs. Campbell gave approximately $180,000.00 to Campbell University.

Upon Mrs. Campbell's death on 16 May 1996, Wiggins presented her 1988 will and the 1990 codicil to the probate court. The Harnett County Clerk of Superior Court issued Letters Testamentary, which appointed Campbell University, by Wiggins, as the executor of Mrs. Campbell's estate. Soon thereafter, Wiggins took the "Oath of Executor" and has served in that capacity up to the present time.

Plaintiffs filed a *caveat* to their aunt's will on 16 May 1999. During discovery, plaintiffs learned for the first time about some of the documents their aunt had signed, and the extent to which Campbell University benefited from Mrs. Campbell's will. After they discovered this information, plaintiffs filed a civil complaint in Harnett County on 15 June 2000. Their complaint alleged that defendants unduly influenced Mrs. Campbell and breached their fiduciary duty to her while acquiring *inter vivos* transfers of Mrs. Campbell's assets in favor of Campbell University. In their prayer for relief, plaintiffs requested the following remedies:

> 1. That the Court impose a constructive trust on all assets that Campbell University has acquired, directly or indirectly, from Gladys Campbell during her life or after her death and that this trust also include any interest, profits or other proceeds received from investment or transfer of assets obtained from Gladys Campbell.
>
> 2. That the requested constructive trust be for the benefit of those persons who would be the beneficiaries under the last will of Gladys Campbell not obtained by the exercise of unlawful

influence or, in the event that no such will qualifies for probate, then for the benefit of those persons who are the heirs at law of Gladys Campbell.

3. From the assets of the constructive trust, the plaintiffs recover any costs and expenses, including any attorney fees, incurred either in connection with this litigation or in the caveat proceedings involving the estate of Gladys Campbell and that defendants be ordered to reimburse the constructive trust for any such payments.

4. That compensatory damages be awarded against the defendants to compensate the plaintiffs for any losses they may have incurred, directly or indirectly as a result of the defendants' actions.

5. That punitive damages, up to $250,000 per defendant, be awarded to the plaintiffs by reasons of defendants' conduct, with these damages to be in such amount as shall be appropriate under all the circumstances in light of such acts on the part of each defendant as may constitute a breach of the fiduciary obligation owed by such defendant to Gladys Campbell or as may constitute part of a more widely extended plan or scheme to obtain assets by the use of undue influence.

6. That plaintiffs recover from the defendants the costs of this action, including reasonable attorney fees.

7. That this case be consolidated for trial and further disposition with the pending caveat proceeding which concerns the purported will of Gladys Campbell, deceased.

Defendant Johnson filed an answer on 9 August 2000, which contained both a response to the allegations of plaintiffs' complaint and a motion to dismiss (based on six defenses) pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b) (1999). The first defense was based on the fact that there was a prior pending action (the *caveat* proceeding) in existence; defendant Johnson also asserted three defenses based on the statutes of limitations, one defense based on a lack of subject matter jurisdiction, and one defense asserting that plaintiffs were not real parties in interest. Finally, Johnson asserted that plaintiffs' claims were barred by the doctrines of *res judicata* and election of remedies.

Defendants Wiggins and Campbell University filed their joint answer on 19 September 2000, which contained both a response to

the allegations of plaintiffs' complaint and a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b). In support of their motion to dismiss, defendants recounted the same six defenses propounded by defendant Johnson, and further asserted that the case should be dismissed because plaintiffs failed to allege wrongdoing by defendant Wiggins in his individual capacity. Defendants also maintained plaintiffs' claim that Wiggins violated the Revised Rules of Professional Conduct did not constitute a cognizable cause of action. Defendants moved to strike a portion of plaintiffs' complaint and denied exerting undue influence upon Mrs. Campbell. Defendants reiterated the fact that many of the documents executed by Mrs. Campbell were revocable in nature; as to the documents which were not unilaterally revocable, defendants pointed out that Mrs. Campbell received valuable consideration and did not file a lawsuit to set them aside. Finally, defendants asserted that N.C. Gen. Stat. § 84-5 (1999) (prohibiting the practice of law by a corporation) went into effect on 1 October 1997, long after the 1988 will and the 1990 codicil were executed, and was irrelevant to the case.

On 7 November 2000, the trial court filed two orders in which it allowed defendants' motions to dismiss on six of the defenses. The trial court agreed that plaintiffs' lawsuit was barred by the statutes of limitations and allowed defendants' motions to dismiss on those three defenses. Additionally, the trial court dismissed plaintiffs' complaint because the trial court lacked subject matter jurisdiction, since the *caveat* proceeding was still pending in Harnett County at the time the complaint was filed. The trial court also agreed that defendant Wiggins could not be sued individually because all actions he took were done in his capacity as President and CEO of Campbell University, and plaintiffs did not allege misconduct on his part in his role as Mrs. Campbell's attorney-in-fact. The only document in which Wiggins was individually named was the Power of Attorney. Finally, the trial court agreed plaintiffs' claim that Wiggins violated the Revised Rules of Professional Conduct was not a cognizable cause of action; moreover, the trial court was persuaded by defendants' argument that unauthorized practice of law did not state a cognizable cause of action. The trial court's orders then dismissed plaintiffs' complaint against defendants Wiggins and Campbell University with prejudice, and dismissed plaintiffs' complaint against defendant Johnson with prejudice in its entirety. Plaintiffs appealed.

On appeal, plaintiffs argue that the trial court erred by (I) granting defendants' motions to dismiss based on the statutes of limita-

tions; (II) granting defendants' motions to dismiss based on a lack of subject matter jurisdiction; (III) granting defendants' motion to dismiss on the ground that plaintiffs did not allege a cause of action against defendant Wiggins in his individual capacity; and (IV) granting defendants' motion to dismiss on the ground that plaintiffs' allegations that defendant Wiggins violated the North Carolina Rules of Professional Conduct was not a cognizable cause of action. For the reasons set forth herein, we agree with defendants and affirm the trial court's dismissal of plaintiffs' complaint.

From the outset, we note that plaintiffs' lawsuit was dismissed by the trial court pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b). When ruling on such a motion, the trial court must decide " ' "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. . . ." ' " *Liptrap v. City of High Point*, 128 N.C. App. 353, 355, 496 S.E.2d 817, 818 (quoting *Soderlund v. N.C. School of the Arts*, 125 N.C. App. 386, 389, 481 S.E.2d 336, 338 (1997) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987))), *disc. review denied*, 348 N.C. 73, 505 S.E.2d 873 (1998).

I. The Statutes of Limitations

[1] By their first assignment of error, plaintiffs argue the trial court erred in granting defendants' motions to dismiss based on the statutes of limitations, because their case is governed by a ten-year statute of limitations and was timely filed. When determining the applicable statute of limitations, we are guided by the principle that the statute of limitations is not determined by the remedy sought, but by the substantive right asserted by plaintiffs. *See Speck v. N.C. Dairy Foundation*, 64 N.C. App. 419, 426, 307 S.E.2d 785, 790 (1983), *rev'd on other grounds*, 311 N.C. 679, 319 S.E.2d 139 (1984). In the present case, plaintiffs' complaint defined their cause of action as a claim for constructive fraud, which they argue has a ten-year statute of limitations, pursuant to N.C. Gen. Stat. § 1-56 (1999). Section 1-56 states:

> An action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued.

To support their claim for constructive fraud, plaintiffs alleged facts and circumstances which created a relationship of trust and confidence between Mrs. Campbell and defendants that led to and sur-

rounded the consummation of the transactions of which plaintiffs complain; plaintiffs also alleged that defendants sought their own advantage during their dealings with Mrs. Campbell. Despite plaintiffs' characterization of their lawsuit in this manner, we do not find these arguments persuasive. Instead, we agree with defendants that plaintiffs' complaint does not satisfy the elements of constructive fraud. Plaintiffs' complaint was properly dismissed by the trial court because their valid causes of action were governed by three-year statutes of limitations, and plaintiffs' complaint was not timely as to those causes of action. We will examine each of these in turn.

(a) N.C. Gen. Stat. § 1-15(c) (1999)

As to defendant Johnson, plaintiffs claim that he improperly performed professional services as an attorney for Mrs. Campbell. Claims such as this are governed by N.C. Gen. Stat. § 1-15(c), which establishes a four-year statute of repose and a three-year statute of limitations. Section 1-15(c) states:

> (c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is . . . economic or monetary loss . . . which originates under circumstances making the . . . loss . . . not readily apparent to the claimant at the time of its origin, and the . . . loss . . . is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . .

Plaintiffs' characterization of their claim against Johnson as a "breach of fiduciary duty" is not meaningful. Instead, we believe plaintiffs' claim is one of ordinary legal malpractice. As such, it properly falls within the parameters of N.C. Gen. Stat. § 1-15(c). Careful examination of plaintiffs' complaint shows that the last act performed by Johnson of which they complain is the deed of transfer he prepared in November 1990. Since over three years had passed from that time until plaintiffs' lawsuit was filed in June 2000, plaintiffs'

claim against Johnson was barred by the statute of limitations contained in N.C. Gen. Stat. § 1-15(c).

(b) N.C. Gen. Stat. § 1-52(9) (1999)

Plaintiffs' lawsuit is also barred by N.C. Gen. Stat. § 1-52(9). Section 1-52(9) provides a three-year statute of limitations:

> (9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Our Supreme Court has held that N.C. Gen. Stat. § 1-52(9) applies " 'to all actions, both legal and equitable, where fraud is an element, and to all forms of fraud, including deception, imposition, duress, and undue influence.' " *Swartzberg v. Insurance Co.*, 252 N.C. 150, 156, 113 S.E.2d 270, 277 (1960) (quoting McIntosh, *North Carolina Practice and Procedure* § 183). *See also Little v. Bank*, 187 N.C. 1, 121 S.E. 185 (1924) (placing claims of undue influence under the three-year statute of limitations). Applying these principles to the present case, we conclude that plaintiffs' complaint was filed four years and one month beyond the statute of limitations and is, therefore, time-barred.[1]

(c) N.C. Gen. Stat. § 1-52(1) (1999)

Defendants Campbell University and Wiggins also assert that plaintiffs' complaint arises in contract; defendants thus argue that a three-year statute of limitations applies under N.C. Gen. Stat. § 1-52(1), which states:

> Within three years an action—
>
> (1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1).

Defendants urge this Court to adopt the three-year statute of limitations to the extent that plaintiffs' lawsuit is construed as a breach of

1. We also note that the statute of limitations began no later than 16 May 1996, the date of Mrs. Campbell's death. Plaintiffs are bound by the statute of limitations as it would apply to their aunt; it does not matter when they discovered the undue influence, because plaintiffs' claim of undue influence derives from transactions between their aunt and defendants. Additionally, we recognize that Mrs. Campbell never sought to set aside any of the documents she executed and did not revoke any of her revocable estate planning documents.

fiduciary duty by defendants to Mrs. Campbell. *See Davis v. Wrenn*, 121 N.C. App. 156, 464 S.E.2d 708 (1995), *cert. denied*, 343 N.C. 305, 471 S.E.2d 69 (1996) (breach of fiduciary duty by executor is governed by the three-year statute of limitations provided in N.C. Gen. Stat. § 1-52(1)). *See also Tyson v. N.C.N.B.*, 305 N.C. 136, 142, 286 S.E.2d 561, 565 (1982) (applying Section 1-52(1) to actions regarding an executor's breach of fiduciary duties).

The crux of plaintiffs' complaint is that all the documents executed by Mrs. Campbell were improper. However, after determining that plaintiffs' lawsuit is governed by the three-year statutes of limitations, we conclude that plaintiffs were not timely with any of their filings.

Document	**Date**	**Expiration of Three-Year Statute of Limitations**
Will	25 January 1988	25 January 1991
Contract and Agreement	10 March 1988	10 March 1991
Charitable Remainder Annuity Trust	10 March 1988	10 March 1991
Revocable Asset Management Trust	1 April 1988	1 April 1991
Power of Attorney	7 April 1989	7 April 1992
Codicil	11 January 1990	11 January 1993
Deed	28 November 1990	28 November 1993

Plaintiffs' lawsuit was not filed until June 2000, more than three years after each document was executed. Plaintiffs' lawsuit is time-barred with respect to all the documents of which plaintiffs complain. Plaintiffs' first assignment of error is, therefore, overruled.

II. The *Caveat* Proceeding and Subject Matter Jurisdiction

[2] Throughout their second assignment of error, plaintiffs argue they are not challenging the validity of the will as part of this appeal; however, after careful examination of the record below, we conclude that plaintiffs are challenging not only the *inter vivos* transfers made by their aunt, but also the underlying will.

In their brief to this Court, plaintiffs assert that "the caveat is concerned with the validity of the will and the civil complaint that is the subject of this action is only attacking the validity of the *inter vivos* transactions." We do not agree. Paragraph 9 of plaintiffs' complaint makes the following allegation:

> 9. The execution of the purported will (in January 1988) was the result of a plan on the part of agents and representatives of Campbell University to have her transfer to Campbell University, by will, contract and agreement, trust agreement, and otherwise almost all of the assets which belonged to Gladys Campbell and thereby inevitably deprive the members of her family, who were the natural objects of her affection, of opportunity for benefit from these transferred assets during her life *or at her death.*

(Emphasis added.) This language indicates that the will itself was under attack by plaintiffs in both their complaint and in the *caveat* proceeding.

To the extent that plaintiffs' complaint states Campbell University obtained property from the probate of Mrs. Campbell's will, we conclude their exclusive remedy is the *caveat* proceeding. We also take judicial notice of the fact that Mrs. Campbell's 1988 will and her 1990 codicil were deemed valid by the Harnett County Superior Court on 24 April 2001, as part of the disposition of the *caveat* proceeding. (In the Matter of the Will of Gladys Baars Campbell, No. 96 E 227; appealed to the North Carolina Court of Appeals, No. COA01-1223; filed 28 September 2001 and docketed 5 October 2001.) Therefore, until such time as the will and codicil are deemed invalid, we will treat them as the valid last will and codicil of Mrs. Campbell.

N.C. Gen. Stat. § 31-32 (1999) states:

> At the time of application for probate of any will, and the probate thereof in common form, or at any time within three years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: Provided, that if any person entitled to file a caveat be within the age of 18 years, or insane, or imprisoned, then such person may file a caveat within three years after the removal of such disability.
>
> Notwithstanding the provisions of the first paragraph of this section, as to persons not under disability, a caveat to the probate of a will probated in common form prior to May 1, 1951, must be filed within seven years of the date of probate or within three years from May 1, 1951, whichever period of time is shorter.

In general, "[t]he purpose of a caveat is to determine whether the paperwriting purporting to be a will is in fact the last will and testament of the person for whom it is propounded." *In re Spinks*, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5 (1970). "The filing of a caveat is the customary and statutory procedure for an attack upon the testamentary value of a paperwriting which has been admitted by the clerk of superior court to probate in common form." *Id.* An attack upon a will offered for probate must be direct and by *caveat*; a collateral attack is not permitted. *In re Will of Charles*, 263 N.C. 411, 415, 139 S.E.2d 588, 591 (1965); *see also Johnson v. Stevenson*, 269 N.C. 200, 202, 152 S.E.2d 214, 216 (1967); and *Casstevens v. Wagoner*, 99 N.C. App. 337, 338, 392 S.E.2d 776, 778 (1990). Additionally, a direct attack by *caveat* has been held a complete and adequate remedy at law, such that a plaintiff is not entitled to equitable relief. *Johnson*, 269 N.C. at 204, 152 S.E.2d at 217.

Plaintiffs requested the imposition of a constructive trust in their complaint, as well as damages. To the extent that such relief is predicated upon the provisions of Mrs. Campbell's will, those issues were properly dismissed by the trial court, as they constituted an attack on the validity of the will and should have been raised in the *caveat* proceeding, rather than in this lawsuit. We further note that "[a]n attack on the validity of a will most commonly deals with issues involving undue influence and testamentary capacity." *Brickhouse v. Brickhouse*, 104 N.C. App. 69, 72, 407 S.E.2d 607, 609-10 (1991). Thus, plaintiffs' allegations of undue influence by defendants upon their aunt should also have been made in the *caveat* proceeding, rather than in this complaint. Such action is the correct method of disposition under N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (1999), which states:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

Therefore, to the extent the complaint and the *caveat* deal with the same issues and request resolution of those issues, the trial court did not have subject matter jurisdiction to consider the later filed complaint when the *caveat* proceeding was still pending in Harnett County. As the trial court lacked subject matter jurisdiction to decide the propriety of the transfers effectuated by Mrs. Campbell's will, plaintiffs' second assignment of error is overruled.[2]

2. We note that plaintiffs requested an equitable remedy (the constructive trust) in their complaint. If plaintiffs successfully challenged the validity of the will in the *caveat* proceeding, they would be able to set aside their aunt's 1988 will and 1990 cod-

III. Claims Against Wiggins in His Individual Capacity

[3] Plaintiffs next argue it was proper for them to assert causes of action against defendant Wiggins in his individual capacity because "a person is personally liable for all torts committed by him, notwithstanding that he may have acted as an agent for another or as an officer for a corporation." *Baker v. Rushing*, 104 N.C. App. 240, 247, 409 S.E.2d 108, 112 (1991). Plaintiffs also assert that Wiggins is liable to plaintiffs for "facilitation of fraud." Defendant Wiggins maintains that the claims against him in his individual capacity were properly dismissed because " '[d]ismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure . . . when some fact disclosed in the complaint necessarily defeats the plaintiff's claim.' " *Hooper v. Liberty Mut. Ins. Co.*, 84 N.C. App. 549, 551, 353 S.E.2d 248, 250 (1987) (quoting *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)).

Examination of the 4 June 1996 Letters Testamentary indicates that the Clerk of Harnett County Superior Court named Campbell University, Inc., by Norman A. Wiggins, as the Executor of the Estate of Gladys Baars Campbell. Wiggins asserts that plaintiffs' complaint alleges no facts which demonstrate any wrongdoing by Wiggins himself. Since conclusions of law or unwarranted deductions of fact are not considered during a motion to dismiss, plaintiffs' failure to allege such facts is fatal to this claim. Plaintiffs' complaint specifically refers to Wiggins as President of Campbell University. There are many examples in plaintiffs' complaint wherein they describe actions by Wiggins as done "on behalf of Campbell University." Wiggins did not derive any personal benefit from his actions with respect to Mrs. Campbell. Also, the simple fact that defendant Wiggins was Mrs. Campbell's alternate attorney-in-fact does not mean that he can be sued individually, unless plaintiffs show he committed some wrongdoing as her attorney-in-fact. We also note that, aside from the fact that Wiggins was named as alternate attorney-in-fact under Mrs. Campbell's Power of Attorney, plaintiffs have failed to show that either Wiggins or Campbell University acted in a fiduciary relationship to Mrs. Campbell. *See In re Estate of Ferguson*, 135 N.C. App. 102, 105, 518 S.E.2d 796, 798-99 (1999) ("trial court's jury instruction that a power of attorney creates a fiduciary relationship between principal and attorney-in-fact held error when the power of attorney did not exist when the will was executed"), *id.* (quoting *In re Will of*

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icil and could offer her earlier 1984 will for probate. At no point, however, would plaintiffs be entitled to equitable remedies as a result of the *caveat* proceeding.

Atkinson, 225 N.C. 526, 529-30, 35 S.E.2d 638, 640 (1945)). Therefore, because plaintiffs were unable to allege facts showing wrongdoing by Wiggins as an individual against Mrs. Campbell, their third assignment of error is overruled.

IV. Ethics Violations and Unauthorized Practice of Law Claims

[4] Finally, plaintiffs assert Wiggins and Campbell University exercised undue influence over Mrs. Campbell, violated the Rules of Professional Conduct, and engaged in the unauthorized practice of law, all in furtherance of their "goal" of unduly influencing Mrs. Campbell. Plaintiffs argue they are not suing defendants for violating specific aspects of the law, but rather for unduly influencing Mrs. Campbell into executing documents favoring Campbell University.

This Court has held that "a breach of a provision of the Code of Professional Responsibility is not 'in and of itself . . . a basis for civil liability . . . .' " *Webster v. Powell*, 98 N.C. App. 432, 439, 391 S.E.2d 204, 208 (1990), *aff'd*, 328 N.C. 88, 399 S.E.2d 113 (1991) (quoting *McGee v. Eubanks*, 77 N.C. App. 369, 374, 335 S.E.2d 178, 181 (1985), *disc. review denied*, 315 N.C. 589, 341 S.E.2d 27 (1986)). Also, evidence of purported rules violations is properly excluded when a case is subject to dismissal. *Id.* This rule of law was incorporated into Revised Rule of Professional Conduct 0.2 as follows:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Plaintiffs also cite N.C. Gen. Stat. § 84-5 (1999) in their complaint and argue it prohibits unauthorized practice of law by a corporation.

However, that statute does not provide a private cause of action. Since plaintiffs are private citizens, they cannot recover for any alleged violation of this statutory provision. *See Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 338, 511 S.E.2d 41, 44, *cert. denied*, 350 N.C. 851, 539 S.E.2d 13 (1999). We also agree with defendants' position that the Clerk of Harnett County Superior Court issued Letters Testamentary and such action invokes a presumption of validity until a reviewing court states otherwise. We will therefore treat the 1988 will and the 1990 codicil as the valid last will of Mrs. Campbell until such time as it is overturned by a reviewing court.

Based on a careful review of the record and the arguments presented by the parties, we conclude the trial court properly dismissed plaintiffs' action.

Affirmed.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER SCOTT ROBINSON

No. COA00-1247

(Filed 5 February 2002)

1. Search and Seizure— search by parole officer—not in lieu of search warrant

The trial court did not err by denying a defendant's motion to suppress marijuana eventually found after a parole officer attempted to gain entry into defendant's house pursuant to a parole condition allowing warrantless searches where defendant contended that the use of the parole officer's authority was in lieu of police officers obtaining a search warrant and was not in furtherance of the supervisory goals of probation. The fact that other police officers were in the area of defendant's home when the parole officer approached defendant did not affect the legality of the parole officer's conduct, and the Fourth Amendment does not limit searches pursuant to probation conditions to those searches that have a probationary purpose.

2. Search and Seizure— unlawful warrantless entry—subsequent warrant—independent source doctrine

Assuming that a warrantless entry by officers into defendant's home was not justified by exigent circumstances and was unlawful, evidence thereafter seized from the home pursuant to a subsequently obtained search warrant was admissible under the independent source doctrine where the search warrant was obtained on the basis of an informant's tip that defendant was growing marijuana in his home, corroborating evidence was obtained while officers were lawfully on the premises attempting to gain consent to search, and defendant refused to consent to a search; the warrant application contained no information concerning what the officers observed when they initially entered the home without a warrant; and there was no indication that the warrant was prompted by what the officers saw during the warrantless entry.

3. Search and Seizure— warrant—probable cause—corroboration of tip

A detective's affidavit provided a sufficient showing of probable cause to support issuance of a search warrant where an informant's anonymous tip was not reliable standing alone, but the information in the tip was sufficiently corroborated to provide reasonable cause to believe that a search of defendant's house would reveal marijuana.

4. Appeal and Error— appointment of counsel refused—no prejudicial error

There was no prejudicial error in a marijuana prosecution where the court refused to appoint appellate counsel without making findings and conclusions regarding defendant's financial status but defendant's counsel took all of the necessary steps to docket defendant's appeal and filed a brief on defendant's behalf. The denial of defendant's request for appointed counsel was not prejudicial to defendant's right to counsel.

Appeal by defendant from judgment entered 18 May 2000 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 8 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General Michael C. Warren, for the State.

Kristoff Law Offices, P.A., by Sharon H. Kristoff, for defendant-appellant.

CAMPBELL, Judge.

Defendant was indicted for maintaining a dwelling for keeping and selling controlled substances, manufacturing marijuana, and possession with the intent to manufacture, sell or deliver marijuana. Defendant filed a motion to suppress evidence seized from his home pursuant to a search conducted on 8 September 1999. Defendant argued that the officers entered his house without a warrant, without probable cause, and in the absence of exigent circumstances, and that the subsequently obtained search warrant was not supported by probable cause. The trial court denied Defendant's motion to suppress and signed an order to that effect on 18 May 2000. This original order was misplaced and the trial court entered an exact copy of the original on 15 September 2000 *nunc pro tunc* 18 May 2000. Subsequent to the denial of his motion to suppress, Defendant pled guilty to manufacturing marijuana and maintaining a dwelling for keeping and selling controlled substances. Defendant received a suspended prison sentence with supervised probation for three years. From the denial of his motion to suppress, Defendant appeals pursuant to N.C. Gen. Stat. § 15A-979(b).

The facts pertinent to this appeal are as follows: On 31 August 1999, Captain Mardy Benson ("Captain Benson") of the Johnston County Sheriff's Department received an anonymous tip advising that the informant had been present at a store and overheard a conversation concerning Christopher Robinson ("Robinson," or "Defendant") and a marijuana growing operation located in the bedrooms of Robinson's house. Specifically, the anonymous informant overheard that Robinson was on probation, that Robinson's probation officer had come by Robinson's house, and that Robinson could not believe his probation officer had not seen the grow lights or smelled the marijuana. The informant further overheard that someone was coming by Robinson's house to pick up some marijuana that had been harvested from the plants growing in the house, that the marijuana growing operation was a hydroponic system, and that Robinson's wife's name was Terrell. The informant also advised Captain Benson that she did not know Robinson.

Captain Benson informed Agent A.W. Bryan ("Agent Bryan"), a detective on the Johnston County Interagency Drug Task Force, of the details of this anonymous tip. Agent Bryan recognized the name Christopher Robinson and, upon investigation, discovered that she had arrested Christopher Robinson on 15 May 1998 and charged him with maintaining a place to keep controlled substances, possession with intent to manufacture, sell and deliver marijuana, and manufacturing marijuana. This earlier arrest of Robinson was the result of a consensual search of Robinson's residence, which led to the discovery of approximately ten marijuana plants in various stages of growth and cultivation, grow lamps, a bag containing approximately 0.2 grams of marijuana, and other paraphernalia commonly used in the indoor cultivation and manufacture of marijuana. This growing operation was primarily located in the bedroom closet of Robinson's then residence.

After receiving the information from the anonymous tip, Agent Bryan contacted the Johnston County Probation Parole Office and spoke with Officer Stephen Wood ("Officer Wood"), who informed Agent Bryan that Robinson was still on probation from this earlier drug offense, and as a special condition of his probation, Robinson had agreed to submit to warrantless searches of his person and residence. Agent Bryan and Officer Wood discussed setting up a date and time at which to attempt to conduct a warrantless search of Robinson's house pursuant to his probation.

On 7 September 1999, Agent Bryan and Officer Wood decided that they would go to Robinson's house the following night. Officer Wood would attempt to gain consent to search the house, and if Robinson refused to consent, he would be arrested for a probation violation. Agent Bryan and other officers of the Interagency Drug Task Force planned to be at a prearranged location in the general area of Robinson's house in case Officer Wood needed some assistance.

On 8 September 1999, Officer Wood and Probation Officer Jansen Lee ("Officer Lee") went to Robinson's house, located at 3388 U.S. 301 South, to attempt to gain consent to search. When the officers arrived, Robinson stepped off the front porch and met them in front of the house. Officer Wood asked Robinson for consent to search the house. After conferring with Terrell Allen ("Allen"), who the record indicates is Robinson's girlfriend and not his wife, and who had joined Robinson and the officers outside, Robinson refused to grant consent for a search. Officer Wood explained to Robinson that his refusal to consent was a violation of his probation and that he was

going to be arrested. Robinson replied, "Okay. You can arrest me." Robinson was arrested and taken to Johnston County Jail. Agent Bryan, stationed at the prearranged location with other agents of the Drug Task Force, was notified of Robinson's arrest.

At that point, Agent Bryan and the other officers decided to go to the house themselves to attempt to obtain consent to search from Allen, who they knew to be there based on Officer Wood's earlier encounter with her. Lieutenant Daughtry and Special Agent Parrish knocked on the front door and identified themselves. Agent Bryan remained stationed near her car, which was parked at the front of the driveway, approximately ten feet from the house. The driveway ran along the right side of the house, placing Agent Bryan and her car in close proximity to an air-conditioning unit which was located on the ground immediately beside the house. Lieutenant Daughtry and Agent Parrish received no response in their repeated attempts to get someone to come to the door. Meanwhile, from her location approximately three to five feet from a window of the house, Agent Bryan observed movement inside the house. Lieutenant Daughtry and Agent Parrish then joined Agent Bryan at her location on the right side of the house. From this location, the officers smelled a strong odor of marijuana emanating from the house, in and around the vicinity of the air-conditioning unit.

The officers then decided to return to their prearranged location to meet with other agents and decide how to proceed. Upon their return to the prearranged location, Lieutenant Daughtry decided to call the house to talk with Allen in another attempt to gain consent to search. Lieutenant Daughtry spoke with Allen over the phone and Allen refused to grant consent. Allen also told Lieutenant Daughtry that she wanted to contact her lawyer.

At this time, the officers called District Attorney Tom Lock to explain the situation and make sure there were sufficient exigent circumstances present to allow the officers to enter the house without a warrant in order to secure the premises and prevent the destruction of any evidence. District Attorney Lock told the officers that they could enter the house without a warrant, and the officers returned to the house to do so.

After another unsuccessful attempt to get a response from knocking on the front door, the officers broke into the house. Once inside, the officers restrained Allen and conducted a protective sweep of the house to search for any other inhabitants and secure the premises

and any evidence that could possibly be destroyed. Agent Bryan then went back to her office and prepared the search warrant application that was submitted to the magistrate.

As part of the search warrant application, Agent Bryan swore to the following: (1) Robinson's previous arrest on drug charges and the evidence that was discovered upon searching Robinson's house in connection with this previous arrest; (2) the anonymous tip received by Captain Benson concerning Robinson and a marijuana growing operation; (3) Agent Bryan's confirmation through Officer Wood that Robinson was in fact on probation; (4) Robinson's refusal to consent to a search of the house; (5) Robinson's subsequent arrest for a probation violation for refusing to consent; (6) the subsequent unsuccessful attempt to secure consent to search from Allen; (7) Agent Bryan's observation of movement inside the house; and (8) the officers' detection of the odor of marijuana emanating from the house. Based on these facts and her law enforcement experience, Agent Bryan gave her opinion that probable cause was present to believe that marijuana, drug paraphernalia, and other indicia of drug activity were present in and around Robinson's house. The magistrate issued the search warrant and the officers returned to Robinson's house to conduct the search. The officers' search resulted in the seizure of marijuana, marijuana cultivation paraphernalia, and a .12-gauge shotgun.

Defendant brings forward numerous assignments of error which present three arguments against the trial court's denial of Defendant's motion to suppress. Defendant also assigns error to the trial court's failure to appoint counsel to perfect his appeal. After a careful review of the record, briefs, and transcript, we affirm the trial court's denial of Defendant's motion to suppress.

"Upon a voir dire hearing pursuant to a motion to suppress evidence, the trial court's findings of fact, if supported by competent evidence, are conclusive and binding on the appellate courts. The conclusions drawn from the facts found are, however, reviewable." *State v. Wallace*, 111 N.C. App. 581, 584, 433 S.E.2d 238, 240 (1993).

[1] Defendant first contends that the trial court erred in not granting his motion to suppress on the ground that the law enforcement officers unlawfully attempted to have a probation officer conduct a warrantless search of Defendant's residence as part of their criminal investigation, and not as part of the probation supervision process. Defendant's argument has no merit.

"The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' " *United States v. Knights*, — U.S. —, —, — L. Ed. 2d —, — (No. 00-1260, filed 10 December 2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 143 L. Ed. 2d 408, 414 (1999)). Defendant's status as a probationer subject to a search condition bears on both sides of that balance. "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Id.* In the instant case, as a special condition of probation for his previous drug conviction, Defendant was required to "[s]ubmit at reasonable times to warrantless searches by a probation officer of his person and of his vehicle and premises while he is present, for purposes specified by the court and reasonably related to his probation supervision . . . ." N.C. Gen. Stat. § 15A-1343(b1)(7) (1999). This probation condition significantly diminished Defendant's reasonable expectation of privacy.

"In assessing the governmental interest side of the balance, it must be remembered that 'the very assumption of the institution of probation' is that the probationer 'is more likely than the ordinary citizen to violate the law.' " *Knights*, — U.S. at —, — L. Ed. 2d at — (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 880, 97 L. Ed. 2d 709, 721 (1987)). Accordingly, the State's "interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen." *Id.*

Nonetheless, Defendant contends that Agent Bryan used Officer Wood's authority to search Defendant in lieu of obtaining a search warrant, thereby resulting in an attempt by Officer Wood to gain consent to search Defendant's house which was not in furtherance of the supervisory goals of probation, and was therefore unreasonable under the Fourth Amendment. The record shows that after receiving an anonymous tip indicating that Defendant was growing marijuana in his house, Agent Bryan provided that information to Officer Wood, who was Defendant's probation officer as a result of an earlier offense likewise involving the indoor cultivation of marijuana. This information indicated to Officer Wood that Defendant was in violation of his probation. It clearly furthered the supervisory goals of pro-

bation for Agent Bryan to forward this information to Officer Wood, and for Officer Wood to attempt to investigate this information further by seeking Defendant's consent to a search of the house. The fact that Agent Bryan and other officers were in the general area of Defendant's home when Officer Wood approached him about consenting to a search does not affect the legality of Officer Wood's conduct. *See State v. Church*, 110 N.C. App. 569, 576, 430 S.E.2d 462, 466 (1993) ("the presence and participation of police officers in a search conducted by a probation officer, pursuant to a condition of probation, does not, standing alone, render the search invalid"). Further, in *Knights*, the United States Supreme Court recently held that a law enforcement officer's search of a probationer subject to a search condition does not violate the Fourth Amendment when the law enforcement officer has reasonable suspicion that the probationer is engaged in criminal activity. *Knights*, —— U.S. at ——, —— L. Ed. 2d at ——. Thus, the Fourth Amendment does not limit searches pursuant to probation conditions to those searches that have a "probationary purpose." *Id.* Accordingly, we overrule Defendant's first assignment of error.

[2] Next, Defendant argues that the trial court erred in its conclusion that the officers' warrantless entry into Defendant's home was justified by exigent circumstances. Assuming, *arguendo*, that the officers' warrantless entry into Defendant's home was not justified by exigent circumstances, the evidence later seized as a result of the subsequently obtained search warrant is nevertheless admissible under the independent source doctrine.

"The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search." *Wallace*, 111 N.C. App. at 589, 433 S.E.2d at 243 (citing *Murray v. United States*, 487 U.S. 533, 101 L. Ed. 2d 472 (1988)). However, evidence is not to be excluded if the connection between the unlawful search and the discovery and seizure of the evidence is so attenuated as to dissipate the taint, as where the police had an independent source for discovery of the evidence. *Id.* "The independent source doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality." *Id.* However, "[a]ny search pursuant to a warrant is not a genuinely independent source of information sufficient to remove the taint of an earlier unlawful entry if the warrant was either prompted by what officers saw in the initial unlawful entry, or if the information obtained during the entry

was presented to the Magistrate and affected his decision to issue the search warrant." *Id.* at 590, 433 S.E.2d at 243.

In applying the independent source doctrine in *Segura v. United States*, 468 U.S. 796, 82 L. Ed. 2d 599 (1984), the United States Supreme Court held that a search warrant was valid where the information used to obtain the search warrant was not derived from an initial unlawful entry, but rather came from sources wholly unconnected with the unlawful entry and was known to the agents well before the initial unlawful entry. Thus, the dispositive question is whether the search warrant in the case *sub judice* was based on, or prompted by, information obtained from the officers' warrantless entry, or was it based on information acquired independently of the warrantless entry so as to purge the search warrant of the primary taint.

In the instant case, the officers had acquired information from an anonymous informant and decided to investigate further. Upon investigation, the officers corroborated some of the information provided by the informant. The officers attempted to gain consent to search Defendant's house, but were denied. While attempting to gain consent, the officers discovered further evidence corroborating the informant's tip. The officers then entered the home to secure it and any evidence it might contain, and then went to apply for a search warrant. In the search warrant application, the affiant referenced as grounds for probable cause (1) the informant's tip, (2) Defendant's refusal to consent to a search of the house, and (3) and the corroborating evidence, including the strong odor of marijuana, obtained while legally on Defendant's property attempting to gain consent to search. The warrant application contained no information concerning what the officers observed when they initially entered the house without a warrant. Nor is there any indication that the search warrant application was prompted by what the officers saw in the warrantless entry. Thus, the search warrant was not tainted by the officers' warrantless entry. Accordingly, Defendant's second assignment of error is overruled.

[3] Defendant further contends that the trial court erred in concluding that Agent Bryan's affidavit provided a sufficient showing of probable cause to support the magistrate's issuance of the search warrant. We disagree.

In determining whether probable cause exists for the issuance of a search warrant, the "totality of the circumstances" test enunciated

in *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983), is to be applied. *State v. Beam*, 325 N.C. 217, 381 S.E.2d 327 (1989); *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984); *State v. Witherspoon*, 110 N.C. App. 413, 429 S.E.2d 783 (1993). The "totality of the circumstances" test has been described as follows:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.[citation omitted].

Arrington, 311 N.C. at 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 [1983]). "The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *Id.* at 636, 319 S.E.2d at 256. Under the "totality of the circumstances" test, the dispositive question is "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists." *Beam*, 325 N.C. at 221, 381 S.E.2d at 329.

In the instant case, the magistrate had before him the following information: (1) that Defendant had previously been arrested on marijuana-related charges after a search of his residence revealed the presence of marijuana and paraphernalia used in the indoor cultivation of marijuana; (2) that Defendant was still on probation for this previous violation of the Controlled Substances Act; (3) that the affiant had received information that Defendant was again growing marijuana in his residence and that an individual was coming by the house to pick up some marijuana that had been harvested from the plants in the house; (4) that Defendant refused to allow his probation officer to conduct a warrantless search of his residence pursuant to the terms of Defendant's probation; (5) that Defendant's girlfriend also refused to consent to a search of the residence; (6) that while unsuccessfully attempting to get Defendant's girlfriend to respond to their knocks on the front door of the residence, the officers observed movement inside the house; and (7) that the officers smelled a strong odor of marijuana emanating from the house.

The magistrate was presented with a sworn affidavit signed by Agent Bryan. Agent Bryan's affidavit stated that Captain Benson had been informed by an anonymous informant that Defendant was growing marijuana in his house. "The police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties." *State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 765 (1971). Agent Bryan's affidavit reflected that the anonymous tip was based on a conversation overheard by the informant concerning Defendant and Defendant's marijuana growing operation. The informant provided the following details of this conversation: (1) where in the house the marijuana was being grown (two bedrooms), (2) that Defendant was currently on probation, (3) that an exchange of harvested marijuana was planned, and (4) that the marijuana growing operation was a hydroponic system. However, the affidavit does not contain any information as to when the informant overheard the conversation involving Defendant, when the planned exchange of marijuana was to take place, or where Defendant's residence was actually located. Further, the anonymous informant advised that she did not know Defendant. Agent Bryan's affidavit also lacks any statement that the informant had provided law enforcement officers with accurate and useable information in the past. Therefore, the anonymous informant's tip does not contain sufficient evidence of reliability to make it, standing alone, sufficient to support the magistrate's probable cause determination.

However, Agent Bryan's affidavit contains several pieces of information that tend to corroborate the informant's anonymous tip. First, Agent Bryan's investigation revealed that Defendant was in fact on probation at the time. Second, both Defendant and Defendant's girlfriend refused to grant consent to law enforcement officers to conduct a search of the house, further corroborating the likelihood that contraband of some kind may be present in the house. Third, the affiant observed movement inside the house while the other officers were knocking on the front door in an unsuccessful attempt to gain consent to search. Finally, the affiant and the other officers smelled a strong odor of marijuana emanating from the house.

Defendant contends that the information concerning movement inside the house and the odor of marijuana emanating from the house cannot be considered in determining whether the search warrant was supported by probable cause because that information itself was obtained pursuant to an illegal search. While Defendant concedes that the officers were entitled to go to the front door of Defendant's

house for the purpose of a general inquiry or interview, *see State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 599-600 (1979), Defendant argues that the officers were not allowed to look around the yard and into the windows of the house. The legal questions are whether Agent Bryan had a right to be on the right side of the house when she looked through the window and observed movement inside the house, and whether all three officers had a right to be in the vicinity of the air-conditioning unit when they smelled the odor of marijuana.

The record reveals that Agent Bryan remained stationed near her car when the other officers approached the front door of Defendant's house. Agent Bryan's car was located in the driveway on the right side of the house, approximately ten feet away from the house. If the officers were entitled to enter Defendant's driveway and go to the front door, which is undisputed, there is nothing unlawful or unreasonable about Agent Bryan remaining in close proximity to her car approximately five feet from the house while the other two officers knocked on the front door. From this location, Agent Bryan observed movement inside the house. Agent Bryan then alerted the other two officers and they came over to her location on the right side of the house. The record then shows that the officers smelled marijuana emanating from the house in the general vicinity of the air-conditioning unit. The air-conditioning unit was located on the right side of the house approximately ten feet from Agent Bryan's car, which was legally parked in the driveway. Based on this record, we conclude that the officers had a right to be where they were when they observed the movement in the house and when they smelled the marijuana odor. Thus, this information was properly included in the search warrant application affidavit.

Upon the totality of the circumstances presented, we conclude the magistrate in the instant case had ample basis upon which to find probable cause to authorize a search of Defendant's residence. Although the informant's tip was not reliable standing alone, the information contained in the tip was sufficiently corroborated to provide reasonable cause to believe that a search of Defendant's house would reveal the presence of marijuana. Consistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant, reviewing courts should not have a negative attitude toward warrants and "should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Illinois v. Gates*, 462 U.S. 213, 236, 76 L. Ed. 2d 527, 547 (1983)

(quoting *United States v. Ventresca*, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 689 (1965)); *see also State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 434 (1991). "[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Id.* at 237 n.10, 76 L. Ed. 2d at 547 n.10 (quoting same). In light of the Fourth Amendment's strong preference for searches pursuant to warrants, we agree with the magistrate's probable cause determination in the case *sub judice*.

[4] Finally, Defendant contends that the trial court erred in denying court-appointed counsel to perfect his appeal. We conclude that any such error by the trial court was not prejudicial to Defendant.

The record discloses that Sharon Kristoff ("Ms. Kristoff"), Defendant's attorney on appeal, was appointed to represent Defendant on 21 October 1999. Ms. Kristoff represented Defendant at the suppression hearing and his plea hearing. Following the trial court's sentencing of Defendant pursuant to his guilty plea, Ms. Kristoff gave oral notice of appeal from the trial court's denial of Defendant's motion to suppress. The trial court indicated that it would not sign the appellate entries appointing Ms. Kristoff to perfect Defendant's appeal until Defendant filled out a new affidavit of indigency. This request by the trial court was permitted under N.C. Gen. Stat. § 7A-450, which provides: "[t]he question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation." N.C.G.S. § 7A-450(c) (1999). The trial court subsequently denied court-appointed counsel to perfect Defendant's appeal.

Defendant argues that the trial court committed plain error in denying his request for appointed counsel on appeal without citing to the affidavit of indigency or making findings of fact or conclusions of law regarding Defendant's financial status. In support of this contention, Defendant relies on *State v. Haire*, 19 N.C. App. 89, 198 S.E.2d 31 (1973), in which this Court held that the denial of counsel without evidence to support a finding of non-indigency entitled the defendant to a new trial. However, the facts of the case *sub judice* are readily distinguishable from those in *Haire*. In *Haire*, the defendant requested the appointment of counsel at the outset of jury selection. The court denied the defendant's request at that time and later made an inquiry into the defendant's financial status after the jury was selected. After this inquiry, the court entered an order denying the defendant's request for counsel, and the defendant was not represented at trial.

In the instant case, the record discloses that Defendant was represented by counsel at the suppression hearing and during the entry of his guilty plea. After the trial court refused to appoint counsel to perfect Defendant's appeal, Ms. Kristoff filed written notice of appeal on Defendant's behalf. Ms. Kristoff then took all the necessary steps to docket Defendant's appeal with this Court and followed that with the filing of a brief on Defendant's behalf. Unlike the defendant in *Haire*, we conclude that Defendant here has received adequate representation at all stages, including the suppression hearing, his plea hearing, and his appeal to this Court. Therefore, any error committed by the trial court in failing to make findings of fact and conclusions of law to support its denial of Defendant's request for appointed counsel on appeal was in no way prejudicial to Defendant's right to counsel. Therefore, Defendant's final assignment of error is overruled. However, we reiterate that N.C.G.S. § 7A-450(c) provides that "[t]he question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation."

Defendant's arguments attacking the denial of his motion to suppress fail, and we affirm the trial court's judgment.

Affirmed.

Chief Judge EAGLES and Judge HUDSON concur.

STATE OF NORTH CAROLINA v. DULAINE LOTHARP

No. COA00-1329

(Filed 5 February 2002)

1. Assault; Criminal Law— aggravated assault—disjunctive instructions—erroneous

The trial court erroneously gave disjunctive instructions in a prosecution for assault with a deadly weapon inflicting serious injury where the court told the jury to return a verdict of guilty if it found that defendant beat the victim with his hands and feet and/or a chain, and that defendant's hands and feet and/or the chain were deadly weapons. While there is a line of cases which allows disjunctive phrasing if there is a single wrong which can

be proven by alternative means, the controlling statute here requires that an assault must have been committed with a deadly weapon with a resulting serious injury from the use of that weapon.

2. Sentencing— habitual felon—irrelevant additional felony pleas

There was no prejudicial error in an habitual felon prosecution where the documents admitted to show prior felonies contained evidence of additional felony pleas which had not been listed in the indictment and which the State was not seeking to prove. The three additional convictions were not relevant and should have been redacted, but the court gave a limiting instruction and defendant did not show that a different outcome would have resulted without this evidence.

3. Criminal Law— defense counsel's argument—intoxication of assault victim

The trial court did not abuse its discretion in a prosecution for assault with a deadly weapon inflicting serious injury by not allowing defendant to argue the North Carolina impaired driving statute as a comprehensible standard by which the jury could determine the intoxication of the victim. While it is true that argument of any relevant point supported by the evidence is allowed, the court must not permit an improper application of a statute to the evidence, and defendant was allowed to make the point that the victim was intoxicated at the time of the attack.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from judgments dated 26 May 2000 by Judge Michael E. Beale in Superior Court, Union County. Heard in the Court of Appeals 10 October 2001.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

Marjorie S. Canaday for defendant-appellant.

McGEE, Judge.

Dulaine Lotharp (defendant) was indicted for robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury while occupying the status of habitual felon. Evidence at trial

tended to show that Terry Barrett (Barrett) moved into a new apartment in Monroe, North Carolina on or about 22 February 1999 and met defendant shortly thereafter. Defendant, Barrett, and Chris Craig (Craig) drank alcohol and smoked crack cocaine off and on at Barrett's apartment from the evening of 24 February through the early evening of 25 February. During the afternoon of 25 February, Craig and defendant had a confrontation about defendant borrowing money from Craig and Barrett. Both Craig and defendant left Barrett's apartment between 5:30 p.m. and 6:00 p.m.

Barrett testified that he was awakened later that evening by a knock at his door. Barrett stated that someone outside the door identified himself as "Laine," the name by which Barrett knew defendant. When Barrett opened the door, defendant kicked him in the face, knocking him to the floor. Defendant repeatedly kicked and punched Barrett about the head saying, "This is for Chris." Barrett lost consciousness. Barrett testified he kept a metal five-pound chain wrapped in duct tape on his night stand and when he regained consciousness, the chain was on the floor near his feet. Barrett also testified that his wallet with about $300.00 in it was missing.

As a result of the attack, Barrett suffered a broken cheek bone, broken upper jaw bones on both sides of his face, and bruises on his lower back and shoulder. Dr. William McClelland testified he performed reconstructive surgery on Barrett's face, and that as a result of the attack, Barrett lost a significant amount of blood and also suffered temporary minor memory loss. Dr. McClelland further testified that the injuries to Barrett's face could have been caused by hands and feet, or by a blunt object. He testified that the bruises on Barrett's back were likely not caused by hands or feet but could have been caused by "the chain."

A jury convicted defendant of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon and being an habitual felon. The trial court sentenced defendant to a minimum of 151 months and a maximum of 191 months for each of the two convictions, with the sentences to run consecutively. Defendant appeals.

I.

[1] In his first assignment of error, defendant argues that the trial court erred in giving a disjunctive instruction to the jury, raising the possibility that the jury's verdict was not unanimous on the issue of

assault with a deadly weapon inflicting serious injury. Under the North Carolina Constitution, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const., art. 1, § 24; *see also*, N.C. Gen. Stat. § 15A-1237(b) (1999). A person is guilty of felonious assault with a deadly weapon inflicting serious injury if he "assaults another person with a deadly weapon and inflicts serious injury." N.C. Gen. Stat. § 14-32(b) (1999). The trial court instructed the jury as follows:

> I charge that if you find from the evidence beyond a reasonable doubt that . . . the defendant intentionally beat the victim with his hands and feet, and/or with a chain and that the defendant's hands and feet and/or the chain were deadly weapons, thereby inflicting serious injury upon the victim, it would be your duty to return a verdict of guilty of assault with a deadly weapon inflicting serious injury. However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of assault with a deadly weapon inflicting serious injury, but would consider whether the defendant is guilty of assault inflicting serious injury.

Two lines of cases have developed addressing the question of whether submission of an issue to the jury in the disjunctive is reversible error and are based upon *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990) and *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986).

Two early cases in the *Hartness* line follow the same general proposition that some statutes allow for a "single wrong" to be "established by a finding of various alternative elements" and thus a disjunctive instruction is not a basis for reversal. *Hartness*, 326 N.C. at 566, 391 S.E.2d at 180. In *Jones v. All American Life Ins. Co.*, 312 N.C. 725, 325 S.E.2d 237 (1985), a plaintiff-beneficiary attempted to recover life insurance proceeds. The common law "slayer" doctrine was raised as a defense to the plaintiff's recovery of the proceeds because the evidence tended to show that the plaintiff "killed or procured the killing" of the insured. *Id.* at 733, 325 S.E.2d at 241. The jury instruction in *Jones* asked, "Did . . . plaintiff[] willfully and unlawfully *kill* [the insured] *or procure his killing*?" *Id.* at 737, 325 S.E.2d at 243. The plaintiff argued that this disjunctive instruction was ambiguous and thus prevented the jury from reaching a unanimous verdict because "the disjunctive issue left open the possibility that less than all the jurors could agree on whether plaintiff herself killed [the insured], or had him killed by her sons or some other party." *Id.* Our

Supreme Court disagreed and held that the disjunctive instruction was not fatally ambiguous because the jury only needed to find that the plaintiff had participated in the death of the insured by either alternative method to bar the plaintiff's recovery of the proceeds. *Id.* at 738, 325 S.E.2d at 244.

The defendant in *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985) was convicted of possession with intent to sell and deliver a controlled substance in violation of N.C. Gen. Stat. § 90-95(a)(1), stating that it is unlawful to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." *Id.* at 129, 326 S.E.2d at 28. The defendant argued that the use of a disjunctive jury form in this case resulted in a non-unanimous verdict. Our Supreme Court held that unanimity was satisfied because "[i]t is the *intent* of the defendant that is the gravaman of the offense." *Id.* It was therefore immaterial whether the jury found the crime was committed by sale or delivery of a controlled substance, as long as all the jurors found that the defendant possessed the controlled substance and had the requisite intent, through either the sale *or* delivery of the controlled substance. *Id.* The requirement of unanimity was therefore satisfied. *Id.* at 131, 326 S.E.2d at 29.

At issue in *Hartness* was the defendant's conviction for taking indecent liberties with a minor in violation of N.C. Gen. Stat. § 14-202.1, which states that a person is guilty of the crime if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child . . . for the purpose of arousing or gratifying sexual desire." *Hartness*, 326 N.C. at 567, 392 S.E.2d at 180. The trial court instructed the jury according to the pattern jury instructions which read in part, "[t]hat the defendant wilfully took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire." *Id.* at 563, 392 S.E.2d at 178. The defendant contended that this instruction improperly permitted the jury to convict him by a less than unanimous verdict because "the jury could have split in its decision regarding which act constituted the offense, making it impossible for the court to determine whether the jury was unanimous in its verdict." *Id.* Our Supreme Court disagreed and found that the General Assembly intended that the single offense of taking indecent liberties with a minor could be satisfied by "any one of a number of acts." *Id.* at 567, 391 S.E.2d at 180. The Court reasoned that because the gravaman of the offense is the defendant's *purpose* for committing the act, the particular act performed is tangential. *Id.*

Our Supreme Court found *Hartness* controlling in the 1996 case of *State v. Oliver*, 343 N.C. 202, 215, 470 S.E.2d 16, 24 (1996). The defendant was charged and convicted of driving while impaired in violation of N.C. Gen. Stat. § 20-138.1. The trial court charged the jury in part:

> So . . . I charge you that if you find from the evidence beyond a reasonable doubt that . . . defendant . . . drove a vehicle on a highway within the [S]tate and that when he did so he was under the influence of an impairing substance *or* had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of [0.08] or more it would be your duty to return a verdict of guilty of impaired driving.

Id. at 214, 470 S.E.2d at 23-24. On appeal, the defendant argued that the disjunctive instruction given to the jury allowed for a non-unanimous verdict in violation of our state constitution and statutes. Our Supreme Court stated that the plain language of the statute proscribes a single wrong which can be proven by alternative means. The Court thus found that the disjunctive phrasing of the jury instructions was not fatal because regardless of whether some jurors found the defendant under the influence of an impairing substance, and others found the defendant's alcohol concentration at the prescribed statutory level, a unanimous jury found the defendant guilty of the single offense of driving while impaired.

In contrast to the *Hartness* line of cases, decisions under *Diaz* have stated that a disjunctive jury instruction is "ambiguous and fatally defective" where the instructions allow the jury to convict the defendant of "two or more possible crimes in a single issue." *State v. Lyons*, 330 N.C. 298, 303, 412 S.E.2d, 308, 312 (1991); *see also, Diaz*, 317 N.C. at 553, 346 S.E.2d at 494.

In *State v. Albarty*, 238 N.C. 130, 132, 76 S.E.2d 381, 382-83 (1953), a warrant was issued for the defendant for violation of N.C. Gen. Stat. § 14-291.1 which "makes it a misdemeanor for any person to 'sell, barter or cause to be sold or bartered, any ticket, . . . for any number or shares in any lottery . . . to be drawn or paid within or without the State.' " *Id.* at 133, 76 S.E.2d at 383. A jury found the defendant guilty as charged in the warrant. Our Supreme Court stated that in the context of N.C. Gen. Stat. § 14-291.1, "sell" and "barter" are not synonyms. *Id.* at 132, 76 S.E.2d at 383. Accordingly, a defendant can violate the statute "in four distinct ways. He may sell the illegal articles, or he may barter them, or he may cause another to sell them,

or he may cause another to barter them." *Id.* Because the warrant was issued in the disjunctive, the verdict was "invalid for uncertainty" as to which crime the defendant was charged with. *Id.* at 132-33, 76 S.E.2d at 383.

In *State v. McLamb*, 313 N.C. 572, 577-78, 330 S.E.2d 476, 480 (1985), our Supreme Court found a single set of jury instructions to be fatally ambiguous in part. In *McLamb*, the defendant was charged with both "the sale *or* delivery of cocaine, and the possession of cocaine with intent to 'sell or deliver.' " *Id.* at 577, 330 S.E.2d at 479. Because the sale and delivery of controlled substances are distinct offenses, the Supreme Court held that the charge of "sale or delivery of cocaine" was fatally defective and ambiguous. *Id.* at 577, 330 S.E.2d at 480. However, under *Creason*, the verdict of "possession with intent to 'sell or deliver' " cocaine was found not to be fatally ambiguous. *Id.* at 577-78, 330 S.E.2d at 480.

In *Diaz*, the defendant was charged in an indictment with trafficking in marijuana in an amount in excess of 10,000 pounds. *Diaz*, 317 N.C. at 546, 346 S.E.2d at 490. The trial court charged the jury that "if you find from the evidence and beyond a reasonable doubt that . . . the defendant . . . knowingly possessed or knowingly transported marijuana . . . it would be your duty to return a verdict of guilty as charged." *Id.* at 553, 346 S.E.2d at 493-94. Our Supreme Court stated that under N.C. Gen. Stat. § 90-95(h)(1), "[s]ale, manufacture, delivery, transportation, and possession of 50 pounds or more of marijuana are separate trafficking offenses for which a defendant may be separately convicted and punished." *Id.* at 554, 346 S.E.2d at 494. The Court held that because the disjunctive instructions made it impossible to tell what charge, if any, the jury unanimously found the defendant guilty of, the instructions were fatally defective because they were ambiguous. *Id.* Consistent with *Hartness*, however, the Court also noted that, "[t]he disjunctive will [not] always be fatally ambiguous. An examination of the verdict, the charge, the initial instructions by the trial judge to the jury . . . and the evidence in a case may remove any ambiguity created by the charge." *Id.* However, the defendant in *Diaz* was deprived of his constitutional and statutory right to a unanimous jury verdict.

Our Supreme Court distinguished the *Hartness* and *Diaz* decisions:

> There is a critical difference between the lines of cases represented by *Diaz* and *Hartness*. The former line establishes that

> a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. The latter line establishes that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.

Lyons, 330 N.C. at 302-03, 412 S.E.2d at 312.

Defendant argues that the *Diaz* line of cases controls here in that the disjunctive jury instruction was ambiguous and fatally defective because it raised the possibility of a non-unanimous jury verdict. Defendant argues that some jurors could have found that Barrett suffered a serious facial injury, but that it was inflicted with the non-deadly use of hands and feet; or that the chain was a deadly weapon, that it inflicted the back injury, but that the back injury was not a serious injury. Defendant also argues that since the jury was not required to specify what deadly weapon or what serious injury was involved, if any, it is impossible to determine from the verdict what the jury decided.

In contrast, the State contends that the *Hartness* line of cases controls and the disjunctive instruction was not fatally defective. Because all of Barrett's injuries occurred during one assault, the State argues that the jury need only have found that a deadly weapon was used and that a serious injury occurred.

A careful review of the underlying statute, N.C. Gen. Stat. § 14-32(b) (1999), aids us in determining which line of cases controls in this case. First, where "the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). The language in N.C.G.S. § 14-32(b) that "[a]ny person who assaults another person with a deadly weapon" plainly states that the gravaman of the offense is the assault of another with a deadly weapon. The plain meaning of "inflicts serious injury" is that if a person commits an assault with a deadly weapon and serious injury results *from that* assault, the person is guilty of felonious assault under N.C.G.S. § 14-32(b).

Second, if a person merely assaults another with a deadly weapon, then the person is guilty of a Class A1 misdemeanor assault

under N.C. Gen. Stat. § 14-33(c) (1999) if the person "commits any assault" and "in the course of the assault . . . he or she . . . [i]nflicts serious injury upon another person *or* uses a deadly weapon." (emphasis added). Under the State's interpretation of N.C.G.S. § 14-32(b), we could not determine when a defendant has met all the elements of felonious assault with a deadly weapon inflicting serious injury or when he has merely satisfied either element required for misdemeanor assault.

The State argues that under *State v. Rhyne*, 39 N.C. App. 319, 250 S.E.2d 102 (1979), "[w]here multiple weapons are used during an altercation to produce multiple injuries, a defendant is rightfully charged with only a single assault when the assault occurred at a single time and against a single victim." *Rhyne* is distinguishable from this case, however, because in *Ryhne* our Court allowed the use of multiple weapons to be incorporated into one charge to prevent the defendant from being subject to double jeopardy and to protect the defendant from being charged with a separate count of assault for each blow struck. *Id.* at 324-25, 250 S.E.2d at 106. Neither double jeopardy nor multiple counts of assault are at issue in the case before us.

Third, the disjunctive jury instruction in this case did not require the jury to determine whether the weapon inflicting serious injury was a deadly weapon as N.C.G.S. § 14-32(b) requires. Under our case law, an object can be found to be a "deadly weapon" if it is an instrument which is likely to produce death or great bodily harm "according to the manner of its use or the part of the body at which the blow is aimed." *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978). When a weapon may or may not be likely to produce fatal results due to its use, a jury's role as finder of fact is to determine whether the object was used as a deadly weapon. *Id.* Because the jury instructions at issue did not require the jury to specify whether it found the chain or defendant's hands and feet, or all three, to be deadly weapons, the instructions are ambiguous.

We are persuaded that the *Diaz* line of cases controls the case before us and that under N.C.G.S. § 14-32(b) an assault must have been committed with a deadly weapon and serious injury resulted from the use of that deadly weapon. The disjunctive jury instructions in this case made it impossible to tell whether the jury unanimously found that defendant used a specific deadly weapon to cause a specific serious injury. Thus, the disjunctive jury instructions

are ambiguous and fatally defective, requiring that defendant receive a new trial, which is hereby granted.

II.

[2] Because the error argued in defendant's second assignment of error may occur at retrial of defendant's case, we address defendant's contention that the trial court erred in admitting evidence that was unfairly prejudicial to defendant in the habitual felon proceeding. In North Carolina an habitual felon is defined as "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal or state court in the United States or combination thereof." N.C. Gen. Stat. § 14-7.1 (1999). The second and third felonies must have been committed after the conviction or guilty plea of the felony preceding it. *Id.*

During the habitual felon proceeding in this case, the State introduced into evidence the records of defendant's prior convictions, as evidence of the three convictions upon which the State relied for the habitual felon indictment. Defendant argues admission of these documents was in error because each of these exhibits contained not only the felonies the State relied on to support the habitual felon indictment, but also three additional felony pleas which the State was not seeking to prove and which were not listed in the habitual felon indictment. Defendant argues these additional felonies were not relevant and their admission was unfairly prejudicial.

Relevant evidence is admissible; relevant evidence is defined as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 and Rule 402 (1999). Relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403. "[E]ven though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

In the present case, evidence of defendant's three felony convictions which were in addition to the convictions the State was attempting to prove, is not relevant evidence and is inadmissible.

Thus, the trial court should have redacted the irrelevant felonies to ensure that the jury would not improperly consider them. The trial court, however, did issue a limiting instruction for all three convictions directing the jury to consider only the convictions relating to the habitual felon proceeding. Defendant has failed to show that the admission of the irrelevant felonies unfairly prejudiced the outcome such that a different result would have been reached by the jury had the evidence not been admitted.

Defendant's second assignment of error is dismissed.

III.

In his third assignment of error, defendant contends that the trial court erred in denying his *Batson* motion because the prosecution impermissibly used a peremptory challenge to excuse a potential juror solely on the basis of her race, thereby violating defendant's rights under the Fourteenth Amendment of the United States Constitution and Art. I, Sec. 26 of the North Carolina Constitution. Since a different jury will be empaneled for defendant's new trial, we need not address this issue.

IV.

[3] By his fourth assignment of error, defendant contends that the trial court erred in denying his motion that he be allowed to argue the North Carolina impaired driving statute as a comprehensible standard by which the jury could determine how intoxicated Barrett was at the time of the assault. We will address defendant's fourth assignment of error because this alleged error could occur at retrial of defendant's case.

At trial, defendant argued that Barrett lacked credibility because he was intoxicated at the time the attack occurred. Although Dr. McClelland testified that Barrett had 298 milligrams of alcohol per deciliter of blood, he was unable to convert that number into a standard commonly recognized by lay persons. To make the level of intoxication more clear to the jurors, defendant sought to address the North Carolina standard for intoxication while driving a motor vehicle in his closing statement. *See* N.C. Gen. Stat. §§ 20-4.01 and 20-138.1 (1999). The State objected and the trial court subsequently denied defendant's motion, stating that the driving while impaired statute was irrelevant because Barrett was not operating a vehicle at the time he was attacked.

Our Supreme Court has stated that

> [w]hile it is clear that 'the whole case as well of law as of fact may be argued to the jury' [citation omitted], and that 'counsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom,' [citation omitted] nevertheless the conduct of arguments of counsel to the jury must necessarily be left largely to the sound discretion of the trial judge.

State v. Whiteside, 325 N.C. 389, 398-99, 383 S.E.2d 911, 916 (1989) (citing *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977)). Absent a gross abuse of discretion, a trial court's determination on the scope of jury arguments should not be disturbed. *State v. Woods*, 56 N.C. App. 193, 196, 287 S.E.2d 431, 433, *cert. denied*, 305 N.C. 592, 292 S.E.2d 13 (1982).

Defendant argues that N.C. Gen. Stat. § 15A-1230(a) permits an attorney, during closing argument, "on the basis of his analysis of the evidence to argue any position or conclusion with respect to a matter in issue." While it is true that this statute allows an argument of any relevant point that is supported by the evidence, the trial court must not permit an improper application of a statute to the evidence.

Moreover, although defendant was not allowed to argue to the jury the intoxication standard from the impaired driving statute, he was permitted to convey the point that Barrett was intoxicated at the time of the attack. Dr. McClelland testified that Barrett reported drinking six beers the night he was attacked, and in his closing argument defendant's attorney stated that Barrett's blood alcohol concentration was, "[p]ut simply, .29" and repeated this statement several times. Also, defendant fails to show why a standard developed to show impaired driving of a vehicle is relevant as to what constitutes intoxication in other situations.

The trial court did not abuse its discretion in denying defendant's request to argue to the jury the standard for intoxication while driving a vehicle. Defendant's fourth assignment of error is dismissed.

New trial.

Judge BIGGS concurs.

Judge TIMMONS-GOODSON dissents with separate opinion.

TIMMONS-GOODSON, Judge, dissenting.

Because I disagree with the majority that the jury instructions given in the present case were fatally ambiguous, I respectfully dissent. I detect no reversible error by the trial court.

The majority states that, "[b]ecause the jury instructions at issue do not require the jury to specify whether they found the chain or defendant's hands and feet, or all three, to be deadly weapons, the instructions are ambiguous." I disagree. The trial court instructed the jury in pertinent part as follows:

> I charge that if you find from the evidence beyond a reasonable doubt that . . . the defendant intentionally beat the victim with his hands and feet, and/or with a chain **and** that the defendant's hands and feet and/or the chain were deadly weapons, thereby inflicting serious injury upon the victim, it would be your duty to return a verdict of guilty of assault with a deadly weapon inflicting serious injury.

(emphasis added). The above-stated instruction requires the jury to find that (1) the defendant intentionally beat the victim with his hands and feet and/or a chain *and* (2) that the defendant's hands and feet and/or the chain was a deadly weapon that inflicted serious injury. The disjunctive used in the instructions did not create fatal ambiguity; rather, it allowed the jury to choose between two alternative instrumentalities as the deadly weapon inflicting serious injury. Thus, the jury could find that defendant inflicted serious injury upon the victim by assaulting him with either his hands and feet *or* the chain. The instructions clearly required the jury to find that defendant assaulted the victim using a deadly weapon, thereby inflicting serious injury. Accordingly, there was no ambiguity as to whether or not the jury unanimously found each necessary element for the crime of assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b). Because the instructions in the instant case allowed the jury to convict defendant of a single wrong by alternative means as approved of in the *Hartness* line of cases, I conclude that the instructions were not fatally ambiguous, and I would therefore hold that the trial court committed no error.

JAMES McDEVITT, III, PLAINTIFF v. JANICE STACY AND LARRY STACY, DEFENDANTS

No. COA01-15

(Filed 5 February 2002)

1. Appeal and Error— assignment of error—not consistent with transcript

An assignment of error was dismissed where it did not comport with the transcript in that plaintiff's assignment of error referred to the denial of his motion for a directed verdict on contributory negligence based upon defendants' failure to amend their answer to conform to the evidence, but the transcript shows that the motion was based on insufficient evidence to establish contributory negligence.

2. Negligence— contributory—within scope of pleadings

The issue of contributory negligence was within the scope of the pleadings in an automobile accident case and no further amendment was needed where the trial court by implication granted defendants' motion to amend their pleadings to include contributory negligence when it denied plaintiff's motion in limine to exclude the issue of plaintiff's contributory negligence; the evidence supported the issue of contributory negligence; plaintiff was put on notice of the affirmative defense of contributory negligence by defendants' conditional pleading; plaintiff did not move to strike the allegations and replied denying negligence and asserting the last clear chance doctrine and defendant's gross negligence; plaintiff availed himself of all opportunities to fairly and fully prosecute his case; plaintiff failed to argue or show any prejudice to the trial court in presenting his case; plaintiff requested instructions on last clear chance, gross negligence, and reckless driving and appealed from the denial of those instructions; and plaintiff failed to argue any prejudice on appeal.

3. Motor Vehicles— leaving lane of travel—sudden emergency

There was no error in an automobile accident case where the trial court instructed the jury that plaintiff's violation of the statute requiring drivers to remain in the right lane constituted contributory negligence where plaintiff argued that sudden emergency excused his leaving his lane, but failed to request that instruction, did not assign plain error or argue that the jury may have reached a different result, and there was no evidence that

would support a reasonable inference of each element of the doctrine of sudden emergency.

4. Motor Vehicles— last clear chance—instruction denied

The trial court did not err by denying plaintiff's requested instruction on last clear chance where defendant testified that she was on the wrong side of the road placing newspapers in boxes when she saw plaintiff's lights approaching, that she decided that it would be better to sit off the road instead of trying to go completely across the road, and that there was nothing more she could have done to avoid the collision after she made the decision to park parallel in a customer's driveway.

5. Motor Vehicles— reckless driving—instruction denied

The trial court properly denied plaintiff's requested instruction on reckless driving where defendant's uncontradicted testimony was that she was very cautious when she delivered newspapers in the early morning hours on dark, deserted roads and defendant's conduct did not indicate carelessness, wicked purpose, or willful or wanton disregard for the safety of plaintiff.

6. Motor Vehicles— newspaper carrier—gross negligence—evidence insufficient

The evidence of gross negligence was insufficient to defeat contributory negligence in an automobile accident case involving a carrier inserting newspapers into boxes on a dark road.

Judge HUDSON dissenting.

Appeal by plaintiff from judgment entered 25 September 2000 by Judge Donald M. Jacobs in Johnston County Superior Court. Heard in the Court of Appeals 7 November 2001.

Jones, Martin, Parris, and Tessener, L.L.P., by Hoyt G. Tessener, for plaintiff-appellant.

Teague, Campbell, Dennis, & Gorham, LLP, by Mallory T. Underwood and Tara L. Davidson, for defendant-appellee.

TYSON, Judge.

James McDevitt ("plaintiff") appeals from an order and judgment entered after the jury returned a verdict in favor of defendants. We find no error.

I. Facts

Janice Stacy (individually "defendant"), substituting for her husband Larry Stacy, (collectively "defendants") was delivering newspapers from their car at approximately 5:15 a.m. on the morning of 20 October 1998. Defendant was moving slowly along the shoulder of the wrong side of the road inserting newspapers into her customers' boxes. It was dark and virtually no other traffic was on the road. Defendant saw a car approaching in the distance with its headlights on. Defendant slowly pulled her car into a driveway parallel to the road. Defendant dimmed her high-beams and engaged the emergency flashers. Plaintiff approached, swerved, and collided into defendants' car. Both cars were damaged. Plaintiff and defendant walked away from the scene without medical assistance.

Plaintiff filed his complaint alleging that defendant was negligent on 28 June 1999. On or about 11 September 1999, defendants answered generally denying plaintiff's allegations and pleading "conditional contributory negligence." On 7 September 1999, plaintiff replied denying negligence, alleged defendant's conduct constituted gross negligence, and specifically pled the doctrine of last clear chance.

The trial commenced on 28 August 2000. Plaintiff moved *in limine* to exclude all evidence of contributory negligence based on defendants' pleading errors. Defendants responded and moved to amend their answer to include contributory negligence to the extent their pleadings were insufficient. After considering both motions simultaneously, the trial court expressly denied plaintiff's motion. The jury returned a verdict in favor of defendants on 1 September 2000 barring plaintiff's recovery based on his own contributory negligence.

II. Issues

Plaintiff argues that the trial court committed reversible error: (1) denying his motion *in limine* to exclude contributory negligence as an issue at trial based on defendants' inadequate pleadings, (2) instructing the jury that plaintiff leaving his lane to avoid the collision constituted contributory negligence, and (3) denying plaintiff's requested jury instructions.

[1] At the outset we note that one of plaintiff's assignments of error does not comport with the transcript. Plaintiff's assignment of error number two in the record states "[t]he Court's denial of Plaintiff's

Motion for a Directed Verdict on the issue of contributory negligence where the Defendants failed to move to amend their Answer to conform to the evidence pursuant to N.C.R.Civ.P. [sic] 15(b)." The trial transcript shows that plaintiff's motion was based on "insufficiency of the evidence" to establish contributory negligence, not based on plaintiff's failure to move to amend their answer. This assignment of error is dismissed. N.C. R. App. P. 10(c) (1999).

III. Contributory Negligence

[2] Plaintiff argues that the issue of contributory negligence should have been excluded from trial because defendants failed to properly plead that affirmative defense, and that the trial court failed to rule on defendants' motion to amend their pleadings to include contributory negligence. We disagree.

A. Pleadings

The North Carolina Rules of Civil Procedure require a pleading setting forth an affirmative defense to include "a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." N.C. Gen. Stat. § 1A-1, Rule 8(c) (1990). Under "notice theory" pleading, a pleading must give "sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and . . . to get any additional information he may need to prepare for trial." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970). "Under our new Rules of Civil Procedure, the requirements for pleading an affirmative defense are no more stringent than those for pleading a cause of action." *Bell v. Traders & Mechanics Ins. Co., Inc.*, 16 N.C. App. 591, 593, 192 S.E.2d 711, 712 (1972).

Defendants answered the complaint and pled "conditional contributory negligence," stating that:

> These defendants are informed and believe and [sic] evidence may be developed through the course of this litigation which may support the assertion of a defense of contributory negligence to the claim of the plaintiffs. Until these defendants have been provided the opportunity to conduct discovery in this case inquiring into those matters which may support such a defense, one cannot be pleaded. Accordingly, these defendants specifically reserve

> their right pursuant to provisions of North Carolina Rule of Civil Procedure 8(c) and put the plaintiff on notice of their intention to assert the affirmative defense of contributory negligence in the event that facts discovered in this action may support such a defense.

(Emphasis supplied). Plaintiff filed a reply to defendants' answer wherein he stated that:

> Plaintiff responds to Defendants' answer which alleges conditional contributory negligence, as follows:
>
> Responding to Defendants' defense of "Conditional Contributory Negligence," Plaintiff denies the allegations of negligence contained therein and denies that any negligence on the part of Plaintiff contributed to or was the cause of his injury.
>
> Responding to the same defense, Plaintiff alleges that if plaintiff's conduct amounts to contributory negligence, then Defendants' [sic] conduct constituted gross negligence, which would defeat any contributory negligence which Defendants ascribes to Plaintiff.
>
> Plaintiff also specifically pleads the doctrine of last clear chance in avoidance to the affirmative defense of contributory negligence, and alleges as follows:
>
> 1. That Plaintiff, at the time of the accident described in the Complaint, was in a position of peril from which he could not remove himself;
>
> 2. That thereafter Defendants [sic] discovered, or in the exercise of reasonable care should have discovered, Plaintiff's position of peril, and Defendant . . . had the time and means to avoid the injury to Plaintiff, but negligently failed to exercise ordinary care to do so;
>
> 3. That such failure on the party of Defendant . . . proximately caused Plaintiff's injuries as described in the Complaint.

We conclude that plaintiff's detailed reply to defendants' answer shows that plaintiff received notice that contributory negligence was an issue in the case.

Plaintiff correctly points out that "[a] defendant's failure to plead an affirmative defense *ordinarily* results in waiver thereof, unless the issue is tried by the express or implied consent of the parties."

Sloan v. Miller Building Corp., 128 N.C. App. 37, 43, 493 S.E.2d 460, 464 (1997) (emphasis supplied) (citing N.C. Gen. Stat. § 1A-1, 15(b) (1990); *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E.2d 656 (1984)). We do not decide whether "conditional" pleading of affirmative defenses satisfies the requirements of Rule 8(c). The record reveals that defendants moved to amend any alleged defect in their pleadings, and the trial court granted by implication that motion when it simultaneously denied plaintiff's motion *in limine* to exclude the issue of plaintiff's contributory negligence.

B. Motion to Amend

Rule 15(b) provides in pertinent part that:

> Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment . . . . If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when . . . the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

N.C. Gen. Stat. § 1A-1, Rule 15(b) (1967). "Liberal amendment of pleadings is encouraged by the Rules of Civil Procedure in order that decisions be had on the merits and not avoided on the basis of mere technicalities." *Phillips v. Phillips*, 46 N.C. App. 558, 560-61, 265 S.E.2d 441, 443 (1980) (citing N.C. Gen. Stat. § 1A-1, 15; *Mangum v. Surles*, 281 N.C. 91, 187 S.E.2d 697 (1972)); *see also Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986). Plaintiff recognizes in his brief that "[t]he trial judge is allowed broad discretion in ruling on such motions." *Auman v. Easter*, 36 N.C. App. 551, 555, 244 S.E.2d 728, 730, *cert. denied*, 295 N.C. 548, 248 S.E.2d 725 (1978) (citation omitted). "The objecting party has the burden of satisfying the trial court that he would be prejudiced by the granting or denial of a motion to amend . . . . The exercise of the court's discretion is not reviewable absent a clear showing of abuse thereof." *Watson v. Watson*, 49 N.C. App. 58, 60-61, 270 S.E.2d 542, 544 (1980) (citations omitted). "The objecting party must meet these requirements in order to avoid 'litigation by consent' or allowance of motion to amend." *Roberts v. Memorial Park*, 281 N.C. 48, 58, 187 S.E.2d 721, 727 (1972).

Plaintiff did not argue during the hearing of his and defendants' motions, and does not argue here, any prejudice in the preparation, presentation, or result of his case. Plaintiff has failed to satisfy his burden that the trial court abused its discretion by allowing defendants' motion to amend their answer to correct any defects in their affirmative defense.

Plaintiff argues alternatively that "[d]efendants' motion to amend their answer was not ruled upon, and therefore cannot be considered to have been granted." We disagree.

Plaintiff asserts that *Winfield Corp. v. McCallum Inspection Co.*, 18 N.C. App. 168, 176, 196 S.E.2d 607, 611 (1973) controls this issue. *Winfield* is distinguishable. In *Winfield*, the plaintiff filed a motion to amend its complaint to allege "special damages" but the record failed to disclose whether the motion was ever allowed. *Id.* Our Court would not infer that the motion had been granted solely on the fact that the trial court's order included "special damages." *Id.* The record did not indicate that the issue of "special damages" had ever been mentioned prior to plaintiff filing its motion or that the issue of "special damages" was ever addressed by the trial court. *Id.*

Unlike *Winfield*, the record here is clear that the issue of contributory negligence was (1) raised in defendants' answer; (2) replied to by plaintiff, including the issues of the last clear chance doctrine and defendant's gross negligence; (3) included in a pre-trial order as one of defendants' contested issues, signed by plaintiff, defendant, and the trial judge; (4) at issue during the trial; and (5) admitted as being an issue at trial by plaintiff when he requested jury instructions on last clear chance, gross negligence, and reckless driving.

Plaintiff argues additionally that the trial court did not explicitly grant defendants' motion to amend at the time the trial court denied plaintiff's motion *in limine*. Plaintiff insists that the trial court merely denied his motion. We disagree.

Both motions were simultaneously being considered by the trial court. The two inextricably linked motions also addressed the exact same issue at the exact same time. We conclude that denial of the one was affirmation of the other. *Expressio unius est exclusio alterius*, provides that the mention of one implies exclusion of the other. *Campbell v. Church*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979) (citing *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 43 L. Ed. 341 (1898)). The entire record shows that contributory negligence was an issue at trial.

Plaintiff also has failed to show any resulting prejudice in his ability to prosecute the trial nor any abuse of discretion by the trial court in allowing the issue of contributory negligence into the trial. We hold that any defect in defendants' pleadings was corrected by the trial court's granting defendants' motion to amend and the trial court's denying plaintiff's motion to exclude contributory negligence as an issue at trial.

C. Failure to Amend

Plaintiff also argues that "[e]ven taking the evidence in the light most favorable to Defendants . . . [their] pleadings were not amended to conform to the evidence presented." Having concluded that the trial court granted defendants' motion to amend, we need to decide whether the lack of a formal amendment of defendants' pleadings affects the jury's verdict.

Our Supreme Court in *Roberts*, 281 N.C. at 59, 187 S.E.2d at 727 specifically held that when a non-objecting party allows evidence to be presented at trial outside the scope of the pleadings, the pleadings are deemed amended to conform to the evidence, and no formal amendment is required. The Court noted, however, that "the better practice dictates that even where pleadings are deemed amended under the theory of 'litigation by consent,' the party receiving the benefit of the rule should move for leave of court to amend, so that the pleadings will actually reflect the theory of recovery." *Id.*; *see e.g. Mangum*, 281 N.C. at 98, 187 S.E.2d at 702 (failure to make formal amendment will not jeopardize a verdict based on competent evidence where no objection is made); *Graves v. Walson*, 302 N.C. 332, 341, 275 S.E.2d 485, 491 (1981) (filing a formal written amendment to the complaint by leave of court is envisioned by Rule 15(b)); *Rite Color Chemical Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 21-22, 411 S.E.2d 645, 650 (1992) (citation omitted) ("That a formal amendment to pleadings is not made is of no consequence, for the amendment is presumed to have been made").

Here, plaintiff contends, however, that he objected at trial and defendants never amended their pleadings. Generally, "[a] formal amendment to the pleadings 'is needed only when evidence is objected to at trial as not within the scope of the pleadings.' " *Taylor v. Gillespie*, 66 N.C. App. 302, 305, 311 S.E.2d 362, 364 (1984) (quoting *Securities & Exch. Comm'n v. Rapp*, 304 F.2d 786 (2d Cir. 1962), *cited with approval in Roberts*, 281 N.C. at 57-58, 187 S.E.2d at 726). At bar, contributory negligence was within the scope of the pleadings,

and plaintiff's objections were all general, based solely on defendants' "conditional" pleading.

In *Smith v. Buckhram*, 91 N.C. App. 355, 372 S.E.2d 90 (1988), a defendant made the same argument that plaintiff asserts here. The defendant argued that "the trial court erred by allowing testimony that plaintiff's injury was permanent, and by instructing the jury on the issue of permanency, because plaintiff failed to include an allegation to that effect in her complaint." *Id.* at 358-59, 372 S.E.2d at 92. This Court concluded that:

> Although defendants are correct in their assertion that plaintiff did not amend her complaint to allege that her injuries were permanent, testimony was raised at trial to that effect. The objections made at trial to this line of testimony were all general in nature, therefore defendants did not avail themselves of the opportunity to demonstrate prejudice, or to obtain a continuance, as provided for in the statute. Therefore the issue of permanency of injuries was properly treated by the court as if it had been raised in the pleadings."

Id. at 359, 372 S.E.2d at 93. A party objecting at trial has the burden of showing actual prejudice by admission of the evidence. *Roberts*, 281 N.C. at 58, 187 S.E.2d at 727.

In *Miller v. Talton*, 112 N.C. App. 484, 435 S.E.2d 793 (1993), the plaintiff argued that "the affirmative defense of the statute of limitations, having never been properly pleaded, was not before the trial court, . . . constitutes a waiver of that defense . . . and could not, therefore, provide a basis for summary judgment." *Id.* at 486-87, 435 S.E.2d at 796. "Although defendants' motion to amend was allowed by order . . . defendants never filed an amendment to their answer to allege a statute of limitations defense." *Id.* at 486, 435 S.E.2d at 796. *Miller* cited the general rule that waiver usually results unless the issue is raised by express or implied consent. This Court then concluded that "although it is a better practice to require a formal amendment to the pleadings, unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment." *Id.* (quoting *Ridings v. Ridings*, 55 N.C. App. 630, 632, 286 S.E.2d 614, 615-16, *disc. review denied*, 305 N.C. 586, 292 S.E.2d 571 (1982)). "This is especially true where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence." *Id.* (citing *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981)).

In *Department of Transp. v. Bollinger*, 121 N.C. App. 606, 468 S.E.2d 796 (1996), the trial court heard evidence not in the pleadings and defendants objected to consideration of it without plaintiff formally amending the pleadings. Our Court held that "[t]he evidence defendants object to is within the scope of the pleadings." *Id.* at 609, 468 S.E.2d at 798. "Plaintiff's pleadings make reference to the Right of Way Agreement . . . . Defendants were put on notice . . . . At no time during the hearing did they request a continuance of the hearing based on surprise or lack of knowledge . . . . Defendants have failed to show how they have been prejudiced by the trial court's" treating evidence "as an amendment to the pleadings." *Id.*

Here, plaintiff "has advanced no suggestion of additional witnesses he might have called, further cross-examination he would have conducted, supplementary exhibits he would have introduced, or how amendment otherwise prejudiced him maintaining his [case]." *Shore v. Farmer*, 133 N.C. App. 350, 355, 515 S.E.2d 495, 498, *rev. on other grounds*, 351 N.C. 166, 522 S.E.2d 73 (1999) (citing *Vance Trucking Co., Inc. v. Phillips*, 51 N.C. App. 85, 90, 275 S.E.2d 497, 500 (1981) ("defendants failed to show how the amendments [to pleadings so as to conform to the evidence] would [have] prejudice[d] them in maintaining their defense")).

Plaintiff made general objections at the hearing and trial. He did not argue, nor show any prejudice, or seek a continuance as allowed by the statute.

We hold that when the trial court grants defendants' motion to amend their pleadings to include contributory negligence, the evidence supports the issue of contributory negligence, and plaintiff: (1) is put on notice of an affirmative defense of contributory negligence by defendants' conditional pleading, (2) does not move to strike the allegations and replies denying negligence, asserting the last clear chance doctrine and defendant's gross negligence, (3) avails himself of all opportunities to fairly and fully prosecute his case, (4) fails to argue or show any prejudice to the trial court in presenting his case, (5) requests the instructions of last clear chance, gross negligence, and reckless driving, (6) appeals from the denial of those requested instructions, and (7) fails to argue any prejudice on appeal, the issue of contributory negligence is within the scope of the pleadings, and no further amendment is required. This assignment of error is overruled.

IV. Jury Instructions

[3] Plaintiff contends that the trial court committed reversible error by instructing the jury that plaintiff's violation of G.S. § 20-146 constituted contributory negligence and argues that the doctrine of sudden emergency should excuse him from leaving his own lane. N.C. Gen. Stat. § 20-146 (1986).

G.S. § 20-146 requires a driver to remain in the right hand lane while driving. Violation of that statute is negligence *per se*. *Anderson v. Webb*, 267 N.C. 745, 148 S.E.2d 846 (1966). Plaintiff correctly points out that the doctrine of sudden emergency is an exception to the application of the statute. The elements are: (1) "an emergency situation must exist requiring immediate action to avoid injury," and (2) "the emergency must not have been created by the negligence of the party seeking the protection of the doctrine." *Allen v. Efird*, 123 N.C. App. 701, 703, 474 S.E.2d 141, 142-43 (1996) (citation omitted).

Plaintiff failed, however, to: (1) request that instruction during the charge conference, (2) assign plain error here, and (3) argue that the jury may have reached a different result, other than saying that it "impacted the jury." Furthermore, there is no evidence, when viewed in the light most favorable to plaintiff, that would support a reasonable inference of each essential element of the doctrine of sudden emergency to warrant that instruction. This assignment of error is overruled.

V. Plaintiff's Requested Instructions

Plaintiff requested that the trial court instruct the jury on the doctrine of last clear chance, reckless driving, and defendant's gross negligence. The trial court refused to give such instructions. The trial court must give requested instructions, at least in substance, if they are proper and supported by evidence. *Haymore v. Thew Shovel Co.*, 116 N.C. App. 40, 49, 446 S.E.2d 865, 871 (1994) (citing *State v. Lynch*, 46 N.C. App. 608, 265 S.E.2d 491, *rev'd on other grounds*, 301 N.C. 479, 272 S.E.2d 349 (1980)).

A. Last Clear Chance

[4] The issue of last clear chance "[m]ust be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine." *Trantham v. Estate of Sorrells*, 121 N.C. App. 611, 612-13, 468 S.E.2d 401, 402, *disc. review denied*, 343 N.C. 311, 471 S.E.2d 82

(1996). The plaintiff must show the following elements: "(1) The plaintiff, by her own negligence put herself into a position of helpless peril; (2) Defendant discovered, or should have discovered, the position of the plaintiff; (3) Defendant had the time and ability to avoid the injury; (4) Defendant negligently failed to do so; and (5) Plaintiff was injured as a result of the defendant's failure to avoid the injury." *Id.* at 613, 468 S.E.2d at 402 (citations omitted).

Here, defendant testified that when she saw the plaintiff's lights approaching in the distance she was on the wrong side of the road placing newspapers in customers' boxes, and decided that she "would be better off sitting off the road instead of trying to take time to go completely back across the road." After defendant made that decision to park parallel in a customer's drive-way, there was nothing more she could have done to avoid the collision. Viewing all the evidence in the light most favorable to plaintiff, the jury could not find all the elements necessary for the doctrine of last clear chance. The trial court did not err denying plaintiff's requested instruction.

B. Reckless Driving Instruction

[5] Plaintiff argues that "there was ample evidence of Defendant's perilous operation of her automobile" and that the trial court erred by not giving a reckless driving instruction. Defendant points out that she "admittedly drove her car on the wrong side of the road, at night, with her headlights on and directed at oncoming traffic." Defendant then contends that "(c)ertainly such conduct indicates a careless and heedless attitude toward the safety of oncoming travelers." We disagree.

> G.S. § 20-140 defines reckless driving.
>
> (a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.
>
> (b) Any person who drives any vehicle upon a highway or any other public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

N.C. Gen. Stat. § 20-140 (a)-(b) (2001). " 'An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a

reckless indifference to the rights of others.' " *Wagoner v. North Carolina R.R. Co.*, 238 N.C. 162, 167, 77 S.E.2d 701, 705 (1953) (quotation omitted).

Defendant was negligent in driving on the wrong side of the road to deliver her newspapers. The evidence indicates, however, that defendant's car was parked completely in a driveway off the road as plaintiff's car approached. Defendant's uncontradicted testimony was that she was very cautious when she delivered newspapers in the early morning hours on "really dark, deserted roads." Defendant's conduct does not indicate the level of carelessness, wicked purpose, or a willful or wanton disregard for the safety of plaintiff. There was no evidence to support the jury instruction on reckless driving. The trial court properly denied plaintiff's request.

C. Gross Negligence Instruction

[6] Defendant finally argues that driving up the wrong side of the road, and choosing to stay there when defendant's car approached "fits the definition of wilful conduct" sufficiently to defeat defendant's affirmative defense of contributory negligence.

Our Supreme Court recently stated that "it is clear from the language of this Court that the difference between ordinary negligence and gross negligence is substantial." *Yancey v. Lea*, 354 N.C. 48, 53, 550 S.E.2d 155, 158 (2001). "An act is done wilfully when it is done purposefully and deliberately in violation of law, (citation omitted) or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason." *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929) (citations omitted). Viewing the entire record in the light most favorable to plaintiff, there is no evidence that will support a reasonable inference of gross negligence. This assignment of error is overruled.

No error.

Judge TIMMONS-GOODSON concurs.

Judge HUDSON dissents.

HUDSON, Judge, dissenting.

Although I agree that notice pleading generally applies in North Carolina, I read Rule 8(c) and related cases to require that the defend-

ant actually plead the defense of contributory negligence. *See* N.C. Gen. Stat. § 1A-1, Rule 8(c) (1999). In their answer here, the defendants did not plead contributory negligence; rather, they gave notice of their intention to so plead, if they learned facts which justified it. Indeed, the defendants here averred in their answer that they had no basis for pleading contributory negligence, but intended to amend to include such allegations, if they learned facts during discovery to justify such an amendment. The defendants did not advise the court that they had learned any such new facts, nor did they amend their answer. Accordingly, I do not believe that the defendants sufficiently pled the defense of contributory negligence, as required by the Rules.

The language of Rule 8(c) at issue here is the following:

> (c) Affirmative Defenses.—In pleading to a preceding pleading, a party shall set forth affirmatively . . . contributory negligence . . . . Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved.

The paragraph that the majority quotes from the answer filed by the defendants, which refers to "conditional contributory negligence," contains no factual allegations at all, and gives no notice, particular or otherwise, of the occurrences the defendants intended to prove. In fact, the quoted paragraph specifically states that the "defense [of contributory negligence] . . . cannot be pleaded." I do not agree that one can read sufficient notice of the basis for the defense into this pleading, which specifically provides that the defendants did not know if they even had such a basis. On its face, this paragraph in the answer fails to satisfy the special pleading requirements of Rule 8(c). Even if the trial court, by implication, granted the defendants' oral motion to amend their answer, the defendants never actually amended the answer, orally or in writing. Since contributory negligence was ultimately the basis upon which the jury returned its verdict against the plaintiff, I believe that prejudice to the plaintiff is manifest, and I would reverse and remand for a new trial. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA v. AKEEM YOUNG

No. COA01-109

(Filed 5 February 2002)

1. **Search and Seizure— traffic stop—probable cause—driving wrong way on a one-way street**

The objective facts provided probable cause for a traffic stop which eventually led to an armed robbery prosecution where defendant made a three point turn after entering a one-way street in the wrong direction.

2. **Search and Seizure— investigatory stop—based on tip**

An investigatory stop was justified based upon a reasonable suspicion that defendant was involved in robberies of a Western Union where an officer received a tip; the officer had previous knowledge of the circumstances of the robberies which allowed him to corroborate the information provided by the informant; and the officer observed that defendant generally met the description of the perpetrator provided by witnesses to the robberies.

3. **Search and Seizure— traffic stop—permissible scope**

A traffic stop which eventually led to an armed robbery prosecution did not exceed its permissible scope where the officer did not request defendant's license and registration, defendant's behavior was not typical in that he came toward the patrol car quickly after the stop, defendant made a statement which the officer knew to be false, and the officer was aware that defendant could be an armed robbery suspect and that an anonymous caller had stated that defendant was armed and dangerous. At any rate, the evidence which defendant sought to suppress came from a consensual search of the vehicle rather than from the pat-down following the stop.

Judge GREENE concurring.

Appeal by defendant from judgments entered 22 September 1999 by Judge Steve A. Balog in Orange County Superior Court. Heard in the Court of Appeals 8 January 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Marc D. Bernstein, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

HUNTER, Judge.

Akeem Akbar Young ("defendant") appeals the denial of his motion to suppress resulting in defendant's entry of a plea of guilty to two counts of robbery with a dangerous weapon. We affirm the denial of defendant's motion to suppress.

Evidence presented at the hearing on defendant's motion tended to establish that on 5 October and 19 October 1998, a Western Union located at the Carr Mill Mall in Carrboro, North Carolina, was robbed. The first robbery occurred on a Monday, and the perpetrator used a handgun to facilitate the robbery. The perpetrator was described as a black male of medium build, approximately five feet eight inches tall, with a dark complexion and some facial hair. The 19 October 1998 robbery also occurred on a Monday, and the perpetrator was again described as a black male of medium build, approximately five feet eight inches tall and weighing 150 pounds, approximately late twenties to thirty years of age, and with light facial hair. He was described as wearing a denim jacket or shirt. The perpetrator used a knife to facilitate the robbery.

On the following Monday, 26 October 1998, a call was received by the 911 call center for the Carrboro Police Department. The female caller would not identify herself, stating she did not want to endanger her life or her child's life, but said she knew who had robbed the Western Union on 5 October and 19 October 1998. She stated the man was currently in the vicinity of a Wendy's restaurant near the Western Union and was driving a white 1998 Buick Century. The caller described the man as a black male, approximately five feet five inches tall, weighing approximately 155 pounds, and with light facial hair and a dark complexion. The suspect was described as wearing a blue denim shirt over a white undershirt, black jeans, and yellow and gray tennis shoes. The caller stated that the man was very dangerous and was currently armed with a pistol.

Officer Paul Atherton of the Carrboro Police Department received the information provided by the anonymous caller. He was familiar with the robberies that had occurred at the Western Union. Officer Atherton drove to the vicinity of the Wendy's and parked his

vehicle in a parking lot directly across from the restaurant. While there, Officer Atherton observed a white sedan enter the Wendy's parking lot. He then drove to the Wendy's in his unmarked patrol car, but the white sedan was not there when he arrived. Officer Atherton circled the block, and as he returned to the Wendy's, he observed a late model white Buick Century parked in a parking lot across the street from the Wendy's to the east. Officer Atherton parked his vehicle approximately fifty yards from the Buick. Within approximately one minute, he observed defendant, a black male fitting the description of the suspect, walk to the white Buick and enter the car. Officer Atherton observed that defendant was wearing a blue denim shirt over a white shirt, dark pants, and tennis shoes with yellow on them. He testified defendant appeared to be approximately five feet eight inches tall.

Defendant pulled out of the parking lot and began traveling north on Greensboro Street. Officer Atherton followed defendant. Just after defendant passed Carr Mill Mall, defendant made a left turn onto East Poplar Street, a one-way street. Defendant began driving the wrong way down East Poplar Street, which was clearly marked with both a "One-Way" sign and a "Do Not Enter" sign. Shortly after making the turn, defendant stopped his vehicle and executed a three-point turn on East Poplar Street. Defendant then exited East Poplar Street and proceeded south on Greensboro Street, the opposite direction from which he had previously been traveling.

Officer Atherton activated his blue lights and made a U-turn to get behind defendant. Defendant pulled into a parking lot, and Officer Atherton followed. Officer Atherton testified that as soon as he pulled in behind defendant, defendant exited his vehicle and quickly walked towards Officer Atherton's patrol car before he could exit. Officer Atherton stated that he exited his vehicle as soon as he could and instructed defendant to "[h]old on." Defendant stopped and began clutching his chest, stating that he needed an ambulance because he had just been robbed. Officer Atherton asked defendant where he had been robbed, and defendant responded he had been robbed at the Old Well Apartments near the BP gas station. Officer Atherton testified that he knew "right then" defendant was lying, and he proceeded to execute a "very quick cursory search" of defendant for weapons.

Defendant did not continue to talk about having been robbed, and "either avoided or ignored" Officer Atherton's questions regarding the alleged robbery. Another officer who arrived at the scene

asked defendant if he could search his vehicle. Defendant consented, and hit a remote button which opened the trunk. The officers recovered a pistol from underneath the driver's seat. When defendant could not produce a concealed weapons permit, he was informed that he was being placed under arrest for carrying a concealed weapon. Defendant resisted the arrest and a struggle ensued, during which a stainless steel gun magazine fell to the ground. A Western Union money order linked to one of the robberies was later recovered from defendant's shirt pocket.

On 5 January 1999, defendant was indicted for two counts of robbery with a dangerous weapon. On 1 September 1999, defendant moved to suppress evidence gathered in connection with his arrest on 26 October 1998. Defendant did not testify at the hearing. On 22 September 1999 the trial court denied defendant's motion. He thereafter entered a plea of guilty to the two counts in exchange for the dismissal of two additional charges. Defendant was sentenced to two consecutive terms of fifty-one to seventy-one months in prison. He appeals.

[1] Defendant assigns error to the denial of his motion to suppress, arguing that his stop, detention, and arrest on 26 October 1998 violated his Fourth Amendment right to be free from unreasonable search and seizure, and therefore, any evidence recovered as a result must be suppressed. We disagree, and affirm the trial court's denial of defendant's motion.

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact ' "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." ' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations omitted). "This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000).

Defendant first argues Officer Atherton's traffic stop of defendant was not legally justified on the basis of probable cause that defendant had violated N.C. Gen. Stat. § 20-165.1 (1999). That statute provides:

> In all cases where the Department of Transportation has heretofore, or may hereafter lawfully designate any highway or

> other separate roadway, under its jurisdiction for one-way traffic and shall erect appropriate signs giving notice thereof, it shall be unlawful for any person to willfully drive or operate any vehicle on said highway or roadway except in the direction so indicated by said signs.

N.C. Gen. Stat. § 20-165.1. Defendant argues that although Officer Atherton testified he stopped defendant based upon defendant's driving the wrong way on a one-way street, Officer Atherton did not have probable cause to believe defendant did so "willfully."

The trial court found that "Officer Atherton had probable cause to stop the defendant for the commission of a traffic violation in the officer's presence, a violation of G.S. 20-165.1." Although the trial court's findings of fact are generally deemed conclusive where supported by competent evidence, "a trial court's conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*." *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001).

We emphasize that in examining the legality of the stop at issue, Officer Atherton's subjective reasoning is irrelevant, and the proper inquiry is whether the objective facts support a finding that probable cause existed to stop defendant. *See State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) (officer's subjective motive for traffic stop immaterial; issue is whether objective evidence presented at suppression hearing supports finding that stop was legal); *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982) (" '[t]he scope of the Fourth Amendment is not determined by the subjective conclusion of the law enforcement officer' " (citation omitted)).

" 'Willful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law." *State v. Davis*, 86 N.C. App. 25, 30, 356 S.E.2d 607, 610 (1987) (citing *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473 (1965)). " 'Willfulness' is a state of mind which is seldom capable of direct proof, but which must be inferred from the circumstances of the particular case." *Id.* (citation omitted).

We agree with the trial court that the objective evidence reveals the existence of probable cause to stop defendant for a violation of N.C. Gen. Stat. § 20-165.1. Although the evidence in the present case could suggest defendant did not realize he had turned the wrong way

into a one-way street, the evidence is equally supportive of a finding that defendant used the one-way street to turn around and begin to proceed in a southerly direction on Greensboro Street. The evidence established that defendant had been traveling north on Greensboro Street, and that shortly after he passed the Carr Mill Mall and the Western Union, he executed an illegal turn onto East Poplar Street, did a three-point turn on that street, and then proceeded south on Greensboro Street in the direction from which he came. The evidence establishes the existence of probable cause, based on objective facts, that defendant violated N.C. Gen. Stat. § 20-165.1, thereby permitting Officer Atherton to stop defendant. *See, e.g., McClendon*, 350 N.C. at 636, 517 S.E.2d at 132 (violation of traffic statutes constitutes probable cause to stop vehicle).

[2] In any event, we also hold Officer Atherton was justified in initiating an investigatory stop of defendant based upon a reasonable suspicion that defendant was involved in the robberies of the Western Union. "An 'investigatory stop must be justified by "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." ' " *Kincaid*, 147 N.C. App. at 97, 555 S.E.2d at 297-98 (citations omitted). "The level of suspicion required for an investigatory stop . . . is lower than what is required for a seizure based on probable cause, which is a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity." *State v. Schiffer*, 132 N.C. App. 22, 26, 510 S.E.2d 165, 167, *appeal dismissed and disc. review denied*, 350 N.C. 847, 539 S.E.2d 5 (1999). In determining whether reasonable suspicion exits, a trial court must consider the totality of the circumstances. *Kincaid* at 97, 555 S.E.2d at 298.

"An anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability." *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630. An officer is entitled to ". . . 'rely upon information received through an [anonymous] informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.' " *State v. Bone*, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) (citation omitted).

In *Bone*, our Supreme Court held that the detective sufficiently corroborated information provided by an anonymous informant that the defendant was the perpetrator of a previous murder. *Id.* at 11, 550 S.E.2d at 488. The informant provided police with the defendant's name and physical description, and stated that he had entered the

victim's apartment through a window and punched the victim in the face, causing her to bleed from the ears. *Id.* at 6, 550 S.E.2d at 485. The detective was able to verify that the information provided by the informant was correct. *Id.* at 11, 550 S.E.2d at 488. In addition, when the detective went to question the defendant, he observed that the defendant was wearing the same type of athletic shoes which the detective knew the murderer to have worn during the crime. *Id.*

In this case, as in *Bone*, Officer Atherton had previous knowledge of the circumstances surrounding the robberies of the Western Union. Not only was Officer Atherton able to verify that the information provided by the informant regarding defendant's description, clothing, vehicle, and location was correct, but he was able to corroborate the information based upon his previous knowledge of the Western Union robberies. Officer Atherton viewed defendant entering his vehicle near the Wendy's parking lot, and observed that defendant generally met the description of the perpetrator provided by witnesses to both robberies. The anonymous tip was therefore sufficiently reliable to allow Officer Atherton to conduct an investigatory stop of defendant. In so holding, we note that anonymous tips are one of the most important investigatory tools used by law enforcement to prevent and solve crimes. Only when their use has been unreasonable should our courts restrict their use. This assignment of error is overruled.

[3] In his remaining argument, defendant contends that even if Officer Atherton had legal justification to stop defendant, the detention exceeded the permissible scope allowed for such a stop. Again, we disagree. Defendant argues the scope of a valid traffic stop encompasses a request for a driver's license and registration, a computer check, and the issuance of a citation, and that Officer Atherton never pursued the traffic violation upon stopping defendant. While the evidence is clear that Officer Atherton did not conduct defendant's stop in the routine fashion of first requesting defendant's license and registration, defendant's behavior following the stop was clearly atypical. Officer Atherton testified he intended to conduct defendant's stop as a routine traffic stop, but that before he could even exit his patrol car, defendant had exited his own vehicle and was coming towards him with some speed. Officer Atherton testified it is "very, very rare to have somebody come out of the vehicle and approach you at the speed [defendant] did that morning." He testified defendant's unusual behavior caused him to "heighten [his] sense of safety."

Officer Atherton further testified that he did not initially ask defendant for his license and registration because defendant first began stating that he needed an ambulance because he had just been robbed, which statement Officer Atherton knew to be false based on his observations of defendant prior to the stop. Officer Atherton testified the events unfolded very quickly, and with the knowledge that defendant could be a suspect in an armed robbery and that an anonymous caller stated the suspect was very dangerous and currently armed, he conducted a limited pat-down of defendant for weapons.

"While a routine traffic stop 'does not justify in every instance a protective search for weapons,' an officer is 'permitted to conduct a "pat-down" for weapons once the defendant is outside the automobile . . . if the circumstances give the police reasonable grounds to believe that the defendant may "be armed and presently dangerous." ' " *State v. Hamilton*, 125 N.C. App. 396, 401, 481 S.E.2d 98, 101 (citations omitted) (holding defendant's behavior in reaching towards his left side before exiting vehicle sufficient to justify weapons frisk), *appeal dismissed and disc. review denied*, 345 N.C. 757, 485 S.E.2d 302 (1997); *see also State v. Pearson*, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998) (following a stop, if an officer "reasonably believes that the person is armed and dangerous, the officer may frisk the person to discover a weapon or weapons"); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (following stop, officer may conduct weapons frisk for self-protection " '[i]f, after the detention, [the investigating officer's] personal observations confirm his apprehension that criminal activity may be afoot and [] that the person may be armed . . . .' " (citation omitted)).

In *State v. Alston*, 82 N.C. App. 372, 376, 346 S.E.2d 184, 187 (1986), *affirmed*, 323 N.C. 614, 374 S.E.2d 247 (1988), this Court held the following evidence sufficient to warrant an articulable and objectively reasonable belief that the defendant was potentially dangerous: the defendant generally matched a description of a suspect who had committed a previous armed robbery; the defendant was driving a vehicle similar to that identified as being used by the perpetrator of the robbery; when the officer stopped the defendant, the defendant quickly got out of his vehicle and allowed it to roll back into the police car; and the officer observed that the defendant was " 'acting weird.' " *Id.*; *see also McClendon*, 350 N.C. at 637, 517 S.E.2d at 133 (defendant's responses to officer's questions following routine traffic stop sufficient to justify officer's suspicions that criminal activity afoot).

In the present case, Officer Atherton was justified in an objectively reasonable belief that defendant could be armed and potentially dangerous. Defendant matched a description from an anonymous caller as the perpetrator of two recent armed robberies, which description was consistent with robbery witnesses' descriptions of the robber. In any event, the pat-down of defendant did not yield the evidence which defendant sought to suppress. Rather, the search of defendant's vehicle which actually led to defendant's arrest based upon the discovery of the concealed weapon, was performed pursuant to defendant's consent. Defendant has not challenged the trial court's finding that he gave the officers permission to search his vehicle, and the finding is clearly supported by the evidence.

Taken as a whole, the evidence supports the trial court's findings of fact, and we hold these findings support the conclusion that defendant's stop, detention and arrest were within the permissible bounds of the Fourth Amendment. The trial court therefore did not err in denying defendant's motion to suppress evidence recovered as a result thereof.

Affirmed.

Judge TYSON concurs.

Judge GREENE concurs in a separate opinion.

GREENE, Judge, concurring.

I concur in the majority's opinion but write separately to address the proper application of the differing standards of probable cause and reasonable suspicion in the context of a traffic stop.

While there are instances in which a traffic stop is also an investigatory stop, warranting the use of the lower standard of reasonable suspicion, the two are not always synonymous. A traffic stop made on the basis of a readily observed traffic violation such as speeding or running a red light is governed by probable cause. *See, e.g.*, *State v. McClendon*, 130 N.C. App. 368, 374, 502 S.E.2d 902, 906 (1998) (officer had probable cause to stop vehicle and issue citation for speeding and following too closely), *affirmed*, 350 N.C. 630, 517 S.E.2d 128 (1999); *State v. Hamilton*, 125 N.C. App. 396, 399, 481 S.E.2d 98, 100 (officer had probable cause to stop the vehicle for the purpose of issuing seat belt citations because he had observed that both the

driver and the defendant were not wearing seat belts), *disc. review denied*, 345 N.C. 757, 485 S.E.2d 302 (1997); *see also* N.C. Gen. Stat. § 15A-302(b) (1999) (an officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction). Probable cause is "a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity. *State v. Schiffer*, 132 N.C. App. 22, 26, 510 S.E.2d 165, 167, *disc. review denied*, 350 N.C. 847, 539 S.E.2d 5 (1999). On the other hand, a traffic stop based on an officer's mere *suspicion* that a traffic violation is being committed, but which can only be verified by stopping the vehicle, such as drunk driving or driving with a revoked license, is classified as an investigatory stop, also known as a *Terry* stop. *See, e.g., State v. Kincaid*, 147 N.C. App. 94, 97-98, 555 S.E.2d 294, 297-98 (2001) (officer had reasonable suspicion to stop the defendant for a revoked license based on his knowledge of the defendant); *Schiffer*, 132 N.C. App. at 26, 510 S.E.2d at 167 (deputy had reasonable suspicion to stop the defendant after noticing Florida tags and window tinting which the deputy believed was darker than permitted under North Carolina law). Such an investigatory-type traffic stop is justified if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot. *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982) (quoting *State v. Streeter*, 283 N.C. 203, 210, 195 S.E.2d 502, 507 (1973)).

In this case, because Officer Atherton observed defendant entering a one-way street the wrong way, in apparent violation of section 20-165.1, he needed probable cause in order to stop the vehicle. As noted by the majority, the facts in this case reveal probable cause. Because I agree with the majority's analysis as to all the issues, I concur in the opinion.

WAYMAN HARRIS, EMPLOYEE/PLAINTIFF v. THOMPSON CONTRACTORS, INC., EMPLOYER, AND UNITED STATES FIDELITY AND GUARANTY INSURANCE COMPANY, CARRIER/DEFENDANTS

No. COA01-100

(Filed 5 February 2002)

1. **Workers' Compensation— employer-employee relationship—prisoner—work release employee**

The full Industrial Commission did not err in a workers' compensation case by determining that plaintiff employee's status as a prisoner did not bar recovery, because: (1) the parties entered into a stipulation stating that the parties were subject to and bound by the provisions of the North Carolina Workers' Compensation Act and that an employee-employer relationship existed between the parties at all relevant times; (2) the issue of whether plaintiff and defendant meet the statutory definitions of employee and employer need not be reached due to the stipulations; and (3) a prisoner employed through the work release program is not an agent or employee of the State prison system.

2. **Workers' Compensation— finding of fact—willful intention to injure or kill oneself**

The full Industrial Commission did not err in a workers' compensation case by failing to find that plaintiff employee prisoner's claim is barred under N.C.G.S. § 97-12(3) by his willful intention to injure or kill himself or that his award should be reduced under N.C.G.S. § 97-12 by ten percent based on plaintiff's willful breach of a rule or regulation adopted by the employer including plaintiff's walking the crane with the drop ball raised, because: (1) the negligence of the employee does not disbar him from compensation for an injury by accident arising out of and in the course of his employment; (2) there was no evidence that would show plaintiff willfully intended to injure himself or someone else; and (3) there is no evidence the employer's rule regarding the movement of the crane with the drop ball raised off the ground was ever reduced to writing.

3. **Workers' Compensation— employee not disobeying a direct or specific order from supervisor at time of accident**

The full Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee prisoner was not disobeying a direct or specific order from a then present

supervisor at the time of the accident, where (1) the superintendent testified that at the time of the accident there was not anyone standing beside plaintiff or anyone standing there watching him the entire time; (2) plaintiff was hired to work as a drop ball operator; and (3) plaintiff was operating the crane at the time of his accident, which is a duty he was hired to perform.

Appeal by defendants from Opinion and Award entered 24 October 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2001.

The Roberts Law Firm, P.A., by Joseph B. Roberts, III, and Scott W. Roberts, for plaintiff-appellee.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-appellants.

EAGLES, Chief Judge.

Thompson Contractors, Inc. and United States Fidelity and Guaranty Insurance Company ("defendants") appeal from an Opinion and Award for the Full Commission awarding Wayman Harris ("plaintiff") workers' compensation benefits. Plaintiff was a Department of Corrections prisoner on work release when he was injured working for Thompson Contractors, Inc. ("Thompson"). After careful consideration of the briefs and record, we affirm.

Plaintiff is serving a life sentence for murder and has been incarcerated with the North Carolina Department of Corrections for approximately 25 years. Plaintiff began working through the work release program in 1992. On 7 July 1997, Thompson employed plaintiff to work as a drop ball operator at their Mill Spring quarry in Polk County. As a drop ball operator, plaintiff operated a crane that lowered a ball from the boom to break up rocks. Plaintiff had not operated a crane before his employment with Thompson. During August 1997, Thompson reassigned plaintiff to work at Miller Creek quarry in Rutherford County.

Plaintiff had operated a "D-25" model crane at the Mill Spring quarry. This crane was "much smaller" than the Northwest "D-80" crane that plaintiff operated at the Miller Creek quarry. The "D-80" crane weighed approximately 80 tons and the drop ball weighed approximately 10,000 pounds. The "D-80" crane that plaintiff operated was originally manufactured as a shovel crane and subsequently

modified. The "stick and the bucket was taken off of it" and "the boom was extended to make it into a crane boom." The boom is the arm that extends off the crane which can be moved up and down. The crane is on two tractor treads which move the crane forward, backwards, right and left. The crane with the boom can rotate 360 degrees on the tractor treads.

On 17 September 1997, plaintiff was operating the "D-80" crane at the Miller Creek quarry. Plaintiff was "walking" the crane, which is moving the crane on its tractor treads, to another area of the quarry. While "walking" the crane, plaintiff contends that the cabin filled with smoke. As he got up to check on the source of the smoke, the crane toppled over trapping plaintiff underneath. Defendants contend that there was no smoke or fire in the cabin and the crane toppled due to plaintiff "walking" the crane with the boom and drop ball raised.

Plaintiff lost his left foot in the accident and suffered shoulder, rib and leg injuries. After the accident, plaintiff's left leg was amputated below the knee.

After the accident, plaintiff's claim for workers' compensation benefits was denied. Plaintiff requested a hearing which was held before Deputy Commissioner Kim L. Cramer on 9 March 1999. Deputy Commissioner Cramer denied plaintiff benefits in an Opinion and Award filed 29 October 1999. Plaintiff appealed for review and the matter was heard by the Full Commission. In its Opinion and Award filed 24 October 2000, the Full Commission reversed the Deputy Commissioner's holding and awarded plaintiff benefits. Defendants appeal.

Defendants raise three issues on appeal. Whether the Full Commission erred in: (1) its determination that plaintiff's status as a prisoner did not bar recovery; (2) failing to find that plaintiff's claim is barred by his willful intention to injure or kill himself; and (3) its application of *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 293 S.E.2d 196, *reh'g denied*, 306 N.C. 565 (1982).

"On appeal from an award of the Industrial Commission, the scope of our appellate review is limited to two questions: (1) whether the Commission's findings of fact are supported by competent evidence in the record; and (2) whether the findings of fact justify the Commission's conclusions of law." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000). "This is true even when

there is evidence that would support contrary findings." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 133, 535 S.E.2d 602, 604 (2000).

[1] Defendants first contend that the Full Commission erred in determining that plaintiff's status as a prisoner did not bar recovery by plaintiff. We do not agree.

Defendants argue that G.S. § 97-13(c) bars recovery by plaintiff. It states that the "[Workers' Compensation Act] shall not apply to prisoners being worked by the State or any subdivision thereof, ..." G.S. § 97-13(c). Further, G.S. § 148-6 states that "such convicts so hired, or employed, shall remain under the actual management, control and care of the Department [of Correction] . . . ." In addition, a prisoner on work release "shall give his work-release earnings, less standard payroll deductions required by law, to the Department of Correction." G.S. § 148-33.1(f). Defendants contend that plaintiff was being worked by the State since plaintiff was to remain under the "actual management, control and care" of the Department of Correction ("DOC") and DOC received the prisoner's earnings.

Defendants also argue that no contract for hire existed between plaintiff and defendant Thompson. Defendants contend that a contract existed between defendant Thompson and the State, not between plaintiff and defendant Thompson. Defendants argue that the State assigned workers to Thompson and that Thompson had no say in the selection of work release employees. The Workers' Compensation Act defines employee as "every person engaged in an employment under any appointment or contract of hire . . . ." G.S. § 97-2(2). Defendants argue that this lack of contract for hire precludes plaintiff from being an employee which is necessary in order to claim benefits.

Defendants cite *Parker v. Union Camp Corp.*, 108 N.C. App. 85, 422 S.E.2d 585 (1992) for support. In *Parker*, the plaintiff suffered compensable work-related injuries and received workers' compensation benefits. *Id.* at 86, 422 S.E.2d at 585. While receiving benefits, the plaintiff was convicted and sentenced to prison. *Id. Parker* held that the plaintiff "was not entitled to receive workers' compensation benefits while in prison . . . ." *Id.* at 88, 422 S.E.2d at 587.

We hold that the Full Commission properly determined that plaintiff's status as a prisoner did not bar plaintiff from receiving benefits. The Full Commission found that:

2. By statute, the North Carolina Department of Correction is authorized to grant work release privileges to eligible inmates pursuant to G.S. § 148-33.1. In this work release program, inmates may work in the public and private sectors and are viewed by the state as not working as agents of the state, but as individuals employed by a regular employer.

The Full Commission concluded:

3. Because the injury giving rise to this claim occurred when plaintiff, while incarcerated, was on work release, the holding in Parker is not controlling and does not bar plaintiff from recovering under the act as an employee. Parker v. Union Camp Corp., 108 N.C. App. 85, 422 S.E.2d 585 (1992).

4. On 17 September 1997, the date of his injury by accident, plaintiff was not being worked by the State or any subdivision thereof and, therefore, the provisions of G.S. § 97-13(c) do not bar plaintiff from recovering workers' compensation benefits from defendants.

The Workers' Compensation Act is broad and covers all employers and employees unless they are specifically excluded.

From and after January 1, 1975, *every employer and employee, as hereinbefore defined and except as herein stated, shall be presumed to have accepted the provisions of this Article* respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby.

G.S. § 97-3 (emphasis added).

Here, plaintiff and defendants entered into a pre-trial agreement which was signed on 2 March 1999. Among other things, this agreement provided that: "1. Employee is Wayman Harris. 2. Employer is Thompson Contractors Inc. . . . 4. Employee-Employer relationship existed." The Opinion and Award by Deputy Commissioner Cramer and the Opinion and Award by the Full Commission contained similar stipulations. This stipulation found in both documents stated that "[t]he parties were subject to and bound by the provisions of the North Carolina Workers' Compensation Act" and an "employee-employer relationship existed between the parties at all relevant times . . . ." A stipulation regarding the employer-employee relation-

ship is binding on the parties. *Sorrell v. Sorrell's Farms and Ranches, Inc.*, 78 N.C. App. 415, 417, 337 S.E.2d 595, 596 (1985).

Other jurisdictions have held that a claimant's status as a prisoner will not prevent the existence of an employer-employee relationship between a claimant-prisoner and a private employer. *See Benavidez v. Sierra Blanca Motors*, 922 P.2d 1205, 1211 (N.M. 1996) (holding that claimant's "status as an inmate does not preclude the existence of an employer-employee relationship for the purpose of receiving workers' compensation benefits."); *Courtesy Construction Corp. v. Derscha*, 431 So.2d 232, 232-33 (Fla. Dist. Ct. App. 1983) (holding that "[w]ork-released prisoners engaged to work in private enterprise, for compensation paid them by private businesses that are 'employers' in every practical sense of the word, are not excluded from [the Workers' Compensation Act]."); *Hamilton v. Daniel International Corp.*, 257 S.E.2d 157, 158 (S.C. 1979) (holding that defendant required to provide workers' compensation benefits due to the existence of an employer-employee relationship and that "[claimant] transcended his prisoner status and became a private employee entitled to workmen's compensation benefits."). However, due to the stipulations that exist here, we need not reach the issue of whether plaintiff and defendant Thompson meet the statutory definitions of employee and employer respectively.

Since the requisite employer-employee relationship exists, plaintiff will be covered by the Act unless the Act specifically excludes him. G.S. § 97-3. Employers and employees not covered by the Act are enumerated in G.S. § 97-13. Those excluded by this provision are: "(a) Employees of Certain Railroads." "(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government, Employer of Less than Three Employees." "(c) Prisoners." "(d) Sellers of Agricultural Products." G.S. § 97-13. Section "(c) Prisoners" states:

> *This Article shall not apply to prisoners being worked by the State or any subdivision thereof*, except to the following extent: Whenever any prisoner assigned to the State Department of Correction shall suffer accidental injury or accidental death arising out of and in the course of the employment to which he had been assigned, if there be death or if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this Article, then such discharged prisoner or the dependents or next of kin of such discharged prisoner may have the benefit of

this Article by applying to the Industrial Commission as any other employee; . . . ."

G.S. § 97-13(c) (emphasis added). A prisoner being worked by the State is specifically excluded from the Act unless the disabling injury continues after the discharge of the prisoner or the prisoner suffers an accidental death. *Richardson v. N. C. Dept. of Correction*, 118 N.C. App. 704, 705, 457 S.E.2d 325, 326 (1995), *aff'd*, 345 N.C. 128, 478 S.E.2d 501 (1996).

G.S. § 148-26(a) provides that "[i]n exercising his power to enter into contracts to supply inmate labor as provided by this section, *the Secretary of Correction shall not assign any inmate to work under any such contract who is eligible for work release* as provided in this Article, ..." (Emphasis added.) In addition, "[n]o prisoner employed in the free community under the provisions of [G.S. § 148-33.1] shall be deemed to be an agent, employee, or involuntary servant of the State prison system while working in the free community or going to or from such employment." G.S. § 148-33.1(g). The DOC is not authorized to assign a prisoner pursuant to any labor contracts when that prisoner is eligible for work release. Also, a prisoner employed through the work release program is not an agent or employee of the State prison system. This, along with the stipulations and Pre-Trial Agreement, is sufficient to show that plaintiff was not "being worked by the State."

The General Assembly has specifically excluded the provisions of the Workers' Compensation Act from certain prison laborers. Counties may work prisoners confined in local confinement facilities. G.S. § 162-58. The General Statutes provide for the liability of counties that work prisoners. G.S. § 162-61. Counties are liable for emergency medical services for prisoners while they are working and for injuries to third parties incurred through the negligence of working prisoners. *Id.* However, this provision states that the "[Employment Security and Workers' Compensation Act] of the General Statutes shall have no application to prisoners" worked by counties. *Id.* However, there is no similar exclusion in the statutes authorizing work release. Prisoners employed in the work release program are only specifically excluded from "any benefits under Chapter 96 of the General Statutes entitled 'Employment Security' during the term of the sentence" but there is no specific exclusion for Chapter 97, the Workers' Compensation Act. G.S. § 148-33.1(h). In the statute authorizing work release, the General Assembly made no specific exclu-

sion for the Workers' Compensation Act as it did in the statutes authorizing the working of county prisoners.

Parker is distinguishable from the instant case. In *Parker*, the claimant was injured on the job before his incarceration and was already receiving benefits. *Parker* at 86, 422 S.E.2d at 585. Here, plaintiff was already incarcerated at the time of his injury and was involved in the work release program when his work related injury occurred.

Moreover, in *Parker's* holding, this Court in dicta stated "we note that the legislature may want to examine the possibility of continuing payment of benefits during a period of incarceration directly to a prisoner's dependents, who may have been relying on the disability payments as a major, or sole, source of income." *Id.* at 88, 422 S.E.2d at 587.

Here, the Full Commission entered the following award:

> 1. Defendants shall pay the Department of Correction temporary total disability compensation at the rate of $204.99 per week for the period of 17 September 1997 through the present and continuing, with said payments to be managed and appropriately distributed by the Department of Correction under its work release program. This compensation is subject to the attorney's fee approved herein.
>
> 2. Defendants shall pay for all medical expenses incurred or to be incurred, subject to the provisions of G.S. § 97-25.1. Defendants shall reimburse the Department of Correction for any payments it has made on behalf of plaintiff relating to his medical care resulting from this injury by accident.

Plaintiff's benefits will be paid to DOC and distributed according to the usual regulations applicable to inmates' work release income. According to G.S. § 148-33.1(f)(2), plaintiff is allowed a reasonable allowance for his incidental personal expenses. Amounts are deducted from plaintiff's earnings for other costs, including plaintiff's keep, judgments and court orders. G.S. § 148-33.1(f). The remaining balance is kept and accumulated to be disbursed to plaintiff when he is discharged or paroled. *Id.*

On these facts we hold that the Full Commission properly concluded that this plaintiff was not barred from the recovery of work-

ers' compensation benefits by his status as a prisoner. This holding does not affect the ability of the Department of Correction to recover money it has spent on behalf of plaintiff for his medical care.

[2] Defendants contend that the Full Commission erred in failing to find that plaintiff's claim is barred by his willful intention to injure or kill himself. We do not agree.

Here, the Full Commission found that "[d]efendants have failed to produce any credible evidence that plaintiff's actions on 17 September 1997 which resulted in his injuries were taken with the specific intention of injuring himself or others." The Full Commission concluded that "[t]he evidence fails to establish that plaintiff's injuries were the result of a willful intention to injure himself or others, or the result of a willful breach of a safety rule or procedure adopted by defendant-employer."

Defendants argue that G.S. § 97-12(3) should bar plaintiff's claim. G.S. § 97-12(3) states that "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by: . . . (3) His willful intention to injure or kill himself or another." Defendants argue that plaintiff intentionally attempted to "walk" the crane with the boom and drop ball raised. Since plaintiff was aware that this was dangerous, defendants assert that plaintiff's action shows his intention to injure himself. In the alternative, defendants argue that G.S. § 97-12 should reduce plaintiff's award by ten percent. It states "[w]hen the injury or death is caused . . . by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury compensation shall be reduced ten percent (10%)." G.S. § 97-12. We are not persuaded.

In order for G.S. § 97-12(3) to bar compensation, "there must have been a willful intention to injure." *Rorie v. Holly Farms*, 306 N.C. 706, 710, 295 S.E.2d 458, 461 (1982). "Intent is usually proved by circumstantial evidence and is therefore reserved for the trier of fact." *Id.*

Defendant's superintendent of the work site testified that he had reprimanded plaintiff twice for walking the crane with the drop ball raised. The last reprimand was one hour before the accident. The superintendent stated that plaintiff was "making a mistake" by operating the crane that way. The superintendent testified that he did not

remove plaintiff from the crane because he "had never seen him take it way up to the top. I mean, I had never seen that happen."

"The negligence of the employee, however, does not debar him from compensation for an injury by accident arising out of and in the course of his employment." *Archie v. Lumber Co.*, 222 N.C. 477, 480, 23 S.E.2d 834, 836 (1943). In addition, "not even gross negligence is a defense to a compensation claim." *Hartley v. Prison Department*, 258 N.C. 287, 289, 128 S.E.2d 598, 600 (1962). There was no evidence that would show plaintiff willfully intended to injure himself or someone else.

Defendants' alternative argument is also without merit. G.S. § 97-12 states that in order for the award to be reduced, the regulation must be approved by the Industrial Commission. Here, there is no evidence that Thompson's "rule" regarding the movement of the crane with the drop ball raised off the ground was ever reduced to writing. The superintendent was asked whether Thompson's safety policy covered when, how and under what circumstances a crane should be moved. The superintendent testified that it was "[n]ot in the company policy, I don't think it does." The evidence supports the Full Commission's finding which in turn justifies its conclusion that "[t]he evidence fails to establish that plaintiff's injuries were the result of a willful intention to injure himself or others, or the result of a willful breach of a safety rule or procedure adopted by defendant-employer." This assignment of error is overruled.

[3] Defendants next contend that the Full Commission erred in its application of *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 293 S.E.2d 196. We do not agree.

The Full Commission found that "[a]lthough plaintiff had previously been warned about moving the crane with the drop ball raised, he was not disobeying a direct or specific order from a then present supervisor when this incident occurred on 17 September 1997." The Full Commission concluded that "[p]laintiff was not disobeying a direct or specific order from a then present supervisor when this incident occurred on 17 September 1997 and, therefore, he may recover compensation for his claim."

Defendants argue that the absence of a supervisor should not determine the matter. They argue that plaintiff's actions were not in furtherance of Thompson's business so plaintiff's disobedient act should operate to bar recovery.

Hoyle stated that:

> [W]e find that thrill seeking which bears no conceivable relation to accomplishing the job for which the employee was hired moves the employee from the scope of his employment. Likewise, disobedience of a direct and specific order by a then present superior breaks the causal relation between the employment and the resulting injury.

Hoyle, 306 N.C. at 259, 293 S.E.2d at 202 (citations omitted). *Hoyle* also stated "[w]e are therefore of the opinion that employee's election to disobey a prior given order did not break the causal connection between his employment and his fatal injury if the disobedient act was reasonably related to the accomplishment of the task for which he was hired." *Id.* at 259, 293 S.E.2d at 203.

The superintendent testified that at the time of the accident there was not anyone "standing beside [plaintiff]" or anyone "standing there watching him the entire time." Plaintiff was hired to work as a drop ball operator. Plaintiff testified that just before the accident, he was "walking" the crane. Plaintiff was operating the crane which is a duty he was hired to perform. This is competent evidence to support the finding that plaintiff "was not disobeying a direct or specific order from a then present supervisor" at the time of the accident. This finding justifies the conclusion that "[p]laintiff was not disobeying a direct or specific order from a then present supervisor . . . therefore, he may recover compensation for his claim." This assignment of error is overruled.

Accordingly, the Opinion and Award for the Full Commission is affirmed.

Affirmed.

Judges MARTIN and BIGGS concur.

IN RE MITCHELL

[148 N.C. App. 483 (2002)]

IN THE MATTER OF: MITCHELL, M., A MINOR CHILD, D.O.B. 12/24/94

IN THE MATTER OF: MITCHELL, K., A MINOR CHILD, D.O.B. 01/16/98

IN THE MATTER OF: MITCHELL, K., A MINOR CHILD, D.O.B. 02/06/96

No. COA01-488, COA01-489, COA01-490

(Filed 5 February 490)

1. **Trials— continuance denied—no possibility of surprise or prejudice**

There was no error in the denial of respondent-mother's motion for a continuance in a termination of parental rights proceeding where there was no possibility that respondent was unfairly surprised or that her ability to contest the petition was prejudiced. Courts cannot permit parties to disregard the prompt administration of justice; to hold otherwise would let parties determine for themselves when they wish to resolve judicial matters.

2. **Termination of Parental Rights— sufficiency of evidence—mother's admitted drug use**

There was clear, cogent, and convincing evidence supporting the trial court's findings leading to a termination of parental rights where respondent-mother admitted using drugs.

3. **Termination of Parental Rights— disposition—no presumption or burden of proof**

A termination of parental rights proceeding was remanded for a new dispositional hearing where the trial court believed that a presumption that termination was in the best interests of the child arose after a finding of grounds for termination. There is no presumption or burden of proof after a finding of grounds for termination; the determination of best interests is more in the nature of an inquisition, with the trial court having the obligation to secure whatever evidence it deems necessary for the decision.

Judge HUNTER concurring in part and dissenting in part

Appeal by respondent from orders entered 16 November 2000 by Judge C. Randy Pool in Transylvania County District Court. Heard in the Court of Appeals 8 January 2002.

H. Paul Averette, for Transylvania County Department of Social Services, petitioner-appellee.

Womble Carlyle Sandridge & Rice, by Stuart A. Brock, for Guardian Ad Litem, petitioner-appellee.

Charles W. McKeller, for respondent-appellant.

TYSON, Judge.

I. Facts

Cynthia Chatman ("respondent"), mother of Mason Mitchell, Kristopher Mitchell, and Kaiden Mitchell ("the children"), appeals from the trial court's orders terminating her parental rights. We affirm in part and reverse in part.

In September 1997, Mason and Kristopher Mitchell were placed in custody of Transylvania County Department of Social Services ("DSS") based upon allegations of neglect. In June 1998, Kaiden Mitchell was placed in custody of DSS upon allegations of neglect. The order adjudicating Kaiden as a neglected and dependent juvenile was filed 20 April 1999 finding substance abuse by respondent. The orders adjudicating Mason and Kristopher neglected do not appear in the records on appeal. An order pursuant to a motion for review, filed 24 April 1998 pertaining to Mason and Kristopher, appears in the record and orders that both parents attend counseling concerning issues of domestic violence, anger management, and substance abuse and dependency.

In July 1998, respondent moved to Oklahoma and then to Tennessee sometime in December 1998. The children remained in foster care. On 28 March 2000, DSS filed a petition to terminate respondent's parental rights to the children. A hearing was scheduled for 12 July 2000. The hearing was continued by the Court on 12 July 2000 to 9 August 2000. The hearing was again continued on 9 August 2000 to 27 September 2000.

Respondent was not present at the adjudication hearing on 27 September 2000, but was represented by counsel. The trial court denied respondent's motion for a continuance. The trial court entered all three orders on 16 November 2000 terminating respondent's parental rights. Respondent appeals from these orders.

II. Issues

The issues presented are whether: (1) the trial court's denial of respondent's motion for a continuance violated her rights to due process and fundamental fairness, (2) the findings of fact and conclusions of law terminating respondent's parental rights were supported by clear, cogent, and convincing evidence, and (3) the trial court improperly shifted the burden of proof to respondent as to the best interests of the children and failed to exercise its discretion under N.C.G.S. § 7B-1110(a).

Respondent's assignment of error to the trial court's denial of her motion to dismiss at the close of petitioner's evidence was not argued in her briefs and is deemed abandoned. N.C. R. App. P. 28(b)(5) (1999).

This Court allowed respondent's motion to consolidate the appeals of the orders terminating her parental rights with respect to her three children, pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure. All three appeals are decided within this opinion. N.C. R. App. P. 40 (1999).

III. Motion for a Continuance

[1] Respondent argues that the hearing to terminate her parental rights was not properly placed on the trial docket and that the denial of her motion for a continuance denied her due process and the fundamental right to parent her children.

A motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and the ruling will not be disturbed absent a showing of abuse of discretion. *State v. Beck*, 346 N.C. 750, 756, 487 S.E.2d 751, 755 (1997). However, when a motion to continue raises a constitutional issue, the trial court's ruling thereon involves a question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record. *State v. Jones*, 342 N.C. 523, 530-31, 467 S.E.2d 12, 17 (1996).

In *Shankle v. Shankle*, 289 N.C. 473, 223 S.E.2d 380 (1976), our Supreme Court stated that:

> [i]n passing on the motion [for continuance] the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and in good faith. . . . [S]ince motions for continuance are generally addressed to the sound discretion of the trial court . . . a denial of

> the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient. . . . The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice.

Id. at 483, 223 S.E.2d at 386.

Respondent raised two grounds in support of her motion to continue the matter: (1) that respondent was unable to obtain transportation to the hearing and (2) that a custody case was pending in the matter. We note that respondent raises for the first time on appeal the issue of improper scheduling or notice of the hearing to the trial court as grounds for her motion for a continuance.

Rule 10(b)(1) of the Rules of Appellate Procedure provides in pertinent part that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1) (1999). Respondent failed to preserve this issue for review.

In our discretion we have reviewed this issue as if respondent had preserved it and we conclude that there was no error in denying the motion for a continuance. N.C.G.S. § 7B-803 directly addresses the issue of continuances for a hearing involving a juvenile matter:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-803 (1999).

Nothing in the record indicates that the court requested or needed additional information in the best interests of the children, that more time was needed for expeditious discovery, or that extraordinary circumstances necessitated a continuance in this case.

Respondent knew in May 1998 that DSS would be filing a petition to terminate her parental rights. Respondent was personally served with a summons and a copy of the petition on 4 April 2000, after the trial court ordered disclosure of respondent's address for service. Respondent filed an answer to the petition on 26 May 2000. Notice of hearing was served upon respondent's attorney on 30 June 2000. On 12 July 2000, the court issued an order continuing the matter to 9 August 2000.

Respondent does not argue that she lacked notice of the original hearing or the continuance of the matter to 9 August 2000. Respondent argues that there is no evidence in the record or transcript that she had notice continuing the case from 9 August 2000 to 27 September 2000. This argument is without merit.

The court calendar, which was included in the record, shows the notation by the Clerk of Court that the matter was "continued—re notice—by service on Skerrett." The trial court found as fact that the matter "was originally scheduled to be heard on August 9, 2000, but was continued to be heard on September 27, 2000." The transcript reflects that respondent's attorney, Skerrett, was present at the 27 September 2000 hearing and that attorney Skerrett stated to the trial court that she spoke with respondent the day before the hearing and that "her grandmother had a doctor's appointment this morning so she was going to be unable to bring her up here today. So she's not here today." The record discloses that respondent's absence was voluntary or through her own negligence in failing to obtain adequate transportation. *See Mitchell County Dep't of Social Services v. Carpenter*, 127 N.C. App. 353, 489 S.E.2d 437 (1997) (respondent's lack of transportation to termination hearing was not excusable neglect).

Respondent knew that the hearing would be held given the facts that she does not contest receiving notice of the original hearing and the order continuing the matter to August. Attorney Skerrett stated at the hearing that she had been representing respondent in this matter for "the past three years." We see no possibility that respondent was unfairly surprised or that her ability to contest the petition to terminate was prejudiced. *See In re Taylor*, 97 N.C. App. 57, 60, 387 S.E.2d 230, 231 (1990) (respondent or counsel was present in court when the matter was continued gave parties notice that a hearing would be held eliminating any surprise or prejudice); *Obsborne v. Osborne*, 129 N.C. App. 34, 38-39, 497 S.E.2d 113, 116 (1998) (plaintiff was represented by counsel during the hear-

ing, almost a full year had passed since the issues were first scheduled, and plaintiff made no showing of what evidence he would have presented if duly notified of the hearing).

Courts cannot permit parties to disregard the prompt administration of judicial matters. To hold otherwise would let parties determine for themselves when they wish to resolve judicial matters. The goal of the termination statute is for the juvenile "to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents." N.C. Gen. Stat. § 7B-1100(2) (1999). We hold that there was no error in the denial of respondent's motion for a continuance. This assignment of error is overruled.

IV. Termination of Parental Rights

[2] Termination of parental rights proceedings are conducted in two phases: (1) the adjudication phase which is governed by N.C.G.S. § 7B-1109 and (2) the disposition phase which is governed by N.C.G.S. § 7B-1110. *See In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614-15 (1997); *In re Brim*, 139 N.C. App. 733, 738, 535 S.E.2d 367, 370 (2000). During adjudication, the petitioner has the burden of proof by clear, cogent, and convincing evidence that one or more of the statutory grounds set forth in N.C.G.S. § 7B-1111 for termination exists. *See* N.C. Gen. Stat. § 7B-1109(e)-(f) (1999). The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If petitioner meets its burden of proof that grounds for termination are present, the trial court then moves to the disposition phase and must consider whether termination is in the best interests of the child. *See* N.C. Gen. Stat. § 7B-1110(a) (1999); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). The trial court has discretion, if it finds by clear, cogent, and convincing evidence that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the best interests of the child. *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910. The trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *Brim*, 139 N.C. App. at 744, 535 S.E.2d at 373.

Respondent assigns error to certain findings of fact and conclusions of law by the trial court arguing that they are not supported by clear, cogent, and convincing evidence. In the present case, the trial court found all three of the statutory grounds for termination. *See* N.C. Gen. Stat. § 1111(a)(1)-(3) (1999).

We begin our analysis with subdivision (2), which requires a showing by petitioner that respondent has failed to make "reasonable progress under the circumstances . . . within twelve (12) months in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2). It is undisputed that the children have been in foster care over twelve months. At the time of the termination hearing, Mason and Kristopher had been in foster care for thirty-six months and Kaiden had been in foster care for twenty-seven months. This Court must determine whether there is clear, cogent, and convincing evidence to support the trial court's finding that respondent has failed to make reasonable progress in correcting the conditions which led to the removal of the children.

It is unclear from the record the specific conditions which led to the removal of Mason and Kristopher, due to the failure to include in the record the order adjudicating the children neglected. The record does indicate that the major concerns of DSS were the presence of substance abuse and domestic violence. The order adjudicating Kaiden a neglected and dependent juvenile cites substance abuse by respondent.

Respondent does not dispute the following findings of the trial court:

> 8. That on May 12, 1998, the mother was taken to the Transylvania Community Hospital for the purpose of taking a drug test . . . the mother refused to take a drug test, admitting to Social Worker Noreda Moody that she had been using crack cocaine.
>
> . . . .
>
> 11. [t]hat mother has admitted using drugs with the father as recently as November 1998.
>
> . . . .
>
> 17. That the mother has continued to have problems with controlled substances from and since the time that the juvenile has been in the custody of the Department of Social Services and has had positive tests for cocaine and marijuana.

There is evidence in the record to support these findings and we conclude that this evidence was clear, cogent, and convincing. *See 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). This assignment of error is overruled. Because we hold that termination was proper pursuant to subsection (2) of N.C.G.S. § 7B-1111(a), it is unnecessary to address respondent's assignments of error relating to the other two subsections of the statute. *See Huff*, 140 N.C. App. at 293, 536 S.E.2d at 842.

V. Best Interests of the Children

[3] Respondent contends that the trial court abused its discretion in finding that it would be in the best interests of the children to terminate her parental rights by shifting the burden of proof to respondent and not exercising its discretion.

After the trial court has found by clear, cogent, and convincing evidence that grounds exist for terminating parental rights, N.C.G.S. § 7B-1111, the trial court is required to determine if it is in the best interests of the child that parental rights be terminated. *See* N.C. Gen. Stat. § 7B-1110(a); *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910 (citing *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984)). There is no burden of proof on either party at this point in the proceeding and no presumption arises upon a section 7B-1111 finding. *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910. This determination of best interests is more in the nature of an inquisition, with the trial court having the obligation to secure whatever evidence, if any, it deems necessary to make this decision. Either party may offer any relevant evidence. *Id.*

In this case, the trial court conducted both phases of the termination proceeding. However, the trial court erroneously shifted the burden of proof as to the best interests of the children to the respondent.

After finding that one or more grounds exists for termination under N.C.G.S. § 7B-1111(a), the trial court asked if there was any additional evidence to be heard. The attorney for the Guardian ad Litem stated:

> Your Honor, I think the statute reads that if you find the grounds then the burden shifts to the respondent mother to show why it's not in their best interest. And if the Court hears none it's deemed

to be in their best interest, so there's no burden on the guardian or the DSS.

The trial court replied:

I think that's generally the way the statute reads. As to the disposition phase, is there any additional evidence on the part of respondent mother?

Attorney for respondent replied:

No.

It is reasonable to construe the comments of the trial court to indicate it believed there arose, upon a finding of a section 7B-1111 ground, a presumption that termination was in the best interests of the children, the respondent was required to rebut this presumption with some evidence, and if she failed to present any such evidence, a termination order would be entered. Thus, the dispositional order must be vacated and this case remanded for a new dispositional hearing. At the new dispositional hearing, because new circumstances may have arisen affecting the best interests of the children since the entry of the first dispositional order, the parties may present new evidence.

Affirmed in part, reversed in part and remanded.

Judge GREENE concurs.

Judge HUNTER concurs in part and dissents in part.

HUNTER, Judge, concurs in part and dissents in part.

I concur with the majority as to issues one and two, but because I would hold that the trial court did not err in determining the best interests of the children, I dissent as to issue three, addressed in part V of the majority opinion. I would affirm the trial court's order in all respects.

The majority determines that the trial court placed an improper burden of proof on respondent during the disposition stage, and that the trial court failed to exercise its discretion in determining whether termination would be in the best interests of the children. The majority evidently bases these conclusions on the fact that the attorney for the guardian ad litem, Ms. Fosmire, told the trial court it was her

understanding that if the trial court found grounds for termination, respondent then carries the burden of showing why termination is not in the children's best interests, and if respondent cannot carry this burden, the trial court must terminate respondent's parental rights.

Indeed, "there is no burden of proof at disposition. The court solely considers the best interests of the child." *In re Dexter*, 147 N.C. App. 110, 114, 553 S.E.2d 922, 924 (2001). N.C. Gen. Stat. § 7B-1110(a) (1999) sets forth the proper procedure for the disposition stage, providing that:

> Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated.

N.C. Gen. Stat. § 7B-1110(a).

In this case, the record reflects the trial court followed the requirements of the statute. After determining that grounds for termination had been established, the trial court allowed for the introduction of further evidence, which was clearly permissible. *See, e.g., In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001). Neither party presented further evidence, and the trial court then made a determination that the children's best interests would be served by terminating respondent's parental rights. This determination was properly entered in the trial court's orders as its conclusion of law number four:

> It is in the best interests of the juvenile[s] that the parental rights of the mother be terminated and that [their] custody be and remain in and with the Transylvania County Department of Social Services pending further Orders herein.

The majority supports its decision by emphasizing that the trial court responded to Ms. Fosmire that the statute was "generally" the way she described. However, such vague a statement does not amount to conclusive proof that the trial court (1) placed any improper burden on respondent; or (2) wholly failed to realize that it was within its discretion to find that termination would not serve the best interests of the children regardless of whether the grounds for termination had been met or whether respondent presented further

evidence during disposition. In termination of parental rights cases, as in other cases, "[t]he presumption is in favor of the correctness of the proceedings in the trial court, . . . and the burden is on the appellant to show error." *In re Moore*, 306 N.C. 394, 403, 293 S.E.2d 127, 132, *reh'g denied*, 306 N.C. 565, —— S.E.2d —— (1982).

The record itself is clear that the trial court appropriately gave the parties an opportunity to present any further evidence during disposition, and thereafter entered a finding determining what the court believed to be in the children's best interests, in accordance with N.C. Gen. Stat. § 7B-1110(a). The record fails to show, and respondent has failed to prove, any error in the trial court's actions. Accordingly, I would affirm the trial court's orders.

CAROLYN BOLES, PLAINTIFF v. U.S. AIR, INC., DEFENDANT, SELF-INSURED (ALEXIS, INC., SERVICING AGENT)

No. COA01-61

(Filed 5 February 2002)

1. Workers' Compensation— continued temporary total disability—doctor's opinion testimony

The full Industrial Commission did not err in a workers' compensation case by awarding continued temporary total disability compensation to plaintiff based on its reliance on one doctor's opinion testimony concerning plaintiff's pain which relied on plaintiff's perception of pain to determine that plaintiff was unable to return to work as a reservationist even though three other doctors thought plaintiff was able to work, because: (1) there was competent evidence from the testimony of both the one doctor and from plaintiff's own testimony supporting this finding; and (2) The Court of Appeals has previously held that an employee's own testimony as to pain and ability to work is competent evidence as to the employee's ability to work.

2. Workers' Compensation— continued medical treatment by treating physician—motion to change treating physician

The full Industrial Commission did not abuse its discretion in a workers' compensation case by awarding continued medical treatment from plaintiff's treating physician and by denying defendant's motion to change plaintiff's treating physician,

because although the testimony of two other doctors was that their evaluation and opinion of proper treatment methods differed from the treatment provided by plaintiff's treating physician, there has been no evidence that the treating physician is not a competent physician.

Appeal by defendant from opinion and award entered 18 September 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 November 2001.

Walden & Walden, by Daniel S. Walden and Margaret D. Walden, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Daniel C. Pope, Jr., and Kimberley A. D'Arruda, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from an opinion and award of the North Carolina Industrial Commission (hereinafter "Commission") awarding plaintiff continuing benefits. Evidence before the Commission tended to show that plaintiff, Carolyn Boles, was employed by defendant, U.S. Air, Inc. (now U.S. Airways, Inc.) as a reservation sales agent (reservationist), providing booking and flight information to the public by telephone. Her job required her to sit at a computer keyboard throughout the workday keying in the necessary information. This work not only physically required her to use both hands repetitively, but cognitively required concentration, memory, and attention to detail. On 7 March 1991, plaintiff tripped and fell on a curb outside her office building as she was going into work. From the fall, plaintiff sustained a back injury manifested by chronic incapacitating neck, left shoulder, and left arm pain. Because plaintiff's symptoms did not significantly improve with conservative treatment (cervical traction, anti-inflammatory medications, and physical therapy), on 21 May 1992, she was examined by Dr. Curling, a neurosurgeon. Dr. Curling testified that an MRI revealed a large spur and associated disk bulge at C5-C6 and that he advised plaintiff to undergo a cervical discectomy at C5-C6 and an iliac crest interbody fusion at C5-C6. Dr. Curling performed this surgical procedure on 17 June 1992 and released plaintiff, without restrictions, on 24 September 1992 to return to work at U.S. Air, Inc., starting on half days for the first two weeks and then working up to whole days.

At the end of September 1992 the Commission approved the parties' Form 21 "Agreement for Compensation for Disability" wherein

defendant accepted plaintiff's injury by accident resulting in an "HNP [at] C5-C6." Additionally, the Commission approved several Form 26 Agreements for temporary total disability of various weeks (not continuous) in 1991 and 1992. In December 1992, Dr. Curling found plaintiff at maximum medical improvement (MMI) and rated her at approximately 10 percent permanent partial disability and released her from his care. Dr. Curling noted that plaintiff was having minimal neck discomfort but that plaintiff had returned to work and was doing her usual job without significant difficulty. On 25 February 1993, the Commission approved the parties' Form 26 "Supplemental Memorandum of Agreement as to Payment of Compensation" for a 10 percent permanent partial disability to the back (for 30 weeks of benefits at the rate of $306.42 per week from 10 December 1992 pursuant to G.S. § 97-31).

On 10 February 1993, plaintiff was again seen by Dr. Curling, complaining of recurrent pain in the neck and left arm. Dr. Curling stated in a letter to plaintiff that her pain was caused by nerve injury and recommended that plaintiff take Elavil for her recurrent neck and arm pain. On 23 August 1993, plaintiff called Dr. Curling indicating that she was having problems with depression and was feeling suicidal and asked that he write a letter giving her permission to stay out of work for two to three weeks so that she could "get her act together." Dr. Curling recommended that plaintiff go to the emergency room and undergo a psychiatric evaluation, contact her family physician, or schedule an appointment with a psychiatrist as soon as possible.

On 23 September 1993, plaintiff's psychiatrist, Dr. Branham, diagnosed plaintiff with major depression and wrote, "[a]t the present time I feel that it would be totally necessary for [plaintiff] to have the least amount of stress possible and since work is a major stress on her life I think she should be held out of work until further notice." Dr. Branham noted that since 7 March 1991, plaintiff had a history of feeling futile, hopeless, and tearful about her chronic pain. Dr. Branham also noted that she had problems sleeping, concentration and memory difficulties, and a loss of interest in daily and family activities. He prescribed chemotherapeutic intervention with antidepressant medication. Following this diagnosis, plaintiff regularly returned to Dr. Branham for treatment.

On 19 July 1994, Dr. Branham indicated in a letter to defendant that "[d]ue to depression, the concentration, physical stamina, memory, and ability to withstand stress have all been eroded to such a

degree that [plaintiff] is unable to work." During Dr. Branham's 1995 deposition, he stated that plaintiff could not return to work because of her pain, her memory and concentration deficits, which he noted were two symptoms of depression, and her difficulty relating to other people. During his 1998 deposition, Dr. Branham testified that he had never considered return to work as a goal, but that plaintiff no longer suffered from impaired memory or cognitive abilities, nor did she have difficulty with interpersonal relations. In the 1998 deposition, Dr. Branham testified that he thought that plaintiff was unable to return to work because she suffers from chronic pain syndrome and intermittent depression.

On 15 March 1994, plaintiff filed a motion pursuant to G.S. § 97-47, alleging she had a change in condition, and moved for additional compensation. She alleged that as a result of increased neck pain and depression, she had been unable to work since 28 September 1993. She also moved, pursuant to G.S. § 97-25, for approval of further medical treatment by Dr. Branham.

On 28 June 1994, after reviewing the results of a functional capacity evaluation, Dr. Curling indicated that plaintiff could return to work on a light-demand level. Additionally, Dr. Curling stated that in his opinion plaintiff was capable of returning to work as a reservations agent.

Plaintiff was sent by defendant for a second opinion and psychological testing to clinical psychologist John F. Warren, III. In September 1994, Dr. Warren tested plaintiff's memory and concentration using the Wechsler Memory Scale-Revised and found that her general memory and verbal memory scores fell within the Superior range. In addition, plaintiff's visual memory, attention/concentration, and delayed recall index scores fell within the Average range. From these test results, Dr. Warren indicated there were no signs of severe memory problems that would cause plaintiff difficulty in terms of trying to attend to the affairs of daily living or work. Plaintiff was also administered the Booklet Category Test (BCT), which is a comprehensive, cognitive screening test designed to evaluate for the presence of cerebral dysfunction. Plaintiff performed within the Average range which suggests "that her non-verbal abstract reasoning and logical analysis skills are adequate for making most decisions required for organized planning and practical, everyday living and working situations." Dr. Warren recommended limited mental health intervention with goals and plans, as opposed to a more traditional, open-ended analytic or dynamic mental health treatment.

In February 1997, Dr. Jones evaluated plaintiff upon defendant's request that he provide a second opinion to clarify plaintiff's psychiatric condition, as well as make recommendations regarding her ability to return to work. At the time of the evaluation, Dr. Jones felt that plaintiff's depressive disorder was in remission. Dr. Jones did not find any impairments that would keep plaintiff from being capable of performing tasks required in the reservationist position. Dr. Jones opined that treatment with specific benchmarks would be more appropriate than Dr. Branham's open-ended treatment program.

During the hearing, plaintiff admitted that she was aware that Dr. Branham was the only physician that she had seen since 1993 who is continuing to excuse her from work as a reservationist. Plaintiff also testified that she did not feel that she was capable of performing her job as reservationist because she was in so much pain that it caused her to have impaired memory and cognitive ability. Plaintiff further testified that she has not attempted to perform the actual job of reservationist since September 1993.

On 25 January 1995 a deputy commissioner heard plaintiff's G.S. § 97-47 motion to reopen her claim by reason of a change in condition for the worse, and her G.S. § 97-25 motion for Commission approval of Dr. Branham and Dr. Rauck. On 5 May 1995, the deputy commissioner ruled that plaintiff had sustained a substantial change for the worse in her condition from the 7 March 1991 back injury resulting in her becoming totally disabled by the same injury on 24 September 1993. Plaintiff was awarded compensation at a rate of $306.42 per week from 24 September 1993 to the scheduled hearing date and continuing thereafter at the same rate for so long as she remains totally disabled. The deputy commissioner also ruled that defendant shall pay all reasonable and necessary medical expenses incurred by plaintiff as a result of her substantial change of condition, including continued psychiatric treatment provided by Dr. Branham and any other treatment he may reasonably recommend that would tend to reduce her chronic incapacitating pain such as a return to the pain clinic. Neither party appealed from the deputy commissioner's opinion and award.

On 7 April 1997, defendant filed a Form 24 "Application to Terminate Payment of Compensation", alleging that plaintiff had unjustifiably refused the employer's offer of suitable employment (as reservations agent) on 14 March 1997. The matter was heard by a deputy commissioner who ruled that plaintiff was justified in refus-

ing the job offer under G.S. § 97-32, that plaintiff remains totally disabled as a result of her 7 March 1991 compensable injury and is entitled to continuing compensation under G.S. § 97-29, and that Dr. Branham remain the treating physician under G.S. § 97-25. Defendant appealed to the Full Commission which modified and affirmed the decision of the deputy commissioner and ordered defendant to continue to pay compensation to plaintiff for temporary total disability, and to continue to pay for her medical treatment, including that provided by Dr. Branham. Defendant appeals.

I.

[1] Defendant first contends that there is no competent evidence to support the Commission's finding of fact that plaintiff remains disabled and therefore, the Commission erred in awarding continued temporary total disability compensation to plaintiff. Defendant specifically assigns error to the following Commission's findings of fact: ". . . Dr. Branham maintains that plaintiff cannot return to work at this time, and remains totally disabled" and "[b]ased upon the restrictions on plaintiff's return to work imposed by [Dr. Branham], the job of reservation agent was not suitable employment and plaintiff's refusal to accept the job of reservation agent offered by defendant on 14 March 1997, was justified."

At the outset, "[t]he standard of review for an appeal from an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). If there is competent evidence to support the findings, they are conclusive on appeal even though there is evidence to support contrary findings. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 484 S.E.2d 853, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). However, ". . . findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). We also emphasize that " '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Dolbow v. Holland Industrial, Inc.*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983) (quoting *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984).

"Thus, the Commission may assign more weight and credibility to certain testimony than other." *Id.* at 697, 308 S.E.2d at 336. *See also Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998).

Defendant argues that the Commission improperly relied on Dr. Branham's testimony in its determination that plaintiff remains totally disabled. Defendant specifically argues that Dr. Branham's opinion testimony is speculative and therefore incompetent evidence. Defendant notes that in 1993, Dr. Branham wrote plaintiff out of work to reduce stress, testified in 1995 that plaintiff was unable to work due to pain, impaired mental and cognitive abilities, and difficulty relating to other people, and testified in 1998 that plaintiff's impaired mental and cognitive abilities and plaintiff's difficulty with interpersonal relationships had resolved but that she was still unable to return to work due to pain and intermittent depression. Defendant argues that Dr. Branham's 1995 testimony that pain was largely a function of plaintiff's anatomical problem with which Dr. Curling was more familiar was inconsistent with his 1998 testimony that plaintiff is unable to perform as a reservationist because of the concentration and agility of movement required and because using the left arm could increase her pain. Defendant points out that Dr. Branham testified there were no tests to measure pain and therefore, defendant asserts Dr. Branham must be relying on plaintiff's perception of pain to determine when plaintiff can return to work.

There was competent evidence, from the testimony of Dr. Branham and from plaintiff's own testimony, supporting the Commission's finding that plaintiff continues to be totally disabled. This Court has previously held that an employee's own testimony as to pain and ability to work is competent evidence as to the employee's ability to work. *See Matthews v. Petroleum Tank Service, Inc.* 108 N.C. App. 259, 423 S.E.2d 532 (1992) (employee's own testimony concerning level of pain he suffered was competent evidence as to his ability to work); *Niple v. Seawell Realty & Indus. Co.*, 88 N.C. App. 136, 362 S.E.2d 572 (1987), (employee's own testimony as to pain upon physical exertion competent evidence as to her ability to work), *disc. review denied*, 321 N.C. 744, 365 S.E.2d 903 (1988). Plaintiff testified that she believes that she is unable to handle calls as a reservationist because one must keep a lot of information in memory, it is stressful, and ". . . with the pain that I've got, I cannot think at times . . . . I have constant pain, and . . . when the pain overwhelms me, I am not able to keep my thoughts in line . . . [and] at times, [] I totally go blank." She further stated, ". . . I probably could

do this job for two or three hours. But then . . . I'd be in bed after that . . . ." Plaintiff occasionally works out in her yard, which entails driving a lawn tractor and pushing a fertilizer spreader, but plaintiff explained that the reservationist position is more mentally demanding and she is only able to work in her yard on her good days which are rare. Thus, we conclude that there is competent evidence supporting the Commission's finding that plaintiff remains totally disabled.

Defendant argues, however, that there was competent medical evidence upon which the Industrial Commission could have relied to conclude that plaintiff is able to return to work. Defendant points out that Dr. Branham is the only doctor who currently claims plaintiff is unable to work. Dr. Curling released plaintiff from a physical standpoint and Dr. Warren and Dr. Jones released plaintiff from a psychological standpoint. Defendant also points out that unlike Dr. Branham, Dr. Warren and Dr. Jones relied on objective testing of plaintiff's abilities and deferred to Dr. Curling's assessment of her physical pain. Dr. Jones found that plaintiff's depressive disorder was in remission and he did not find any impairments that would keep plaintiff from being capable of working as a reservationist. That there may be competent evidence supporting a finding that plaintiff does not remain totally disabled, however, is not dispositive since the issue before us is whether there is any competent evidence in the record supporting the Commission's finding that plaintiff remains totally disabled. *See Goff*, 140 N.C. App. at 132, 535 S.E.2d at 604. If so, the Commission's findings are conclusive on appeal even though there is evidence to support contrary findings. *Hedrick*, 126 N.C. App. at 357, 484 S.E.2d at 856. Since there was competent evidence supporting the Commission's finding that plaintiff continues to be totally disabled, we hold that the Commission did not err in awarding continued temporary total disability compensation to plaintiff.

II.

[2] Defendant next argues the Commission abused its discretion in awarding continued medical treatment by Dr. Branham and denying defendant's motion to change plaintiff's treating physician. G.S. § 97-25 provides that ". . . an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of [her] case, subject to the approval of the Industrial Commission." "The unambiguous language of this statute, thus, leaves the approval of a physician within the discretion of the Commission and the Commission's determination may only be

reversed upon a finding of a manifest abuse of discretion." *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 207, 472 S.E.2d 382, 387, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). An " '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Long v. Harris*, 137 N.C. App. 461, 465, 528 S.E.2d 633, 635 (2000) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Though Dr. Warren and Dr. Jones both testified that their evaluation and opinion of proper treatment methods differed from the treatment provided plaintiff by Dr. Branham, there has been no evidence that Dr. Branham is not a competent physician. Thus, the Commission's decision to allow Dr. Branham to be plaintiff's treating physician is not manifestly unsupported by reason and we hold the Commission did not abuse its discretion by failing to remove him.

Affirmed.

Chief Judge EAGLES and Judge BIGGS concur.

IN THE MATTER OF THE ESTATE OF PEGGY FAIRLEY ANDERSON, DECEASED

No. COA01-143

(Filed 5 February 2002)

1. Estates— revocation of letters of administration—summary judgment

The trial court should not have granted summary judgment for petitioner (McRae) in an action to revoke letters of administration issued to respondent (Anderson) for the estate of Fairley where Fairley first married McRae, told him that she was divorcing him but apparently never did so, and subsequently married Anderson, and McRae subsequently remarried. The parties presented conflicting evidence about whether McRae's acts were knowing and whether they were condoned by Fairley, which bore on whether McRae would be barred from recovering from the estate as a surviving spouse and therefore on whether McRae lacked standing.

2. Estates— qualification of administrator—standing to assert estoppel

The administrator of an estate (Anderson) did not have standing to assert estoppel against a petitioner (McRae) seeking to have Anderson's letters of administration revoked where the decedent (Fairley) had been married to both. The action involved Anderson's qualification as administrator rather than Fairley's interests, and Anderson lacks the necessary privity to argue that McRae's subsequent second marriage bars McRae from challenging Fairley's second marriage (to Anderson.)

Judge CAMPBELL dissenting.

Appeal by petitioner Ernest McRae from order filed 4 October 2000 by Judge William H. Helms in Richmond County Superior Court. Heard in the Court of Appeals 27 November 2001.

Donaldson & Black, P.A., by Arthur J. Donaldson and Rachel Scott Decker, for petitioner-appellant.

Sharpe & Buckner, PLLC, by Richard G. Buckner, for respondent-appellee.

No brief filed for pro se respondent children.

GREENE, Judge.

Petitioner Ernest McRae (McRae) appeals an order filed 4 October 2000 granting summary judgment in favor of respondent Alforence Anderson (Anderson).

On 11 December 1997, McRae filed a petition to revoke the letters of administration issued to Anderson as the administrator of the estate of Peggy Fairley Anderson (Fairley) and to request the appointment of a suitable administrator to take Anderson's place. The petition asserts McRae married Fairley on 22 June 1962 and at no time prior to Fairley's death on 3 September 1991 did McRae and Fairley obtain a divorce. While McRae acknowledges in his petition that Fairley and Anderson participated in a wedding ceremony on 10 September 1965, McRae contends this marriage is void.

An order to show cause filed 11 December 1997 was issued to Anderson by the Clerk of Superior Court of Richmond County (the clerk). Anderson filed a response on 10 March 1998 challenging McRae on the grounds of standing under N.C. Gen. Stat. § 31A-1 and estoppel. In his answer to McRae's request for admissions filed 4 May

1998, Anderson denied any knowledge of McRae's marriage to Fairley until after Fairley's funeral when Anderson was presented with a marriage certificate proving the marriage. Anderson's answer further stated: Fairley had five children when Anderson married her; three more children were born in the years following the marriage ceremony of Anderson and Fairley; and Anderson and Fairley lived together as husband and wife for twenty-six years, until Fairley's death.

In a deposition on 10 February 1999, McRae testified that sometime after their marriage in 1962, Fairley told McRae she was going to divorce him but that he never received any court documents evidencing such a divorce. Believing nevertheless that Fairley had divorced him, McRae entered into a marriage ceremony with Doris McDonald (McDonald) on 13 August 1966. McDonald subsequently divorced McRae because she found out McRae was still married to Fairley. For the last twenty-five to thirty years, McRae has filed his tax returns as a single person. McRae admitted to having heard rumors over the years that he was still married to Fairley, but he never asked Fairley whether or not they were divorced.

By order of the clerk filed 7 September 1999, the matter was transferred to the superior court for trial by jury pursuant to N.C. Gen. Stat. § 1-174 and § 1-273(a) (repealed 1999). *See Burke v. Harrington*, 35 N.C. App. 558, 559-60, 241 S.E.2d 715, 716-17 (1978) (cause of action must be transferred to superior court pursuant to N.C. Gen. Stat. § 1-174 for jury determination of factual issues). Anderson filed a motion for summary judgment on 13 September 2000. The trial court granted Anderson's motion in its October 4 order, thereby dismissing McRae's petition.

The issues are whether: (I) there are genuine issues of material fact as to whether McRae lacked standing under N.C. Gen. Stat. § 31A-1 to petition the superior court for relief; and (II) Anderson had standing to raise the issue of quasi-estoppel as a bar to McRae's challenge of the validity of Anderson's marriage to Fairley.

I

N.C. Gen. Stat. § 31A-1

[1] Anderson successfully argued to the trial court that under N.C. Gen. Stat. § 31A-1 McRae would be barred from recovering from Fairley's estate as a surviving spouse and therefore lacked standing

as a real party in interest to petition the superior court to remove Anderson as the administrator of Fairley's estate. Only a real party in interest has the legal right to maintain a cause of action. N.C.G.S. § 1-57 (1999); *see Crowell v. Chapman*, 306 N.C. 540, 544, 293 S.E.2d 767, 770 (1982). A real party in interest is one "who is benefit[t]ed or injured by the judgment in a case." *Parnell v. Nationwide Mut. Ins. Co.*, 263 N.C. 445, 448, 139 S.E.2d 723, 726 (1965). Section 31A-1 bars the rights of a spouse who engages in certain conduct, including the following: (1) the spouse "voluntarily separates from the other spouse and lives in adultery and such has not been condoned," N.C.G.S. § 31A-1(a)(2) (1999); (2) the spouse "willfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death," N.C.G.S. § 31A-1(a)(3) (1999); or (3) the spouse "knowingly contracts a bigamous marriage," N.C.G.S. § 31A-1(a)(5) (1999). There is no evidence in the record, McRae "willfully or without just cause" abandoned Fairley, leaving this Court to consider the remaining two actions alleged by Anderson.

As to section 31A-1(a)(2), which bars a spouse who "voluntarily separates from the other spouse and lives in adultery and such has not been condoned," the critical element appears to be whether Fairley "condoned" McRae's conduct. Condonation is defined as the "implied forgiveness" of an "offense." *Black's Law Dictionary* 295 (6th ed. 1990). If Fairley indeed never sought a divorce, her marriage to Anderson could reasonably be construed as condonation of any equivalent conduct by McRae. Anderson, on the other hand, contends Fairley never knew of McRae's marriage to McDonald and thus there could not have been any condonation. In respect to section 31A-1(a)(5), barring a spouse who "knowingly contracts a bigamous marriage," McRae asserts he believed Fairley had divorced him and only became suspicious upon hearing rumors years later. Consequently, McRae claims his actions were not committed "knowingly." Because the parties presented conflicting evidence dealing with subjective feelings and intent, i.e. whether McRae's acts were knowing and condoned by Fairley, summary judgment based on the operation of section 31A-1 was not proper. *See Creech v. Melnik*, 347 N.C. 520, 530, 495 S.E.2d 907, 913 (1998) (summary judgment "inappropriate where issues such as motive, intent, and other subjective feelings and reactions are material and where the evidence is subject to conflicting interpretations"); *see also* N.C.G.S. § 1A-1, Rule 56(c) (1999) (summary judgment inappropriate where genuine issues of material fact exist).

II

Estoppel

[2] Anderson further argues summary judgment was proper because McRae's prior conduct estops him from attacking the validity of Anderson's marriage to Fairley. North Carolina courts presume the validity of a second marriage unless " 'the contrary [is] proved.' " *Ivory v. Greer Bros., Inc.*, 45 N.C. App. 455, 459, 263 S.E.2d 290, 293 (1980) (quoting *Kearney v. Thomas*, 225 N.C. 156, 164, 33 S.E.2d 871, 877 (1945)). The burden to disprove the validity of the second marriage rests on the attacking party. *Id.* A party, however, may be barred under quasi-estoppel from such an attack if the "attack . . . is inconsistent with [his or her] prior conduct." *Mayer v. Mayer*, 66 N.C. App. 522, 533, 311 S.E.2d 659, 667, *disc. review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984) (citing Homer Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 Yale L.J. 45, 56 (1960)). This is so " 'regardless of whether the person [attacked] had actually relied upon that conduct.' " *Taylor v. Taylor*, 321 N.C. 244, 249, 362 S.E.2d 542, 546 (1987) (citation omitted). Failure of a person to obtain a copy of a divorce judgment prior to entering into a second marriage constitutes culpable negligence, barring that person under quasi-estoppel from assuming a legal position inconsistent with such previous negligence. *Lane v. Lane*, 115 N.C. App. 446, 452, 445 S.E.2d 70, 73 (citing *Redfern v. Redfern*, 49 N.C. App. 94, 97, 270 S.E.2d 606, 608-09 (1980)) (plaintiff estopped from challenging validity of second marriage where she was culpably negligent in not obtaining a copy of the divorce judgment before remarrying), *disc. review denied*, 338 N.C. 311, 452 S.E.2d 311 (1994).

But in order for a party to have standing to raise the issue of estoppel, the asserted estoppel must be "mutual and reciprocal." 28 Am. Jur. 2d *Estoppel and Waiver* § 115 (1966). According to the principle of mutuality, "an estoppel operates neither in favor of, nor against, strangers—that is persons who are neither parties nor privies to the transaction out of which the estoppel arose." *Id.*; *see Bank v. Rich*, 256 N.C. 324, 329, 123 S.E.2d 811, 815 (1962) (estoppel does not bind strangers). The administrator of an estate is recognized as standing in such privity with the decedent, as her personal representative, that an estoppel that would have operated for or on the decedent can be asserted by or against the administrator. *See* 28 Am. Jur. 2d *Estoppel and Waiver* § 121.

In this case, Anderson argues McRae's subsequent marriage to McDonald, which McRae entered into without obtaining a divorce

judgment for his marriage to Fairley, bars McRae from challenging Anderson's marriage to Fairley. Anderson, however, has no standing to raise this issue since the case at hand involves the preliminary consideration of Anderson's qualification as administrator of Fairley's estate, not a representation of Fairley's interests by the administrator of her estate. In defending his own status, Anderson did not step "in the shoes of" the decedent, *Cheshire v. First Presbyterian Church*, 225 N.C. 165, 168, 33 S.E.2d 866, 867 (1945), and thus attain the privity required to argue estoppel, *Rich*, 256 N.C. at 329, 123 S.E.2d at 815. For the purposes of this proceeding, Anderson remained a stranger to the marriage between McRae and Fairley and McRae's and Fairley's subsequent conduct in relation to this marriage and thus did not have standing to assert estoppel against McRae.[1]

Summary

In conclusion, the trial court erred in granting summary judgment to Anderson because there were genuine issues of material fact as to the issue of McRae's standing under section 31A-1. The trial court also erred in its grant of summary judgment to Anderson on the basis of estoppel because Anderson lacked standing to raise this issue. We therefore remand this case to the trial court for trial on the merits pursuant to section I of this opinion and for entry of summary judgment in favor of McRae on the issue of estoppel under section II, *see* N.C.G.S. § 1A-1, Rule 56(c) (summary judgment proper if there is no genuine issue of material fact and "any party is entitled to a judgment as a matter of law").

Reversed and remanded.

Judge McCULLOUGH concurs.

Judge CAMPBELL dissents.

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1. In *In re Estate of Hanner*, 146 N.C. App. 733, 554 S.E.2d 673 (2001), this Court found that the children of the deceased father could properly attack the validity of their father's marriage to the petitioner who had been married before but whose divorce decree from her previous marriage appeared to be flawed. This Court held that the children had failed to overcome the burden of disproving the validity of the petitioner's second marriage to the father and ruled in favor of the petitioner. *Id.* As noted above, an attack on the validity of a second marriage can be barred under the theory of estoppel if raised by a party with the requisite privity. *See* 28 Am. Jur. 2d *Estoppel and Waiver* § 115. The issue of privity, however, was not raised in *Hanner* because the facts did not support an argument of estoppel. If they had, the children in *Hanner* would have had to show privity as required of Anderson in this case.

CAMPBELL, Judge, dissenting.

This is a proceeding pursuant to N.C. Gen. Stat. § 28A-9-1 to have respondent Anderson removed as administrator of the estate of Peggy Fairley Anderson. On 11 December 1997, petitioner McRae filed a motion to revoke the letters of administration issued to Anderson and to request the appointment of a suitable successor administrator.

The clerk of superior court issued an order to respondent Anderson to show cause why his letters of administration should not be revoked. Anderson filed a response on 10 March 1998 challenging McRae's petition on the grounds of standing, estoppel, laches, and the statute of limitations. By order of the clerk filed 7 September 1999, the matter was transferred to the civil issue docket of superior court for trial of the factual issues pursuant to N.C. Gen. Stat. § 1-174 and § 1-273(a) (repealed and replaced by N.C. Gen. Stat. § 1-301.1 to § 1-301.3, effective 1 Jan. 2000).

On 13 September 2000, respondent Anderson filed a motion for summary judgment, claiming there were no genuine issues of material fact and that he was entitled to judgment as a matter of law. The trial court granted respondent's motion for summary judgment by order entered 4 October 2000, and dismissed McRae's petition to revoke Anderson's letters of administration. The majority opinion concludes that the trial court erred in granting summary judgment to Anderson because there were genuine issues of material fact as to the issue of McRae's standing to bring the petition, and Anderson lacked proper standing to raise the issue of estoppel. Accordingly, the majority opinion remands the matter to superior court for trial on the merits of the issue of standing, and directs entry of summary judgment in favor of McRae on the issue of estoppel.

I respectfully dissent from the majority opinion for I conclude that the trial court did not have subject matter jurisdiction to enter summary judgment on the merits of McRae's petition to revoke Anderson's letters of administration. Therefore, I would vacate the trial court's summary judgment order and remand this matter to superior court for a jury trial on the factual issues presented by McRae's petition.[2] When these factual issues have been determined by the

2. At this stage of a proceeding to revoke letters of administration, the function of the superior court is simply to supervise the jury trial of any issues of fact that are presented by the petition to revoke and have been properly transferred to superior court by the clerk. This role is different from determining whether there are genuine issues of material fact related to the legal question presented by the petition—whether

jury, the matter is to be remanded to the clerk of superior court for determination of the legal question presented—whether Anderson's letters of administration should be revoked. The clerk's decision on this issue is then subject to appeal to superior court pursuant to N.C. Gen. Stat. § 28A-9-4.

The clerk of superior court has express authority under N.C.G.S. § 28A-9-1 (formerly N.C.G.S. § 28-32) "to revoke letters of administration which were improperly issued and to remove any administrator who has been guilty of default or misconduct in the execution of his office." *In re Estate of Lowther*, 271 N.C. 345, 347, 156 S.E.2d 693, 695 (1967). In *In re Estate of Lowther*, Justice Sharp, writing for the Court, examined the history of the clerk of superior court's authority as judge of probate, and clearly set forth the proper procedure to be followed in proceedings to revoke letters of administration. Most importantly, Justice Sharp concluded (1) that proceedings to repeal letters of administration must be commenced before the clerk who issued them in the first instance, and (2) that the superior court has no jurisdiction to appoint or remove an administrator. *Id.* at 354, 156 S.E.2d at 700. "In other words, jurisdiction in probate matters cannot be exercised by the judge of the Superior Court except upon appeal." *Id.*

The procedure that Justice Sharp held to be proper in proceedings of this sort was earlier set out by the Supreme Court in *Murrill v. Sandlin*, 86 N.C. 54 (1882), a proceeding to remove an administrator, in which the Court said:

> It is thus incumbent on the probate judge to make the inquiry, and ascertain for himself the facts upon which the legal discretion reposed in him to remove an incompetent or unfaithful officer, is to be exercised. The original authority to act is delegated to him alone, and he may require the whole issue made between the parties, or any specific question of fact, to be tried by a jury, under the supervision of the judge of the superior court. When these have been determined by the jury, the probate judge, with such supplemental findings of fact by himself as may be necessary, proceeds to decide the question of removal, subject to the right of either party to the contest to have the cause reheard upon appeal.

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the letters of administration at issue should be revoked. The superior court does not have jurisdiction at this point to make such a determination. *See In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967).

Id. at 55. The subsequent repeal of N.C.G.S. § 28-32 and its replacement by N.C.G.S. § 28A-9-1 does not alter the procedure that should be followed in a proceeding to revoke letters of administration.

Applying the principles reaffirmed by Justice Sharp's opinion in *In re Estate of Lowther*, the procedure that should have been followed upon the clerk's transfer of this matter to superior court was to have a jury trial on the factual issues presented by McRae's petition. The findings of fact determined by the jury should then have been submitted to the clerk for the clerk to make the initial legal determination of whether Anderson's letters of administration should be revoked. Thus, I would vacate the trial court's summary judgment order, and remand for proceedings consistent with the Supreme Court's decision in *In re Estate of Lowther.*

In addition, I note that the ultimate factual and legal determinations entered in the subsequent proceedings in this matter would not be res judicata in any other proceeding between the parties which petitioner McRae may be entitled to pursue.[3] *In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693; *Jones v. Palmer*, 215 N.C. 696, 2 S.E.2d 850 (1939).

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. COA00-1430-2

(Filed 5 February 2002)

1. Easements— withdrawal—easement appurtenant remaining

The trial court correctly determined that defendants' withdrawal of dedication of an easement did not extinguish plaintiff's rights to an easement where the original agreement dedicated the easement to the use of the general public and specifically dedicated the incorporeal right to use the easement to the owners of nearby lots. The court properly determined that the dedication as to the general public was properly withdrawn, but plaintiffs are

3. Specifically, the two actions which the record indicates McRae has already commenced against Anderson: (1) the partition proceeding in 97 SP 163, and (2) the action for wrongful distribution of proceeds and benefits in 97 CVS 1345.

owners of an easement appurtenant and have rights above and beyond those of the general public.

2. Easements— location—roadway as permanent monument—governs over course and distance

The trial court did not err by determining that plaintiffs had a right to ingress and egress over an easement from Belvedere Avenue in Charlotte where defendants argued that the 1930 easement fell short of Belvedere Avenue by thirty feet. The call in the 1930 agreement to the northerly edge of Belvedere Avenue governs over course and distance, and Belvedere Avenue is a sufficiently permanent monument upon which the court could base its conclusion that the easement must extend to the roadway as it exists today.

This opinion supersedes the previous opinion filed 4 December 2001.

Appeal by defendants from judgment entered 24 August 2000 by Judge Richard D. Boner in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 9 October 2001. An opinion affirming the order of the trial court was filed 4 December 2001. Defendants' Petition for Rehearing, filed 11 January 2002, was granted on 18 January 2002 and heard without additional briefs or oral argument. This opinion supersedes the previous opinion filed 4 December 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. —, 151 L. Ed. 2d 261 (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. Although plaintiffs' land does not adjoin the easement, the easement is, by definition, appurtenant. *See Brown*, 131 N.C. App. at 122, 505 S.E.2d at 324 ("[a]n easement appurtenant is a right to use the land of another, i.e., the servient estate, granted to one who also holds title to the land benefitted by the easement, i.e., the dominant estate" (citing Webster, *Real Estate Law in North Carolina* §§ 15-3, 15-4 (1994)).

"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.

In the instant case, the agreement not only dedicated the easement to the use of the general public, which dedication the trial court determined was properly withdrawn under N.C. Gen. Stat. § 136-96, but also dedicated specifically to the owners of various nearby lots the incorporeal right to use the easement. As in *Butler Drive*, plaintiffs are owners of an easement appurtenant, and thus have rights to the easement above and beyond those of the general public. The trial court correctly determined that defendants' Withdrawal of Dedication did not extinguish plaintiffs' rights to the easement appurtenant. This argument is therefore overruled.

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 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 nearby 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.

STATE OF NORTH CAROLINA v. KENTAY LAMARR LEE

No. COA00-1486

(Filed 5 February 2002)

1. **Confessions and Incriminating Statements— Miranda warnings—juvenile**

The waiver of rights form read to a juvenile charged with murder was sufficient to inform defendant of his rights where it clearly informed defendant that he had a right to an attorney before questioning began, there was nothing to indicate that defendant's Miranda warnings were conditioned on his willingness to be interrogated, defendant had been arrested before, and the detective testified that defendant was very willing to talk, was cocky about what he had done, and showed no remorse.

2. **Sentencing— life imprisonment—14 year old—not cruel and unusual**

A life sentence for a defendant convicted of murder who was 14 years old at the time of the crime was not cruel and unusual in the constitutional sense.

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

The short form indictment for first-degree murder was sufficient to confer jurisdiction on the trial court.

Appeal by defendant from judgment entered 7 July 2000 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 November 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas F. Moffitt, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

TYSON, Judge.

Kentay Lamarr Lee ("defendant") appeals the trial court's judgment and sentence of life imprisonment without parole. The trial court entered judgment after a jury verdict convicted defendant of first-degree murder based on premeditation and deliberation, and felony murder, and guilty of robbery with a dangerous weapon. We find no error.

I. Facts

On 31 December 1998, Edward Mingo ("Edward") and his brother William Mingo ("William") hosted a New Year's Eve party. Edward and William were both developmentally disabled and lived in separate apartments at Edwin Towers, a public owned residential complex for elderly and young adults with mental disabilities. William recruited people from the street to enlarge the party. William encountered two teenagers later identified as Terrence Henderson ("Henderson") and defendant and brought them to the party. The building's lobby video camera recorded William, defendant, and Henderson enter the building at 9:40 p.m. Defendant wore a dark-blue Carolina Panther's sweatshirt. Everyone at the party drank alcohol and listened to music. William testified that Edward appeared drunk.

William left the party a couple more times, once to buy more beer and again to invite some women back to the party. The lobby camera recorded William leaving at 10:25 p.m. and defendant and Henderson leaving six minutes later. William returned at 10:39 p.m. with more beer. William left again at 10:57 p.m. At 11:05 p.m., the camera recorded defendant, still wearing the blue Panther's sweatshirt, and Henderson standing outside the building next to the self-locking security doors. Defendant and Henderson slipped back into the building after a resident opened the doors as he was leaving. The camera recorded defendant and Henderson exit the building at 12:24 p.m.

Defendant was now wearing a leather jacket later identified as belonging to Edward.

On 2 January 1999, William walked to his brother's apartment to return his glasses. William noticed Edward's door was unlocked. William entered and found Edward dead, lying face down on the floor.

Officers entered the apartment and observed that the couch, living room wall, and floor were covered in blood. Detective Robert Buening ("Detective Buening") testified that the living room and bedroom had been ransacked, and that he saw various injuries on Edward's body. He collected a bloody hammer, covered with hair tissues and traces of scalp.

Dr. James Sullivan ("Dr. Sullivan") performed an autopsy on Edward's body. Dr. Sullivan recorded multiple trauma injuries, including: three cutting wounds, six lacerations or gashes on the head, bruising across the forehead, and approximately twelve other cutting wounds on his back, chest, arm pit, and leg. Dr. Sullivan opined that these trauma injuries, probably resulting from a box cutter and a hammer, caused Edward's death.

The police arrested and transported defendant and Henderson to the police station on 8 January 2000 at approximately 8:15 p.m. Both communicated a statement to police. Defendant was fourteen years old at the time of the crime.

Detective Buening testified that he read defendant his rights from the Charlotte-Mecklenburg Police Department's standard juvenile waiver of rights form ("waiver form") before questioning defendant about the murder. Detective Buening testified that defendant acknowledged that he understood his rights, and that defendant initialed each right listed on the waiver form.

Defendant was tried non-capitally on 26 June 2000. Defendant did not testify or offer evidence. The statements of defendant and Henderson were entered into evidence. Defendant's incriminating tape recorded statement and transcript thereof were published to the jury. The jury found defendant guilty of (1) first-degree murder based on premeditation and deliberation and felony murder, and (2) robbery with a dangerous weapon. The trial court sentenced defendant to life imprisonment without parole for first-degree murder and 55 months minimum and 75 months maximum for robbery with a dan-

gerous weapon to run consecutively with the life sentence. Defendant appeals.

II. Issues

Defendant assigns the following errors: (1) the trial court erred by denying defendant's motion to suppress his statement to police, (2) the trial court erred in sentencing defendant to life imprisonment without parole on first-degree murder, and (3) the trial court erred by entering judgment on the first-degree murder verdict and sentencing because the murder indictment was insufficient. Defendant has assigned numerous other errors. All other assignments raised and not argued by defendant are deemed abandoned pursuant to N.C. R. App. P. 28(b)(5) (1988).

III. Motion to Suppress Defendant's Statement to Police

[1] Defendant argues that the waiver form warnings read to defendant were, as a matter of law, insufficient and defective, failing to satisfy the requirements of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, *reh'g denied*, 385 U.S. 890, 17 L. Ed. 2d 121 (1966).

Miranda requires that, prior to questioning, a defendant be informed that he "has the right to remain silent, that anything he says can be used against him, . . . [and] that he has a right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning . . . ." *Id.* at 478-79, 16 L. Ed. 2d at 726. Additionally, a defendant must be informed of his right to an attorney during questioning. *Duckworth v. Eagan*, 492 U.S. 195, 204, 106 L. Ed. 2d 166, 178 (1989). Moreover, the right to counsel before and during questioning cannot be "linked with some future point in time." *California v. Prysock*, 453 U.S. 355, 360-61, 69 L. Ed. 2d 696, 701-02 (1981). "An interrogating officer need not explain the *Miranda* rights in any greater detail than what is required by *Miranda*, even when the suspect is a minor." *State v. Flowers*, 128 N.C. App. 697, 700, 497 S.E.2d 94, 96-97 (1998) (citing *Prysock*, 453 U.S. at 356-57, 361, 69 L. Ed. 2d at 699-700, 702; *Fare v. Michael C.*, 442 U.S. 707, 726, 61 L. Ed. 2d 197, 213 (1979); *State v. Brown*, 112 N.C. App. 390, 395-97, 436 S.E.2d 163, 166-68 (1993), *aff'd per curiam*, 339 N.C. 606, 453 S.E.2d 165 (1995)).

"In addition to the above-mentioned constitutional rights, our legislature has granted to juveniles the right to have a parent, guardian or custodian present during questioning." *State v. Miller*,

344 N.C. 658, 666, 477 S.E.2d 915, 920 (1996) (citing N.C. Gen. Stat. § 7A-595(a)(3) (1995)).

Here, Detective Buening read defendant his rights from the waiver form, which states:

(1) I have the right to remain silent. That means I do not have to say anything or answer any questions.

(2) If I decide to start answering questions, I still have the right to stop answering questions any time I want to.

(3) If I do answer questions or say anything, whatever I say can be used against me.

(4) I have the right to have a parent, guardian, or custodian here with me now during questioning . . . .

(5) I have the right to talk to a lawyer and to have a lawyer here with me now to advise and help me during questioning.

(6) If I want to have a lawyer with me during questioning but do not have a lawyer, one will be provided to me at no cost before I am questioned.

(7) If I agree to answer questions now, without a lawyer, parent, guardian, or custodian here, I still have the right to stop answering questions whenever I want to.

(8) If I decide to answer questions now, I can still change my mind and stop answering questions until I have talked to a lawyer an/or parent, guardian or custodian.

(Emphasis in original).

Defendant contends that these warnings were insufficient because they (1) did not clearly inform defendant that he had a right to an attorney before the questioning began, and (2) that they conditioned defendant's right to counsel to his willingness to undergo interrogation. The entire record before us does not support defendant's contentions.

"*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." *Prysock*, 453 U.S. at 359-60, 69 L. Ed. 2d at 701. " 'The now familiar *Miranda* warnings . . . *or their equivalent*' " is sufficient. *Id.* at 360, L. Ed. 2d at 701 (emphasis in original) (citation omitted). "Words that convey the substance of pre-

questioning warnings are sufficient." *Miller*, 344 N.C. at 666, 477 S.E.2d at 920 (citation omitted).

"A defendant may waive his *Miranda* rights, but the State bears the burden of proving that the defendant made a knowing and intelligent waiver." *State v. Brown*, 112 N.C. App. 390, 396, 436 S.E.2d 163, 167 (1993) (citing *State v. Simpson*, 314 N.C. 359, 334 S.E.2d 53 (1985); *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 707)). "The totality of the circumstances must be carefully scrutinized when determining if a youthful defendant has legitimately waived his *Miranda* rights." *Miller*, 344 N.C. at 666-67, 477 S.E.2d at 920 (citing *State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983)). " 'Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the [defendant's] background, experience, and conduct . . . .' " *Id.* (citing *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59); *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L. Ed. 2d 984 (1981).

The waiver form's language unequivocally informed defendant that he had the right to a lawyer "now." Number 5 on the waiver form states that "I have a right to talk to a lawyer and to have a lawyer here with me *now* to advise and help me during questioning." (Emphasis added). Detective Buening read defendant his *Miranda* warning rights from the waiver form, and defendant initialed each right, prior to any questioning about the crime. Based on the circumstances in this case the word "now" can only refer to the time prior to or before the questioning about the murder.

Similarly, number 6 on the waiver form states that "[i]f I want to have a lawyer with me during questioning but do not have a lawyer, one will be provided to me at no cost before I am questioned." (Emphasis in original). The word "before" is underlined on the form. We conclude that the words "now," "before," and "during" read in conjunction with all the rights enumerated on the waiver form sufficiently inform a defendant of his constitutional rights to a lawyer before and during questioning.

Second, there is nothing in the record to indicate that the *Miranda* warnings given to defendant, specifically his right to counsel, was conditioned on his willingness to undergo interrogation or "linked with some future point in time." *Prysock*, 453 U.S. at 360, 69 L. Ed. 2d at 701. Detective Buening testified that he asked defendant if he wanted to "talk to me now about the charges outside the presence of your parent, guardian or lawyer." Detective Buening tes-

tified that defendant "indicated he did" want to talk. Detective Buening placed a "check" on the waiver form that stated:

> I am 14 years old or more and I understand my rights as explained by Officer Buening. I DO wish to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now, without anyone here to help me, is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, without anyone here to help me, I am signing my name below.

(Emphasis in original). Defendant then signed his name right below the above-paragraph on the waiver form, after having initialed each right enumerated. The record before us is clear that, given the age of defendant, Detective Buening took extra care to provide defendant his *Miranda* warnings both orally and in writing. There is nothing on the waiver form which links defendant's right to an attorney with his willingness to be questioned.

Finally, the trial court included a finding of fact in its order denying defendant's motion to suppress that "defendant had been through the juvenile arrest process more than once before, and was not naive where his rights were concerned." Detective Buening also testified that defendant was "very willing to talk," was cocky about what he had done, and showed no remorse.

We hold: (1) that the rights and words read to and initialed by defendant constituted a fully effective equivalent of the *Miranda* warnings, conveyed the substance of the pre-questioning warnings, and were in full compliance with all constitutional and statutory requirements; and (2) that considering defendant's background, experience, conduct, and all facts and circumstances, defendant knowingly and voluntarily waived his right to remain silent and have an attorney or guardian present. This assignment of error is overruled.

IV. Defendant's Life Sentence Without Parole

[2] Defendant contends that his sentence of life in prison without parole violates the Eighth Amendment of the United States Constitution, as made applicable to the States through the Fourteenth Amendment, and Article I, Sections 19 and 27 of the North Carolina Constitution. Defendant argues that: (1) the sentence does not reflect "the evolving standards of decency that mark the

progress of a maturing society," (2) "there is no penological justification for imposing [that sentence] on a fourteen-year-old," and (3) the punishment is disproportionate to the crime. Additionally defendant argues that G.S. § 14-17 and G.S. § 7A-608 are unconstitutional on their face, and as applied, for the same reasons outlined above.

We note at the outset that defendant failed to preserve this issue for appeal because he failed to object to the sentence imposed at trial. Defendant asks us to consider his appeal, however, under theories that (1) G.S. § 14-17 and G.S. § 7A-608 are facially unconstitutional, and (2) the unconstitutional application of these statutes constituted plain error.

Considering the age of defendant, even if the appeal was properly before us we believe that the holding in *State v. Stinnett*, 129 N.C. App. 192, 199-200, 497 S.E.2d 696, 701-02, *cert. denied*, 525 U.S. 1008, 142 L. Ed. 2d 436 (1998) is dispositive of defendant's G.S. § 14-17 and G.S. 7A-608 facial challenge. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Defendant has also failed to persuade us that G.S. § 14-7 and G.S. § 7A-601 are unconstitutional as applied to defendant.

Our Supreme Court's holding and analysis in *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999), *superceded by statute on other grounds*, 136 N.C. App. 596, 525 S.E.2d 500 (2000) determines and controls defendant's cruel and/or unusual punishment and proportionality arguments. Defendant's attempts to distinguish *Green* are unpersuasive. In *Green*, the defendant was 13 years old and was sentenced to life in prison for first-degree sexual offense. *Id.* at 592, 502 S.E.2d at 822. The analysis and reasoning in *Green* is even more applicable to the facts at bar. Here, the jury convicted defendant of first-degree murder in a horrific, premeditated and deliberate manner. "It is elementary that this Court is bound by holdings of the Supreme Court." *Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996) (citations omitted). Defendant's punishment " 'is severe but it is not cruel or unusual in the constitutional sense.' " *Green*, 348 N.C. at 612, 502 S.E.2d at 834 (quoting *State v. Fulcher*, 294 N.C. 503, 525, 243 S.E.2d 338, 352 (1978)). This assignment of error is overruled.

V. Indictment Insufficiencies

[3] Defendant contends that the "short" indictment form failed to confer jurisdiction on the trial court arguing that the indictment did not specify all the elements of first-degree murder necessary to put defendant and the grand jury on notice. Defendant concedes that *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000) controls this issue. We are bound by that decision. *Rogerson*, 121 N.C. App. at 732, 468 S.E.2d at 450.

We conclude that defendant's transfer, trial, and sentence were constitutional and free from error.

No error.

Judges TIMMONS-GOODSON and HUDSON concur.

IN THE MATTER OF THE WILL OF: CORNELIUS WINSTON ALLEN, DECEASED

No. COA01-21

(Filed 5 February 2002)

1. Wills— holographic—words of testator—directed verdict denied

Sufficient evidence was presented to submit to the jury the question of whether the testator wrote each word of a holographic will which included the phrases "bank close" and "to and wife Valerie" written with a different pen. Although an expert testified that the disputed phrases were not in the testator's handwriting, several other witnesses testified that the testator added one of the phrases, the testator died eight years after writing the main body of the will and had suffered a stroke in the meantime, and the expert had not examined any other exemplars of the testator's handwriting.

2. Wills— holographic—surplus language

A holographic will was sufficient to dispose of the testator's property where it included the phrases "bank close" and "to and wife Valerie" written with a different pen, but the remainder was sufficient to express the testator's intentions.

3. Wills— holographic—instructions

The trial court did not err in a caveat proceeding by giving the jury an instruction from the Pattern Jury Instructions on holographic wills which was an accurate summary of the law.

4. Wills— holographic—valuable papers

A holographic will was found among the testator's valuable papers where the testator was a person of limited means and little formal education, and the will was found in a bowl in his kitchen with a bank document pertaining to funeral insurance, retirement fund documents, a social security check, papers from the Veterans' Administration Hospital, and other medical statements and bills.

Appeal by caveators from judgment entered 3 October 2000 by Judge Jack A. Thompson in Lee County Superior Court. Heard in the Court of Appeals 17 October 2001.

Love & Love, P.A. by Jimmy L. Love, Sr., for caveators-appellants.

Harrington, Ward, Gilleland & Winstead, L.L.P., by Eddie S. Winstead, III, for propounders-appellees.

BIGGS, Judge.

Mr. Cornelius Allen (Mr. Allen), an elderly widower from Lee County, died on 2 December 1998. He had no living wife or children, and was succeeded by a brother, two sisters, and a nephew (caveators). Upon his death, a handwritten will was found among other papers in a wooden bowl on his kitchen counter.

The will had been witnessed by two of Mr. Allen's friends on 2 January 1991. It bequeathed to one caveator a car, to another his household possessions; left his house to one of the propounders; and divided the contents of a safety deposit box between one of the propounders and one of the caveators. The will also included two phrases, which appeared to be written with a different pen: "bank close" and "to and wife Valerie." Propounders submitted the will for probate on 3 December 1998. Caveators filed a caveat on 23 August 1999, alleging that the will was not a validly executed holographic will. On 2 October 2000 a jury trial was held on the issue of the validity of Mr. Allen's will. Caveators moved for a directed verdict at the close of the propounders's evidence, and again at the close of all the

evidence; their motions were denied. The jury returned a verdict in favor of propounders, finding the will was a valid holographic will. Caveators appeal from the denial of their motions for directed verdict, and from the verdict. Caveators argue that the trial court erred in its denial of their motion for a directed verdict. "A motion for directed verdict tests the sufficiency of the evidence to take the case to the jury." *Lake Mary Ltd. Partnership v. Johnston*, 145 N.C. App. 525, 531, 551 S.E.2d 546, 551, *disc. review denied*, 354 N.C. 363, — S.E.2d — (2001) (quoting *Abels v. Renfro Corp.*, 335 N.C. 209, 214-15, 436 S.E.2d 822, 825 (1993)). In ruling on a motion for directed verdict, the trial court applies the following standard:

> Our courts have consistently held that on motion by a defendant for a directed verdict in a jury trial, the court must consider all of the evidence in the light most favorable to the plaintiff, resolving all conflicts in plaintiff's favor and giving plaintiff the benefit of every inference that can reasonably be drawn in plaintiff's favor; that the court may then grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff.

Meacham v. Board of Education, 59 N.C. App. 381, 383, 297 S.E.2d 192, 194 (1982), *disc. review denied*, 307 N.C. 577, 299 S.E.2d 651 (1983) (citations omitted). Thus,

> the non-movant is given the benefit of all helpful inferences reasonably drawn from the evidence, and all conflicts and contradictions in the evidence are decided in the non-movant's favor. Evidence of the non-movant which raises a mere possibility or conjecture cannot defeat a motion for directed verdict. . . . If, however, non-movant shows more than a scintilla of evidence, the court must deny the motion.

In re Will of Sechrest, 140 N.C. App. 464, 468, 537 S.E.2d 511, 515 (2000) (quoting *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 177 (1990)), *disc. review denied*, 353 N.C. 375, 547 S.E.2d 16 (2001) (citations omitted). Further:

> The trial court is required to submit to the jury those issues 'raised by the pleadings and supported by the evidence.' An issue is supported by the evidence when there is substantial evidence, considered in the light most favorable to the non-movant, in support of that issue. 'Substantial evidence is such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion.'

In re Estate of Ferguson, 135 N.C. App. 102, 105, 518 S.E.2d 796, 798 (1999) (quoting *Johnson v. Massengill*, 280 N.C. 376, 384, 186 S.E.2d 168, 174 (1992)) and (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)) (citation omitted). The trial court's ruling on a directed verdict motion is addressed to the court's discretion, and will not be overturned absent an abuse of discretion. *Crist v. Crist*, 145 N.C. App. 418, 550 S.E.2d 260 (2001).

[1] In the instant case, the only issue raised by caveators' motion for directed verdict was the validity of Mr. Allen's will. The motion should be denied if the trial evidence, considered in the light most favorable to propounders, was sufficient to allow a reasonable mind to find that the validity of Mr. Allen's holographic will had been established by the preponderance of the evidence. We therefore review the law governing holographic wills. The three requirements for a valid holographic will are set forth in N.C.G.S. § 31-3.4 (1999), which provides that:

(a) A holographic will is a will

(1) Written entirely in the handwriting of the testator but when all the words appearing on a paper in the handwriting of the testator are sufficient to constitute a valid holographic will, the fact that other words or printed matter appear thereon not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will, and

(2) Subscribed by the testator, or with his name written in or on the will in his own handwriting, and

(3) Found after the testator's death among his valuable papers or effects, or in a safe-deposit box or other safe place where it was deposited by him or under his authority, or in the possession or custody of some person with whom, or some firm or corporation with which, it was deposited by him or under his authority for safekeeping.

Caveators first argue that their directed verdict motion should have been granted because the evidence presented at trial was insuf-

ficient to meet the statutory requirement that the will be either "written entirely in the handwriting of the testator," or, in the alternative, that if the words not in Mr. Allen's handwriting were disregarded, the remainder would constitute a valid holographic will. Caveators allege that the phrases "bank close" and "to and wife Valerie" were written by someone other than Mr. Allen, and that these words materially alter the meaning of the will, thus invalidating it.

Caveators contend that "[u]ncontradicted expert testimony established that Mr. Allen did not write the entire will[,]" entitling them to directed verdict on this issue. At trial, a handwriting expert testified that the disputed phrases did not appear to be in Mr. Allen's handwriting. However, we are not persuaded by caveators' contention that the authorship of the phrases was conclusively shown by caveators' expert testimony. Several other witnesses testified to their understanding that Mr. Allen added the phrase about "wife Valerie" after the will was initially executed. Moreover, it was not disputed that Mr. Allen died some eight years after writing the main body of the will, and had suffered a stroke before his death. Under these circumstances, Mr. Allen's handwriting may have changed between the original execution of the will and any later additions. We note that the handwriting expert had not examined any other exemplars of Mr. Allen's handwriting.

Generally, the issue of whether a holographic will is entirely in the testator's handwriting is a question for the jury. *In Re Will of Wall*, 216 N.C. 805, 5 S.E.2d 837 (1939) (jury question whether number "5" was written in handwriting of testator); *In Re Will of Penley*, 95 N.C. App. 655, 383 S.E.2d 385 (1989) (question for jury whether codicil to will was in testator's handwriting), *disc. review denied*, 326 N.C. 48, 389 S.E.2d 93 (1990). The issue remains a jury question notwithstanding evidence to the contrary. *In Re Will of Gatling*, 234 N.C. 561, 68 S.E.2d 301 (1951) (caveators offer expert testimony that testator did not write certain words and phrases; jury permitted to decide matter). We conclude that sufficient evidence was presented to submit to the jury the question of whether Mr. Allen wrote each word of the will, and that caveators were not entitled to a directed verdict on this basis.

[2] Caveators argue next that if the evidence raises a doubt regarding the authorship of certain words, then the will must have the same meaning with or without the challenged words. We disagree. The North Carolina Supreme Court has held that:

> When all the words appearing on a paper in the handwriting of the deceased person are sufficient, as in the instant case, to constitute a last will and testament, the mere fact that other words appear thereon, not in such handwriting, but not essential to the meaning of the words in such handwriting, cannot be held to defeat the intention of the deceased, otherwise clearly expressed, that such paper writing is and shall be his last will and testament.

In Re Will of Parson, 207 N.C. 584, 587, 178 S.E. 78, 80 (1935), *(quoting In Re Will of Lowrance*, 199 N.C. 782, 785, 155 S. E. 876, 878 (1930)). Thus, in North Carolina, if the words written by the testator are sufficient to constitute a valid holographic will, then the will is not invalidated by the presence of other words that are not in his handwriting. *Pounds v. Litaker*, 235 N.C. 746, 71 S.E.2d 39 (1952) (presence of surplusage not in handwriting of the deceased does not defeat intention of deceased to execute will); *In Re Will of Wallace*, 227 N.C. 459, 42 S.E.2d 520 (1947) (if handwritten words sufficiently express testator's intent, presence of other words does not invalidate will). If the challenged words are not essential to the will's meaning, they are deemed surplusage. *In Re Will of Lowrance*, 199 N.C. 782, 155 S.E.2d 876 (printed words on letterhead are surplusage). However, the will is invalid if the words that are not in the testator's handwriting are necessary in order to establish a valid holographic will. *Pounds*, 235 N.C. 746, 71 S.E.2d 39 (will cannot be probated where its only "signature" was a monogram not in testator's handwriting); *In Re Will of Smith*, 218 N.C. 161, 10 S.E.2d 676 (1940) (will invalid where words not in testator's handwriting are essential to give other words meaning).

Regarding "bank close," this phrase has no apparent meaning, nor have caveators suggested any. We conclude that this phrase is surplusage, and may be disregarded completely. Regarding the phrase "to and wife Valerie," caveators argue that this phrase effects a material alteration in the will's meaning, by transforming the bequest to Edward Godfrey into a devise to both Edward and Valerie Godfrey as tenants by the entirety. This contention necessarily is premised upon the assumption that the trial court "rewrote" the phrase to read "and to his wife, Valerie," rather than "to and wife Valerie." It is true that "in order to clarify the content of the will, 'the court [may] add, change, or disregard punctuation, phrases, and clauses.' " *Johnson v. Johnson*, 46 N.C. App. 316, 319, 264 S.E.2d 911, 913 (1980) (quoting 1 N. Wiggins, *Willis and Administration of Estates in N.C.* § 133 at

415 (1964)), *disc. review denied*, 300 N.C. 557, 270 S.E.2d 108 (1980); *see also McRorie v. Creswell*, 273 N.C. 615, 160 S.E.2d 681 (1968) (court may disregard grammatical or punctuation errors if necessary to proper construction of will). However, in the case *sub judice*, there is no evidence that the trial court transposed and added words. Nor was the jury instructed to base their deliberations upon the assumption that the phrase had been rewritten.

In the present case, Mr. Allen's holographic will expressed a clear intention to bequeath his house to Edward Godfrey. The phrases which caveators contend may be in someone else's writing does not revoke or alter that intent. Moreover we find it significant that the only person whose inheritance would be affected by the deletion of the words "and to [his] wife Valerie" would be Valerie Godfrey, who has not contested the will.

We conclude that sufficient evidence was presented to submit to the jury the question of the authorship of all parts of the will; and further that if the phrases "bank close" and "to and wife Valerie" are disregarded, the remainder is sufficient to express Mr. Allen's intentions, and to dispose of his property. We further conclude that caveators were not entitled to a directed verdict on the ground that these phrases might have been written by someone other than Mr. Allen. Accordingly, this assignment of error is overruled.

[3] Caveators argue next that the trial court erred in its instructions to the jury. Caveators have not included the jury charge in the record, as required by N.C. R. App. P. 9(f). However, in our discretion, and pursuant to our authority under N.C. R. App. P. 2, we elect to review this issue on its merits.

Caveators object to the following language from the trial court's instructions:

> First, every word of the writing sufficient to constitute a will must be entirely in the handwriting of the deceased. The fact that there are other words which are not in the deceased's handwriting will not render the writing invalid as a will so long as the words which are in his handwriting are sufficient to express his intent to make a will and to dispose of his property. Such other words are surplus.

Caveators argue that the trial court should have instructed the jury to determine specifically whether Mr. Allen wrote "bank close"

and "to and wife Valerie," and then to determine whether those words were essential to the meaning of the will.

The trial court's instruction was taken from the North Carolina Pattern Jury Instructions, N.C.P.I. Civil 860.10. "This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994), *disc. review denied*, 339 N.C. 610, 454 S.E.2d 247 (1995). Moreover, this pattern jury instruction is an accurate summary of the law. We overrule this assignment of error.

[4] Finally, caveators argue that the will did not meet the requirement of G.S. § 31-3.4 that a testator's holographic will be found "among his valuable papers or effects, or in a safe-deposit box or other safe place."

This Court has held that the statute should be read in the disjunctive, and, thus, that a will is valid if found either in a safe deposit box, or among testator's valuable papers or among testator's valuable effects, or in a safe place. *In Re Will of Church*, 121 N.C. App. 506, 466 S.E.2d 297 (1996) (holding that statutory list should be read disjunctively; will found in purse hanging in closet found to be "in safe place" in meaning of statute); *Stephens v. McPherson*, 88 N.C. App. 251, 362 S.E.2d 826 (1987) (will found in jewelry box in bedroom).

The determination of whether a will is found among valuable papers must be evaluated in the context of what would likely be regarded *by the decedent* as valuable. *In re Westfeldt*, 188 N.C. 702, 125 S.E. 531 (1924). In another case, the Supreme Court of North Carolina held that:

> Valuable papers within the meaning of the statute are such papers as are kept and considered worthy of being taken care of by the particular person, having regard to his condition, business, and habits of preserving papers. They do not necessarily mean the most valuable papers of the decedent even, and are not confined to papers having a money value, or to deeds for land, obligations for the payment of money, or certificates of stock. . . consequently, the sufficiency of the place of deposit to meet the requirement of the statute will depend largely upon the condition and arrangements of the testator.

In Re Will of Wilson, 258 N.C. 310, 313, 128 S.E.2d 610, 603-04 (1962) (citation omitted).

In the present case, Mr. Allen's will was found in a bowl in his kitchen. Found in the same bowl were a bank document pertaining to funeral insurance, retirement fund documents, a social security check, papers from the Veterans' Administration Hospital, and other medical statements and bills. The evidence suggested that Mr. Allen was a person of limited means and little formal education. We conclude that in consideration of his apparent style of life, and the nature of the other papers in the bowl, the jury could properly find that the will was found among Mr. Allen's "valuable papers," and accordingly, conclude that the caveators were not entitled to a directed verdict on this ground. This assignment of error is overruled.

For the reasons discussed above, we conclude that the trial court properly submitted the case to the jury, and affirm the court below.

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. RONALD JEFFERY GAITHER

No. COA00-1536

(Filed 5 February 2002)

1. **Appeal and Error— preservation of issues—denial of motion in limine—failure to object at trial**

Although defendant contended that the court erred by denying his motion in limine to suppress out-of-court identification testimony, he did not object at trial and failed to preserve the issue for appellate review.

2. **Constitutional Law— disclosure of informant's identity—denied**

The trial court correctly denied defendant's motion to compel disclosure of an informant's identity where defendant did not present any defense on the merits, did not contend that the confidential informant participated in or witnessed the crime, and failed to make any showing that the particular circumstances of his case mandated disclosure of the identity of the informant.

Appeal by defendant from judgment entered 30 August 2000 by Judge Claude S. Sitton in Catawba County Superior Court. Heard in the Court of Appeals 29 November 2001.

Attorney General Roy A. Cooper, III, by Assistant Attorney General V. Lori Fuller, for the State.

Lisa Andrew Dubs for defendant-appellant.

HUNTER, Judge.

Ronald Jeffery Gaither ("defendant") appeals from a judgment entered against him on the charge of robbery with a dangerous weapon. Defendant argues that the trial court erred in denying his motion to suppress the out-of-court identification of defendant by the robbery victim. We hold that defendant has failed to preserve this issue for appellate review. Defendant also argues that the trial court erred in denying his motion to compel the State to disclose the identity of the informant who provided information to the police leading to defendant's arrest. We disagree, holding that the State was not required to disclose the informant's identity. Accordingly, we find no error in defendant's trial.

I. Facts

The evidence presented at trial tended to establish the following facts. On 23 November 1999, at approximately 8:00 p.m., Debra Mays ("Mays") drove to a Chinese food restaurant and entered the restaurant with her three-year-old daughter. Mays was carrying between $900.00 and $1,100.00 because she had intended to purchase a car that day. Donna Wilson Outen and her husband and their daughter were sitting in the restaurant having dinner. Mays ordered her food and sat down across from the counter, at which time she noticed a man, whom she later identified as defendant, enter the restaurant. Defendant sat down in the chair next to Mays and briefly spoke with Mays and her daughter. Then defendant got up, started to pace, and eventually left the restaurant.

Mays then retrieved her food, exited the restaurant, and proceeded to her car. After Mays took three or four steps, she looked over her shoulder and saw defendant approaching her. She got to her car and unlocked the door, at which time defendant grabbed her elbow. Defendant showed Mays that he had a knife in his hand, and he placed the knife to her throat and told her that if she screamed he would kill her. Defendant also waved the knife above Mays' daugh-

ter's head. Defendant said that he wanted Mays' money, so Mays gave him all of the money in her wallet.

Ms. Outen witnessed defendant robbing Mays through a window of the restaurant. When she saw defendant wave a knife to Mays' daughter, she went outside and told defendant to stop. Defendant let go of Mays and walked away toward the back of the restaurant. Mays and her daughter then went inside the restaurant to call 911.

A total of approximately ten to fifteen minutes elapsed between the time defendant first entered the restaurant and the time he left the restaurant. The restaurant was very well illuminated, and both Mays and Ms. Outen were able to get a good look at defendant. In addition, although the lighting outside in the parking lot was not as bright as in the restaurant, Mays was able to see defendant's face clearly from a distance of approximately one foot during the robbery.

Officers Davis and Burgin arrived at the restaurant within ten to fifteen minutes after the robbery. Officer Burgin questioned Mays and Ms. Outen, who provided descriptions of the perpetrator. Mays told him that the man was black, that he was wearing dark-colored jeans, tennis shoes, and a black T-shirt with an "Emerson's" logo, and that he was about the same height as Officer Burgin. She also pointed to someone and indicated that the perpetrator was of a similar weight. Mays did not describe any facial features of the perpetrator. Ms. Outen told the police that the perpetrator was a black male, wearing dark pants, a T-shirt with an "Emerson's" logo, and a pair of "shades" with gold on the sides.

The description of the perpetrator provided by Mays and Ms. Outen was broadcast over the police radio. Shortly thereafter, Officer Davis received information over his police radio that a certain confidential informant had notified the police that a person suspected of having committed the robbery was at the nearby home of Tina Jordan, also known as "Quacky." As Officer Davis returned to his police car to drive to "Quacky's place," he received additional information that the confidential informant had notified the police that the suspect had entered a red station wagon and was leaving the area.

Officer Davis arrived at the location in less than a minute and spotted a red station wagon. Officer Davis stopped the car and discovered two black males in the front seats and a third black male, defendant, in the back seat. Officer Davis testified that neither of the

individuals in the front seats fit the description of the perpetrator. Defendant was wearing a blue or green pullover sweatshirt, but otherwise fit the general description provided by Mays and Ms. Outen. Defendant consented to a pat-down search, and Officer Davis discovered a pair of glasses with gold down the sides in defendant's pocket. Officer Davis also removed defendant's wallet and found $490.00 in cash. The police detained defendant so that Mays could be brought to the location to identify him.

A police officer drove Mays in a police car to identify defendant. When she reached the place where defendant was being detained, she saw defendant standing in front of a police car with several police officers standing next to him and a second police car near defendant. The two police cars had their flashing blue lights turned on. At that time it was dark, but the headlights of the car in which Mays sat were shining on defendant. When defendant turned around so that Mays could see his face, she immediately identified him as the person who had robbed her, stating to the female officer in the car, "[t]hat's him, but he's not wearing the same shirt."

Ms. Outen testified at trial that she has known defendant since he was little. Her husband, Mr. Outen, similarly testified that he has known defendant all of his life. Ms. Outen did not make it known that she knew defendant until she was subpoenaed approximately two weeks prior to trial. She testified that she did not tell anyone that she knew the identity of the perpetrator prior to being subpoenaed because she was concerned for the safety of herself and her family. At trial, Ms. Outen and Mr. Outen both positively identified defendant as the person who robbed Mays.

II. Procedural History

Prior to trial, defendant filed various motions, including: (1) a motion to suppress the out-of-court "show-up" identification of defendant; (2) a motion to suppress the in-court identification of defendant that occurred during the probable cause hearing; and (3) a motion to compel the State to disclose the identify of the informant, as well as a motion to dismiss based upon the State's refusal to disclose the informant's identity. The court conducted a pre-trial hearing and, at the end of the hearing, the trial court orally entered findings of fact and conclusions of law which were subsequently embodied in an order entered 31 August 2000. In the order, the trial court: (1) denied the motion to suppress the out-of-court identification of defendant by Mays; (2) granted defendant's motion to suppress the

in-court identification of defendant during the probable cause hearing; and (3) denied the motion to compel the State to reveal the identity of the informant and the motion to dismiss.

III. Analysis

At the outset, we note that defendant has violated two Rules of Appellate Procedure. First, the record contains only four assignments of error while defendant's brief sets forth five arguments, the fifth of which does not correspond in substance to any of defendant's assignments of error. For this reason, we will not address defendant's fifth argument. *See* N.C. R. App. P. 10(a). Second, defendant has failed to comply with Rule 28(b)(5), which states that an appellate brief must set forth, immediately below each argument, the assignments of error that are pertinent to the argument. *See* N.C. R. App. P. 28(b)(6). This failure to observe the mandatory Rules of Appellate Procedure subjects an appeal to dismissal. *See, e.g., May v. City of Durham*, 136 N.C. App. 578, 581, 525 S.E.2d 223, 227 (2000). However, because defendant's first four arguments correspond to defendant's four assignments of error in the record, we elect to exercise the discretion accorded us by N.C. R. App. P. 2 to consider the merits of defendant's first four arguments. *See id.*

A. Out-of-Court Identification of Defendant

[1] Defendant's first two assignments of error involve the trial court's denial of defendant's pre-trial motion to suppress the out-of-court "show-up" identification of defendant. Defendant contends his pre-trial motion to suppress the "show-up" identification should have been granted for two independent reasons. First, defendant contends that the State did not establish that there was reasonable suspicion to stop the car and detain defendant based upon the tip from the confidential informant because the State presented no evidence as to the basis of the informant's knowledge and because only minimal testimony was presented regarding the reliability of the informant. Second, defendant contends that the "show-up" identification procedure itself was impermissibly suggestive and created a substantial likelihood of misidentification because defendant was the only suspect presented to Mays and because he was surrounded by police officers and patrol cars with flashing lights. However, we need not address the merits of defendant's arguments regarding the trial court's denial of the pre-trial motion to suppress the out-of-court identification of defendant because defendant failed to object to the admission of this evidence at the time it was offered at trial.

Defendant's motion to suppress was made prior to trial and therefore constitutes a motion *in limine*. *See State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980) ("motion *in limine*" indicates that the motion, regardless of its type, was made prior to trial).

> Rulings by a trial court on motions *in limine* "are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial." . . .
>
> Furthermore, an objection to an order granting or denying a motion *in limine* "is insufficient to preserve for appeal the question of the admissibility of evidence." In order to preserve the issue for appeal, "[a] party objecting to an order granting or denying a motion *in limine* . . . is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted)." Thus, when a party purports to appeal the granting or denying of a motion *in limine* following the entry of a final judgment, the issue on appeal is not actually whether the granting or denying of the motion *in limine* was error, as that issue is not appealable, but instead "whether the evidentiary rulings of the trial court, made during the trial, are error."

State v. Locklear, 145 N.C. App. 447, 452, 551 S.E.2d 196, 198-99 (2001) (citations and footnote omitted).

A review of the transcript of the trial reveals that defendant failed to object to the admission of evidence regarding the out-of-court identification of defendant. During the State's direct examination of its first witness, Mays, the following testimony transpired:

> A. I was in a police car with a female officer. . . . She asked me if it was the same man. And I told her that I could not see his face clearly, to please have him turn around. And she did. And they had him turn around.
>
> Q. And when he turned around, did you know whether or not this was the person?
>
> A. Yes, sir.
>
> Q. And was it the same person that you had seen earlier?
>
> A. Yes, sir, it was.

Defendant failed to object to this testimony. Similar testimony was offered by Officers Burgin and Davis later in the trial, also without

objection by defendant. Because defendant failed to object during the trial to the admission of evidence regarding the out-of-court identification, defendant has failed to preserve for our review the issue of whether this evidence was properly admitted at trial. Therefore, defendant's first two assignments of error are overruled.

B. Identity of Informant

[2] Defendant's third and fourth assignments of error relate to the denial of defendant's pre-trial motion to compel the State to disclose the identity of the confidential informant. Defendant argues that the trial court erred in denying the motion to compel disclosure, and, further, that the trial court erred in denying defendant's motion to dismiss based upon the State's refusal to disclose the identity of the informant. We disagree.

We first note that, contrary to defendant's contention, N.C. Gen. Stat. § 15A-978 (1999) is inapplicable here. That statute addresses situations in which a defendant contends (1) that testimony relied upon *to establish probable cause for the issuance of a search warrant* was not truthful, and (2) that, as a result, the evidence seized pursuant to the search warrant should not be admitted at trial. *See id.* official commentary.

This case involves a tip from a confidential informant that is relied upon by the police as the basis for stopping and detaining a defendant. The legal principles relevant to our analysis are well-established by case law. "[T]he state is privileged to withhold from a defendant the identity of a confidential informant, with certain exceptions." *State v. Newkirk*, 73 N.C. App. 83, 85, 325 S.E.2d 518, 520, *disc. review denied*, 313 N.C. 608, 332 S.E.2d 81 (1985). One such exception arises ". . . '[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . . In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.' " *Id.* at 86, 325 S.E.2d at 520 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61, 1 L. Ed. 2d 639, 645 (1957)). In such situations, if the defendant is able to set forth a "plausible" showing as to the materiality of the informant's testimony, the trial court must then balance the public's interest against the defendant's right to present his case, " 'taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.' " *Id.* (quoting *Roviaro*, 353 U.S. at 62, 1 L. Ed. 2d at 646).

"However, before the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E.2d 580, 582 (1981). Moreover, "[t]he privilege of nondisclosure . . . ordinarily applies where the informant is neither a participant in the offense, nor helps arrange its commission, but is a mere tipster who only supplies a lead to law enforcement officers." *State v. Grainger*, 60 N.C. App. 188, 190, 298 S.E.2d 203, 204 (1982), *disc. review denied*, 307 N.C. 579, 299 S.E.2d 648 (1983). Thus, a defendant who makes no defense on the merits, and who does not contend that the informant participated in or witnessed the alleged crime, has no constitutional right to discover the name of the informant. *State v. Ketchie*, 286 N.C. 387, 392, 211 S.E.2d 207, 211 (1975).

Here, defendant did not present any defense on the merits as to the charges against him. Nor has defendant ever contended that the confidential informant participated in, or witnessed, the crime. Because defendant has failed to make any showing that the particular circumstances of his case mandate disclosure of the identity of the informant, we affirm the trial court's denial of defendant's motion to compel disclosure of the informant's identity, as well as the trial court's denial of defendant's motion to dismiss. Defendant's third and fourth assignments of error are, accordingly, overruled.

No error.

Judges BRYANT and SMITH concur.

IN THE MATTER OF: PATRICIA ECKARD, A MINOR CHILD

No. COA00-655-2

(Filed 5 February 2002)

Termination of Parental Rights— cessation of reunification efforts—order remanded

An order stopping reunification efforts between a parent and a child in foster care was not supported by the evidence, did not consider changed circumstances involving the identification of

the natural father, and did not recognize that the purpose of the Juvenile Code is return of juveniles to their homes. N.C.G.S. §§ 7B-907(b), 7B-100(4).

Appeal by respondent mother from order ceasing reunification efforts entered 17 December 1999 by Judge Nancy Einstein in Catawba County District Court. This case was originally heard in the Court of Appeals 28 March 2001 and we issued an opinion reported at 144 N.C. App. 187, 547 S.E.2d 835 (2001). The Guardian Ad Litem's Petition for Discretionary Review pursuant to North Carolina General Statutes § 7A-31 was allowed by the Supreme Court. By order dated 9 November 2001, our Supreme Court vacated the opinion of this Court and remanded the case to the Court of Appeals for reconsideration. *In re Eckard*, 354 N.C. 362, 556 S.E.2d 299 (2001).

M. Victoria Jayne, for Guardian Ad Litem, petitioner-appellee.

Nathaniel J. Poovey, for respondent-appellant.

TYSON, Judge.

This case has been remanded for our reconsideration in light of our Supreme Court's *per curiam* holdings in *In the Matter of Dula*, 354 N.C. 356, 554 S.E.2d 336 (2001) and *In the Matter of Pope*, 354 N.C. 359, 554 S.E.2d 644 (2001). We briefly review the facts of this case.

On 14 April 1999, upon returning from the grocery store, respondent mother, Angela Eckard, noticed bruises and cuts on her daughter, Patricia, and blood on her boyfriend. Angela immediately took Patricia to Catawba Memorial Hospital where Patricia was diagnosed as having suffered skull fractures and exhibited numerous bruises over her body.

On 21 April 1999, a nonsecure custody order was entered that removed Patricia, then twenty-two months old, from her mother's home and placed her in foster care. Catawba County Department of Social Services ("DSS") filed a petition alleging abuse and neglect. Angela consented to an adjudication which found that Patricia was an abused, neglected and dependent juvenile on 25 May 1999.

A review hearing was held on 24 August 1999 before Judge Einstein at which time DSS informed the court that Angela "has done

everything requested by the Department of Social Services," and "the permanent plan for Patricia Eckard is reunification with her mother, Angela Eckard." The trial court ordered unsupervised visitation.

On 14 December 1999, the permanency planning hearing was held. In its order of 17 December 1999, the trial court found that reunification was not in the best interests of the minor child. The trial court further ordered that custody of Patricia remain with DSS, with placement to continue in the foster home, and that adoption with the foster parents was the permanent plan. Respondent mother appealed. DSS is not a party to this appeal.

On appeal, we held that the evidence presented at trial did not support the trial court's findings and order ceasing reunification efforts, pursuant to N.C. Gen. Stat. § 7B-507(b) (1999) and *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (our Supreme Court held that "[t]he trial court must also consider evidence of changed conditions in light of evidence of prior neglect"). Upon such reconsideration and for the reasons set forth below, we reverse the trial court's order and remand this case to the trial court for further proceedings.

A trial court is required to conduct a permanency planning hearing in every case where custody of a child has been removed from a parent. N.C. Gen. Stat. § 7B-907(a) (1999). The purpose of the hearing is to "develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." *Id.* The trial court shall consider "information from the parent, the juvenile, the guardian, any foster parent, relative or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid in the court's review." N.C. Gen. Stat. § 7B-907(b) (1999). The trial court has the authority to cease reunification efforts pursuant to N.C.G.S. § 7B-507(b). *See* N.C. Gen. Stat. § 7B-907(c) (1999).

The purposes and policies of the Juvenile Code are:

(1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;

(2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family.

(3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; and

(4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.

N.C. Gen. Stat. § 7B-100 (1999). We set out the purposes and policies in this opinion because we conclude that the order entered at the permanency planning hearing: (1) is not supported by the evidence, distinguishing this case from *Dula* and *Pope*, (2) did not consider evidence of changed conditions, (3) does not comply with the statutory requirements set out in N.C.G.S. § 7B-907(b), and (4) is inconsistent with the purposes and policies of the Juvenile Code.

I. Order is Not Supported by the Evidence

In the present case, the trial court made the statutory findings that "efforts to reunify the minor child with her mother would be inconsistent with the child's health, safety, and need for a safe, permanent home within a reasonable period of time" and "not in the best interests of the child." *See* N.C. Gen. Stat. § 7B-507(b)(1) (1999). We previously concluded that the evidence presented did not support these findings. *See In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991) (trial court's findings of fact are conclusive on appeal if supported by any competent evidence).

In *Dula*, the minor child was removed from the mother's custody in May 1998, after an allegation that the child was abused. *In re Dula*, 143 N.C. App. 16, 17, 544 S.E.2d 591, 592 (2001). Twenty months later, January 2000, the trial court held its second permanency planning hearing and ordered that reunification efforts cease. *Id.* The evidence showed that: (1) the child suffered a broken leg while in the care and custody of the respondent mother, (2) respondent mother failed to comply with the case plan by refusing to offer a consistent explanation for the child's injuries, and (3) respondent mother would not accept any responsibility for the injuries to the child. *Id.* at 24-25, 544 S.E.2d at 596-97.

In *Pope*, the minor child was removed from the mother's custody in February 1998, after an allegation that the child was abused and neglected. *In re Pope*, 144 N.C. App. 32, 33, 547 S.E.2d 153, 154

(2001). Sixteen months later, June 1999, DSS filed a petition to terminate the parental rights and the trial court ordered termination based on N.C.G.S. §§ 7B-1111(a)(1) (neglect), 7B-1111(a)(2) (willfully left in foster care), and 7B-1111(a)(3) (willfully failed to pay support). *Id.* at 36, 547 S.E.2d at 156. The trial court found that: (1) the child was starving to death while in the care and custody of the respondent mother, (2) respondent mother had made no progress even with the services provided by DSS and continued to show a lack of understanding of how to care for the child, (3) respondent mother lacked any understanding of the seriousness of the child's condition in February 1998, (4) respondent mother continued to deny that she had done anything to place the child at risk, and (5) respondent mother suffered from a personality disorder with seriously disturbed thinking which is difficult to change, and without change, there would be a high risk of continued neglect. *Id.* at 33-38, 547 S.E.2d at 154-57.

We find this case distinguishable from *Dula* and *Pope*. After less than eight months of placement outside the home, the trial court ordered that reunification efforts cease. The undisputed evidence showed that: (1) the injuries to Patricia occurred while she was in the custody and care of another; (2) respondent mother terminated her relationship with the other person and has established and maintained her own dwelling; (3) despite respondent mother's low I.Q., she has no severe mental health issues that would interfere with her ability to parent; (4) respondent mother understands that her poor choices led to the abuse of the child and that the solution is to proceed more slowly before advancing to a live-in relationship; (5) respondent mother has grown and matured to a level as to not be a danger to Patricia; (6) respondent mother continues to remain employed, pay child support, and visit her child regularly; (7) respondent mother has done everything requested by DSS, is following her case plan, and is exceeding minimal standards of care; (8) respondent mother accepts responsibility on her own part for not protecting Patricia; and (9) DSS recommends that the permanent plan for Patricia be reunification with respondent mother.

The trial court's findings and conclusions were based solely on the report submitted by the Guardian ad Litem and testimony by the foster parents that they had established a close relationship with Patricia, that she calls them "momma" and "daddy, and that they expected to adopt Patricia despite the stated goal of reunification with her natural mother. The uncontradicted testimony and evidence

from the court-ordered psychologist, DSS referred psychologist, DSS nurturing program coordinator, DSS social worker, and respondent mother does not support the findings and conclusions of the trial court. For these reasons, we find this case factually and legally distinguishable from *Dula* and *Pope*.

II. Evidence of Changed Conditions

N.C.G.S. § 7B-907(b) requires the trial court to consider "information from the parent, the juvenile, the guardian, any foster parent, relative or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid in the court's review." The trial court must also consider any evidence of changed conditions. *See Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 (in proceedings to terminate parental rights the trial court must consider any evidence of changed conditions in light of the evidence of prior neglect). We conclude that the trial court failed to consider the evidence of changed conditions presented at the permanency planning hearing.

First, there was overwhelming evidence of changed conditions with respect to Angela Eckard which we previously held did not support the findings and conclusions by the trial court in its order ceasing reunification efforts.

Second, in August 1999, the father of Patricia was identified for the first time through paternity testing. The evidence showed that the father, William Sanford, Jr., had begun visitation and establishing a bond with Patricia. The trial court found that:

> he [Mr. Sanford] appears to be a decent person who makes a late appearance into this case . . . . He should have been considered as a placement for Tricia and should have been interviewed by both the Guardian ad Litem and the Department as soon as testing showed him to be the father. However, in lieu of new statutory guidelines to move these cases to permanency, especially when particularly young children are involved, the Court believes it is too late to include Mr. Sanford in any permanency planning except for visitation with his daughter.

The trial court dismissed the changed conditions in the identification, visitation, and bonding of Patricia with her natural father because he "makes a late appearance."

III. Order Does Not Comply with the Statute

Additionally, we conclude that the trial court did not comply with the statutory requirements of N.C.G.S. § 7B-907(b). This statute reads in pertinent part:

> At the conclusion of the hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:
>
> (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established . . . .

N.C. Gen. Stat. § 7B-907(b)(2) (1999). The trial court dismissed the father as a potential candidate for custody because of his "late appearance." The trial court found that "Tricia is too bonded to her current placement to risk her young and fragile well being at this time." We hold that according to the statute, the trial court should have considered whether the natural father was a candidate for custody of Patricia and have required interviews by the Guardian ad Litem and DSS to further investigate Patricia's placement with her other natural parent.

IV. Purposes and Policies of the Juvenile Code

We have recognized the constitutional protection afforded to family relationships. *See In re Webb*, 70 N.C. App. 345, 350, 320 S.E.2d 306, 309 (1984) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04, 52 L. Ed. 2d 531, 540 (1977)). The purposes and policies of the Juvenile Code recited under N.C.G.S. § 7B-100 are applicable to permanency planning hearings.

The trial court's findings and conclusions were not supported by the evidence, did not consider changed conditions, and did not recognize that the purpose of the Juvenile Code is "return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents." *See* N.C. Gen. Stat. § 7B-100(4). The evidence at the permanency planning hearing supported continuing reunification efforts with Angela and possible custody with Patricia's father, Mr. Sanford. This is consistent with the overriding purposes of respecting family autonomy and protecting

the constitutional rights of the juveniles and parents. *See* N.C. Gen. Stat. §§ 7B-100(1) and (3).

We hold that the order ceasing reunification efforts is not consistent with the purposes and policies of the statute, did not comply with the statute, did not consider changed conditions, and was not supported by the evidence of record. We reverse the order of the trial court and remand for further proceedings to enable DSS to carry out its statutory duties seeking reunification and to determine custody of Patricia. We further hold that, nothing else appearing to the contrary, the time elapsed during the pendency of this appeal shall not affect further proceedings in the trial court.

Reversed and remanded.

Judges WALKER and HUNTER concur.

STATE OF NORTH CAROLINA v. ROBERT ANDERSON REID

No. COA00-1538

(Filed 5 February 2002)

Motor Vehicles— DWI—suspension of commercial license—double jeopardy—noncommercial DWI offense

Defendant's conviction for DWI did not constitute double jeopardy where his commercial driver's license had been suspended for thirty days and he was refused a limited commercial driving privilege. Double jeopardy will attach only when a defendant is forced to defend multiple criminal punishments for one offense; driver's license revocations are civil rather than criminal. Although defendant argued that he was denied his right to earn a livelihood, the state has a greater public safety interest in commercial drivers because of the greater risk of harm. U.S. Const. Amend. V; N.C. Const. Art. I, § 19.

Appeal by defendant from judgment entered 25 April 2000 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 9 January 2002.

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

Tharrington Smith, L.L.P., by F. Hill Allen for defendant-appellant.

THOMAS, Judge.

Defendant, Robert Anderson Reid, appeals from a conviction of impaired driving. He argues that the revocation of his commercial driver's license for a thirty-day period prior to trial and his disqualification from obtaining a commercial limited driver's privilege during that time resulted in double jeopardy.

The State's evidence tended to show the following: On 23 April 1999 at approximately 3:20 a.m., Trooper Donald Pate (Pate) of the North Carolina Highway Patrol observed a Nissan automobile traveling at a high rate of speed.

After clocking the vehicle at 90 m.p.h., Pate pulled it over, and found defendant to be the operator. Defendant's eyes were bloodshot and glassy and Pate smelled a strong odor of alcohol coming from him. Pate then asked defendant to perform field sobriety tests. Based in part on defendant's performance, Pate arrested him for driving while impaired (DWI).

Pate drove defendant to the City/County Bureau of Identification for an Intoxilyzor 5000 test. Defendant's alcohol concentration was 0.10.

At the close of the State's evidence, defendant's motions to dismiss due to insufficiency of the evidence and on double jeopardy grounds were denied. The basis for defendant's double jeopardy argument was what occurred regarding his commercial driver's license after being charged with DWI. That license, as well as his personal driver's license, was revoked for a thirty-day period. Defendant then filed petitions for personal and commercial limited driving privileges. He received the personal limited driving privilege. His request for a commercial limited driving privilege was refused, however, based on a lack of statutory authority. After the thirty-day period, defendant's commercial driving privilege was reinstated upon the payment of a fifty-dollar restoration fee to the North Carolina Department of Motor Vehicles.

Defendant did not testify and did not offer evidence. The jury returned a guilty verdict and the trial court, determining defendant was a Level V offender, entered a suspended sentence.

By defendant's first and second assignments of error, he argues the thirty-day revocation of his commercial driver's license without the availability of a limited commercial license is "punishment." The subsequent prosecution for DWI, he contends, violates the federal double jeopardy clause of the Fifth Amendment to the U.S. Constitution and the North Carolina Law of the Land clause. We disagree.

The double jeopardy clause protects against a second prosecution for the same offense after an acquittal or conviction and protects against multiple punishments for the same offense. U.S. Const. Amend. 5. It is applicable to the states based on the Fourteenth Amendment's due process clause. The Law of the Land clause of the North Carolina Constitution incorporates similar protections.

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. Art. I, § 19. Our Supreme Court has noted that "[i]t is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense . . . . While the principle is not stated in express terms in the North Carolina Constitution, it has been regarded as an integral part of the 'law of the land' within the meaning of [this section]." *State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954).

The General Statutes provide, in pertinent part:

> (b) Revocations for Persons Who Refuse Chemical Analyses or Who Are Charged With Certain Implied-Consent Offenses. —A person's driver's license is subject to revocation under this section if:
>
> (1) A charging officer has reasonable grounds to believe that the person has committed an offense subject to the implied-consent provisions of G.S. 20-16.2;

(2) The person is charged with that offense as provided in G.S. 20-16.2(a);

(3) The charging officer and the chemical analyst comply with the procedures of G.S. 20-16.2 and G.S. 20-139.1 in requiring the person's submission to or procuring a chemical analysis; and

(4) The person:

a. Willfully refuses to submit to the chemical analysis;

b. Has an alcohol concentration of 0.08 or more within a relevant time after the driving;

c. Has an alcohol concentration of 0.04 or more at any relevant time after the driving of a commercial motor vehicle; or

d. Has any alcohol concentration at any relevant time after the driving and the person is under 21 years of age.

N.C. Gen. Stat. § 20-16.5(b) (1999). However, in *State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996), our Supreme Court held that the then ten-day revocation under section 20-16.5 and restoration fee constituted a remedial highway safety measure rather than punishment. The *Oliver* court further stated that "[a]n impaired driver presents an immediate, emergency situation, and swift action is required to remove the unfit driver from the highways in order to protect the public." *Id.* at 209, 470 S.E.2d at 21.

In *Hudson v. United States*, 522 U.S. 93, 99, 139 L. Ed. 2d 450, 458 (1997), the U.S. Supreme Court utilized factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 9 L. Ed. 2d 644 (1963), to determine whether a civil penalty was punitive. The factors include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has been historically regarded as punishment; (3) whether the sanction comes into play only upon a finding of scienter; (4) whether the operation of the sanction will promote the traditional aims of punishment, retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether an alternative purpose to which the sanction may be rationally connected is assignable to it; and (7) whether the sanction appears excessive in relation to the alternative purpose assigned. *Id.*

In *State v. Evans*, 145 N.C. App. 324, 550 S.E.2d 853 (2001), this Court utilized these factors to conclude that section 20-16.5 is

not punitive. The Evans court stated that "the function and intent of [section 20-16.5] is to remove from our highways drivers who either cannot or will not operate a motor vehicle safely and soberly. The purpose of [the] license revocation [is] to prevent unsafe and unfit drivers from operating vehicles and endangering the citizens of North Carolina."

Defendant contends his case is distinguishable, however, in that it was his commercial license that was affected, which denied his "very right to earn a livelihood for that 30-day period." He asserts that his commercial driving privilege was wrongfully affected since he was operating a non-commercial vehicle at the time of the offense. However, the U.S. Supreme Court, in *Seling v. Young*, 531 U.S. 250, 267, 148 L. Ed. 2d 734, 737 (2001), held that "[a]n Act found to be civil cannot be deemed punitive 'as applied' to a single individual in violation of the Double Jeopardy . . . clause" because the impact on a single defendant is irrelevant in a double jeopardy analysis. In total, the *Evans* analysis as to the seven factors is applicable here.

Defendant also argues that the U.S. Supreme Court holding in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 128 L. Ed. 2d 767 (1994), serves to bar his trial because of the license revocation. Even if we had held the revocation here to be punishment, which we do not, whether that would have automatically implicated *Kurth Ranch* is not settled since the ostensibly civil proceeding came prior to the criminal proceeding. The U.S. Supreme Court, in *Kurth Ranch* "specifically noted that 'the statute here does not raise the question whether an ostensibly civil proceeding *that is designed to inflict punishment* may bar a subsequent proceeding that is admittedly criminal in character.' " *Vick v. Williams*, 233 F.3d 213, 218 (4th Cir., 2000), *cert. den.*, 533 U.S. 952, 150 L. Ed. 2d, 754 (2001) (emphasis added). According to *Vick*, the U.S. Supreme Court "specifically reserves the question of whether that [civil] punishment would bar a subsequent criminal proceeding." *Id.*

The safety and remedial purposes of the statute are clear. Regardless of the type of vehicle being driven at the time of the offense, a driver unwilling or unable to conform to the motor vehicle laws is a danger to other citizens on the road. Moreover, we note defendant's Class A commercial driver's license enabled him to operate any Class A motor vehicle. *See* N.C. Gen. Stat. § 20-37.16(b)(1) (1999). The classes of motor vehicles are solely based on the weight of the vehicle. Section 20-4.01 provides, in pertinent part:

(2a) Class A Motor Vehicle.—A combination of motor vehicles that meets either of the following descriptions:

a. Has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.

b. Has a combined GVWR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.

(2b) Class B Motor Vehicle.—Any of the following:

a. A single motor vehicle that has a GVWR of at least 26,001 pounds.

b. A combination of motor vehicles that includes as part of the combination a towing unit that has a GVWR of at least 26,001 pounds and a towed unit that has a GVWR of less than 10,001 pounds.

(2c) Class C Motor Vehicle.—Any of the following:

a. A single motor vehicle not included in Class B.

b. A combination of motor vehicles not included in Class A or Class B.

N.C. Gen. Stat. § 20-4.01(2a); (2b); and (2c) (1999). A Class A commercial driving privilege encompasses some of the largest vehicles on the road. Defendant stated that driving a larger vehicle requires greater skill and that there are more stringent requirements to get a commercial driver's license. *See* Art. 2C of Chapter 20 of the N.C. General Statutes. We thus believe the state has a greater interest in the public's safety regarding commercial drivers because there exists a greater risk of harm. A personal driver's license has been held to be a privilege. *See State v. Evans*, 145 N.C. App. 324, 550 S.E.2d 853 (2001); *Eibergen v. Killens*, 124 N.C. App. 534, 477 S.E.2d 684 (1996). A commercial driver's license is an extraordinary privilege which carries with it additional responsibilities.

Driver's license revocations are civil, not criminal, proceedings. *See State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996); *Seders v. Powell*, 298 N.C. 453, 259 S.E.2d 544 (1979). Double jeopardy will attach only when a defendant is forced to defend himself from multiple *criminal* punishments for one offense.

Accordingly, the revocation of defendant's commercial license for thirty days accompanied by a disqualification for a limited commercial driver's license was not akin to criminal punishment. It was the exercise of reasonable regulatory authority designed for an appropriate public purpose. Defendant's later conviction for DWI did not constitute double jeopardy.

NO ERROR.

Judges WYNN and HUDSON concur.

JERRY GOYNIAS, PLAINTIFF-APPELLANT v. SPA HEALTH CLUBS, INC., DEFENDANT-APPELLEE

No. COA00-1499

(Filed 5 February 2002)

Premises Liability— slip and fall—wet locker room floor

The trial court correctly granted summary judgment for defendant health club in a personal injury action where plaintiff slipped and fell while going from the shower area to a locker room; defendant had placed black nonskid mats on the floor and provided a drain with a slope; plaintiff admitted that he had seen the nonskid mats and that they indicated to him that the floor might be slippery; the texture of the floor exceeded slip resistant standards; and there is no evidence that defendant was actually or constructively aware of the dangerous condition.

Judge BIGGS dissenting.

Appeal by plaintiff from order entered 13 April 2000 by Judge Orlando F. Hudson in Superior Court, Orange County. Heard in the Court of Appeals 10 October 2001.

Michael J. Anderson, for plaintiff-appellant.

Little & Little, PLLC, by Cathryn M. Little, for defendant-appellee.

McGEE, Judge.

Plaintiff filed a complaint for personal injury against defendant, alleging he was injured as a result of defendant's negligence while he was on the premises of defendant's fitness establishment. Plaintiff alleged in his complaint that he fell on a slippery and wet floor after leaving the men's shower area and returning to the locker room area. Plaintiff alleged he subsequently developed neck and back pain as a result of the fall. Defendant filed an answer denying negligence and alleging contributory negligence of plaintiff. Defendant filed a motion for summary judgment, which was granted by the trial court. Plaintiff appeals.

Plaintiff first argues the trial court erred in granting defendant's motion for summary judgment because there exists a triable issue of fact with regard to defendant's negligence. We disagree.

A defendant is entitled to summary judgment if the record shows "that there is no genuine issue as to any material fact and that [defendant] is entitled to . . . judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). As the moving party, a defendant has the burden of establishing the absence of any triable issue of fact. The trial court must construe the evidence in the light most favorable to the non-moving party. *See Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 488 S.E.2d 608 (1997), *aff'd*, 347 N.C. 666, 496 S.E.2d 379 (1998).

In general, property owners have "the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). A property owner "is required to exercise reasonable care to provide for the safety of all lawful visitors on his property, the same standard of care formerly required only to invitees. Whether the care provided is reasonable must be judged against the conduct of a reasonably prudent person under the circumstances." *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 646, *cert. denied*, 351 N.C. 107, 541 S.E.2d 148 (1999). This duty includes the "duty to exercise ordinary care to keep the premises in a reasonably safe condition and to warn the invitee of hidden perils or unsafe conditions that can be ascertained by reasonable inspection and supervision." *Byrd v. Arrowood*, 118 N.C. App. 418, 421, 455 S.E.2d 672, 674 (1995).

In order to show negligence by a defendant, a "plaintiff must show that defendant either (1) negligently created the condition causing injury, or (2) negligently failed to correct the condition after

actual or constructive notice of its existence." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992).

In the case before us, plaintiff has failed to show that defendant negligently created the situation which caused plaintiff's injury. Plaintiff's own expert testified in his deposition that the tile floor was textured and possessed a .64 coefficient of friction, significantly higher than the .04 standard for a bathtub or shower floor. Plaintiff's expert testified the floor was sloped; however, the expert performed no tests which would indicate what that slope was or if it was significant enough to be the cause of the accident. Plaintiff's expert testified the lighting in the room was such that a person could not see a puddle which had formed; however, the expert examined the area two and a half years after the accident, and offered no evidence or factual basis as to what the lighting conditions were at the time of the accident. Plaintiff's expert offered that the slip resistence of the floor was determined with clean water, and that resistence could be lessened by the presence of soap or other oils. However, neither plaintiff nor plaintiff's expert offered any evidence of the presence of soap or oils in the water on the date of the accident. "Negligence is not presumed from the mere fact of injury. Plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, nonsuit is proper." *Roumillat* at 68, 414 S.E.2d at 345.

The record shows defendant installed a tile floor which was textured in order to create a slip-resistant floor with a much greater slip resistance than is required. Defendant placed several non-skid mats in the area where plaintiff fell, and defendant installed a floor with a slope to facilitate the drainage of water. There is no evidence the slope caused plaintiff to fall or was constructed at an angle that would be considered too steep.

A plaintiff may also survive a motion for summary judgment by showing that a defendant failed to correct the condition after actual or constructive notice. *See Roumillat* at 64, 414 S.E.2d at 342-43. However, in this case, plaintiff has failed to offer any evidence which would tend to prove defendant was aware dangerous puddles had formed or were forming on the floor. Plaintiff testified he did not notice any puddles immediately before or immediately after he slipped. He did not notice any standing water until he returned a few minutes later to the place where he fell, accompanied by an employee of the health club. Furthermore, a

> proprietor has no duty to warn an invitee of an obvious danger or of a condition of which the invitee has equal or superior knowledge. Reasonable persons are assumed, absent a diversion or distraction, to be vigilant in the avoidance of injury in the face of a known or obvious danger.

Roumillat at 66, 414 S.E.2d at 344 (other citations omitted).

In *Byrd*, 118 N.C. App. at 421, 455 S.E.2d at 674, the plaintiff attempted to argue that a church was negligent because the plaintiff slipped on a sloped hallway she claimed was wet due to patrons tracking in rainwater. Our Court held summary judgment was appropriate and added that even "if the floor was wet due to the rain that evening, this condition would have been an obvious danger of which plaintiff should have been aware since she knew it was raining outside and it was likely that people would track water in on their shoes." *Id.*

Furthermore, our Court has previously held it "is common knowledge that bathtub surfaces, especially when water and soap are added, are slippery and that care should be taken when one bathes or showers." *Kutz v. Koury Corp.*, 93 N.C. App. 300, 304, 377 S.E.2d 811, 813 (1989). The plaintiff in *Kutz* attempted to argue the defendant was liable for the plaintiff's injury because the defendant had placed non-skid strips in only half of the bathtub. However, our Court held that the "bathtub here was not so unnecessarily dangerous so as to give rise to a claim of negligence." *Id.* at 304, 377 S.E.2d at 814.

While we acknowledge plaintiff did not slip in a bathtub, we still deem the area where he slipped to be an area where one might be expected to exercise extra caution. The chances of water, and even soapy water, on the floor of an area where people walk out of a shower across to a locker room appear to be high. Plaintiff admitted he saw the black nonskid mats on the floor and that he knew the purpose of the mats was to help in preventing falls. He also admitted that the nonskid mats indicated to him that the floors could be slippery.

Defendant was required to keep its premises in a reasonably safe condition. The record shows defendant placed mats on the floor and provided a drain with a slope. Also, the texture of the floor exceeded the required slip resistant standard for bathroom flooring. There is no evidence defendant was actually or constructively aware of an unobvious dangerous condition which it failed to correct. Therefore, plaintiff failed to show defendant breached its duty to plaintiff.

As we have concluded summary judgment was appropriate on the issue of defendant's negligence, we do not need to address plaintiff's second assignment of error concerning contributory negligence.

We affirm the order of the trial court granting defendant's motion for summary judgment.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge BIGGS dissents.

BIGGS, Judge dissenting.

Summary judgment is a drastic remedy and should be used with great caution. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995) (citation omitted). Moreover, such relief is particularly disfavored in cases of negligence or contributory negligence. *Thompson v. Bradley*, 142 N.C. App. 636, 544 S.E.2d 258, *disc. review denied*, 353 N.C. 532, 550 S.E.2d 506 (2001). Indeed, as expressed by the North Carolina Supreme Court, "it is only in exceptional negligence cases that summary judgment is appropriate, since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980) (citation omitted).

In the case *sub judice*, whether defendant exercised reasonable care in the maintenance of its premises is a question of fact for the jury. Moreover, a jury question is presented as to plaintiff's contributory negligence. It was error for the trial court to grant summary judgment and therefore, I respectfully dissent.

DOROTHIA SMITH, PLAINTIFF-EMPLOYEE v. BEASLEY ENTERPRISES, INC./ RED APPLE, DEFENDANT-EMPLOYER AND MANAGED CARE, USA, DEFENDANT-CARRIER

No. COA01-325

(Filed 5 February 2002)

1. **Workers' Compensation— causation—consideration of evidence**

The Industrial Commission in a workers' compensation case correctly concluded that plaintiff failed to establish that her carpal tunnel syndrome was an occupational disease where plaintiff maintained that the Commission disregarded competent evidence from three medical providers, but the Commission specifically referred to evidence offered by two of them, the causation testimony from the third was not sufficiently reliable to constitute competent medical evidence, and the Commission's findings indicate that it considered all competent evidence.

2. **Workers' Compensation— carpal tunnel syndrome—occupational disease**

The Industrial Commission properly concluded in a workers' compensation action that plaintiff had failed to provide competent medical evidence establishing her carpal tunnel syndrome as an occupational disease where the hypothetical question posed to plaintiff's witnesses inaccurately described plaintiff's job responsibilities and her witnesses were unable to recall those responsibilities with specificity.

Appeal by plaintiff from opinion and award filed 15 December 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 December 2001.

Law Offices of Robert J. Willis, by Robert J. Willis, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jennifer Ingram Mitchell, for defendant-appellee.

WALKER, Judge.

Plaintiff filed a workers' compensation claim on 22 April 1998 seeking benefits for her carpal tunnel syndrome which she alleges is an occupational disease. The deputy commissioner denied her claim

and, on 15 December 2000, the Full Commission (Commission) issued an opinion and award affirming the deputy commissioner's holding.

The relevant facts as found by the Commission show the following: In 1988, plaintiff began employment as a deli worker in a convenience store owned by defendant. Her various job responsibilities included washing pieces of chicken and trimming any excess fat from them. To do this, plaintiff held the chicken piece in her left hand and used a knife with her right hand. During a normal workday, this task took between two to three hours to complete.

In June 1993, during an annual physical examination, plaintiff reported pain and numbness in both hands. However, no diagnosis was made at that time. On 20 January 1998, plaintiff sought treatment at Rich Square Medical Center. She reported to a physician's assistant, Delina Cooley (Ms. Cooley), that she had difficulty grasping items with her hands and that she had problems sleeping due to pain in her hands. After examining plaintiff, Ms. Cooley referred her to East Carolina Neurology in Greenville for nerve conduction studies. The referral was confirmed by Ms. Cooley's supervising physician, Dr. Gilberto Navarro (Dr. Navarro).

In March 1998, Dr. Rakesh Jaitley (Dr. Jaitley), a neurologist with East Carolina Neurology, performed nerve conduction studies on plaintiff's hands and arms. These studies suggested that she suffered from bilateral distal median entrapment neuropathy (carpal tunnel syndrome). Plaintiff notified defendant of this diagnosis. Shortly thereafter, she received steroid injections in her wrists.

On 1 September 1998, plaintiff was evaluated by Dr. John R. Leonard, III (Dr. Leonard), a neurosurgeon at East Carolina Neurosurgical Associates, at which time she complained that her symptoms were more severe in her left hand. Consequently, Dr. Leonard performed carpal tunnel decompression surgery on plaintiff's left arm. Following this surgery, Dr. Leonard instructed plaintiff to return to him if she had any further problems with her left hand or if she wanted to schedule surgery for her right hand. After a follow-up evaluation, Dr. Leonard opined that plaintiff had normal median nerve function in her left hand, and on 30 November 1998, he released her to return to regular duty work. Plaintiff had no further contact with Dr. Leonard, and she has not worked for defendant since June 1998.

We summarize plaintiff's assignments of error as two issues: (1) whether the Commission impermissibly disregarded the testimony of plaintiff's medical witnesses; and (2) whether the Commission erred in concluding that plaintiff had failed to establish her carpal tunnel syndrome as an occupational disease.

On appeal, the standard of review for a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings and whether these findings support the Commission's conclusions. *Sidney v. Raleigh Paving & Patching*, 109 N.C. App. 254, 426 S.E.2d 424 (1993). If the Commission's findings are supported by competent evidence, they are to be upheld even if the record presents evidence which would support contrary findings. *Id.* Thus, this Court's role is to determine whether competent evidence exists to support the Commission's findings and whether those findings justify its conclusions and award. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 496 S.E.2d 790 (1998).

[1] Plaintiff first asserts the Commission failed to consider the causation testimonies of Ms. Cooley, Dr. Jaitley and Dr. Navarro when it concluded she did not establish her carpal tunnel syndrome as an occupational disease. In making her assertion, plaintiff relies on this Court's precedent that the Commission must consider and weigh all competent evidence. *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 541 S.E.2d 510 (2001); *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 486 S.E.2d 252 (1997); *and Weaver v. American National Can Corp.*, 123 N.C. App. 507, 473 S.E.2d 10 (1996). She maintains that because the Commission's findings do not specifically reference her medical expert's opinion testimony, it impermissibly disregarded competent evidence.

The record shows the parties stipulated into evidence plaintiff's medical records from Rich Square Medical Center and Dr. Leonard. The Commission also had before it the depositions of Ms. Cooley, Dr. Jaitley, Dr. Navarro and Dr. Leonard. Furthermore, the Commission's opinion and award states that its decision was based upon the "entire record of evidence" and the "briefs and arguments" of the parties.

This Court has ruled that the Commission "must make 'definitive findings to determine the critical issues raised by the evidence,'. . . and in doing so must indicate in its findings that it has 'considered or weighed' all testimony with respect to the critical issues in the case."

Bryant v. Weyerhaeuser Co., 130 N.C. App. 135, 139, 502 S.E.2d 58, 62, *disc. review denied*, 349 N.C. 352, 515 S.E.2d 700 (1998) (internal citations omitted). However, the Commission is not required to make "exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence . . . ." *Id.* The Commission must make findings from which this Court may reasonably infer that it gave proper consideration to all relevant testimony. *Jenkins*, 142 N.C. App. at 78-79, 541 S.E.2d at 515 (*citing Pittman v. International Paper Co.*, 132 N.C. App. 151, 510 S.E.2d 705, *affirmed*, 351 N.C. 42, 519 S.E.2d 524 (1999)).

In *Jenkins* and *Lineback*, we held the Commission did not give proper consideration to the causation testimony of the plaintiffs' medical experts where the findings made no mention of the experts nor presented any evidence from which we could have reasonably inferred that it had considered their testimony. *Id;* and *Lineback*, 126 N.C. App. at 680-81, 486 S.E.2d at 254. Likewise, in *Weaver*, we held the Commission failed to consider the causation testimony of the plaintiff's co-workers where its findings made no mention of the co-workers, yet specifically stated the plaintiff had not proven causation. *Weaver*, 123 N.C. App. at 510-11, 473 S.E.2d at 12. In contrast, the Commission here in its findings specifically refers to evidence offered by Ms. Cooley and Dr. Jaitley. From this, we conclude that the Commission considered the evidence presented from these two witnesses.

Although the Commission's findings do not mention any evidence from Dr. Navarro, the record reveals that, upon cross-examination, he testified that he had never examined plaintiff, was unaware of her specific job duties, and that he did not have an opinion to any degree of medical certainty as to the cause of plaintiff's carpal tunnel syndrome. As such, any causation testimony from Dr. Navarro was not sufficiently reliable as to constitute competent medical evidence. *See Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914-15 (2000) (a medical expert's opinion testimony must be sufficiently reliable to qualify as competent evidence). Therefore, we conclude the Commission was not required to consider his testimony. *See Lineback*, 126 N.C. App. at 680, 486 S.E.2d at 254 (the Commission "may not wholly disregard or ignore *competent* evidence") (emphasis added). We further conclude the Commission's findings indicate that it considered all competent evidence with respect to the critical issues in this case.

[2] Plaintiff next contends the Commission erred in concluding that she had failed to establish her carpal tunnel syndrome as an occupational disease. Under our workers' compensation statute, an occupational disease is:

> Any disease, other than hearing loss . . ., which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C. Gen. Stat. § 97-53(13) (1999). Based on this statutory language, our Supreme Court has identified three elements which an employee must show in order to prove the existence of an occupational disease: (1) the disease is characteristic of a trade or occupation; (2) the disease is not an ordinary disease of life to which the public is equally exposed; and (3) proof of a causal connection between the disease and the employment. *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981).

Plaintiff maintains that the opinions provided by Ms. Cooley, Dr. Jaitley and Dr. Navarro provide competent medical evidence sufficient to satisfy the three elements annunciated in *Hansen*. We disagree.

The record shows the opinions proffered by these witnesses were in response to a hypothetical question posed by plaintiff's counsel. However, defendant correctly points out that the hypothetical question inaccurately describes plaintiff's job responsibilities. Although Ms. Cooley and Dr. Jaitley examined plaintiff, they were unable to recall with specificity her job responsibilities. Therefore, the Commission properly concluded that plaintiff had failed to provide competent medical evidence establishing her carpal tunnel syndrome as an occupational disease.

We have reviewed plaintiff's remaining assignments of error and find them to be without merit. The opinion and award of the Commission is affirmed.

Affirmed.

Judges WYNN and THOMAS concur.

CENTRAL CAROLINA DEVELOPERS, INC., PLAINTIFF v. MOORE WATER AND SEWER AUTHORITY, AND MOORE COUNTY, DEFENDANTS, THIRD-PARTY PLAINTIFF v. VAN CAMP GROUP, INC. AS SUCCESSOR TO AND F/K/A REGIONAL INVESTMENTS OF MOORE, INC., PINEHURST WATER & SANITARY COMPANY, INC., JOHN KARSCIG, ROBERT W. VAN CAMP, JAMES R. VAN CAMP AND DONALD HUFFMAN, THIRD-PARTY DEFENDANTS

No. COA01-102

(Filed 5 February 2002)

1. Eminent Domain— newly purchased property—sewer pipe discovered on property—action time barred

An inverse condemnation claim was time barred where plaintiff bought a lot in 1995, discovered a sewer pipe running through the lot in 1997 which prevented building, and filed suit in 1998. Plaintiff has the burden of proving that the inverse condemnation action was filed within two years of the date of the taking and defendant presented uncontroverted evidence that the pipe was installed prior to 1989.

2. Trespass— sewer pipe on property—action against public utility

Plaintiff had no claim for trespass against defendant water and sewer authority from a sewer pipe laid across its property because defendant is a public utility with the power of eminent domain. The exclusive remedy for failure to compensate for a taking is inverse condemnation.

Appeal by plaintiff from judgment filed 11 October 2000 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 28 November 2001.

Gill & Tobias, LLP, by Douglas R. Gill, for plaintiff-appellant.

Lesley F. Moxley, Moore County Attorney, and Paul A. Raaf, Assistant Moore County Attorney, for defendant-appellee Moore County.

Cranfill, Sumner & Hartzog, L.L.P., by William W. Pollock, for defendant-appellee and third-party plaintiff Moore Water and Sewer Authority; and Van Camp, Meacham & Newman, PLLC, by Michael J. Newman, for third-party defendant-appellee Van Camp Group.

WALKER, Judge.

In August of 1994, plaintiff entered into a contract for the purchase of Lot 253 in a development known as Fairwoods on 7 from Pinehurst Acquisition Corporation. In an addendum to the contract signed 3 August 1994, the parties agreed "[t]hat purchaser accepts subject lot in its present condition and purchaser will be solely responsible for the payment of any expenses that may be incurred in preparing the lot for the construction of a residence thereon."

In May of 1995, prior to the sale, the general contractor for the plaintiff hired Emmett Shelton Raynor, a professional land surveyor, to survey Lot 253. He observed a sewer pipe "clearly visible, and . . . above the water line of the creek," crossing the creek on Lot 253. On 11 May 1995, he informed the plaintiff's contractor of the existence of the sewer pipe. He also informed Moore Water and Sewer Authority (MOWASA) and it was determined that the sewer pipe was active and belonged to MOWASA. Plaintiff claimed it did not receive notice from its general contractor of the existence of this sewer pipe. On 21 July 1995, plaintiff purchased Lot 253. At the time of the purchase, there were no easements, restrictions, or reservations on record other than those contained in the deed.

In mid-May 1997, plaintiff was proceeding to build a residence on Lot 253 when he contends he first discovered the sewer pipe running through the lot. Because the sewer pipe was located on Lot 253, plaintiff could not build. On 16 April 1998, plaintiff filed suit against Pinehurst Acquisition Corporation and MOWASA alleging breach of implied warranty by Pinehurst Acquisition Corporation and claims of trespass and inverse condemnation against MOWASA. MOWASA filed a third-party complaint against Van Camp Group, Inc., as successor to and f/k/a Regional Investments of Moore, Inc., Pinehurst Water and Sanitary Company, Inc., John Karscip, Robert W. Van Camp, James R. Van Camp, and Donald Huffman (Van Camp Group) claiming that if MOWASA were liable to plaintiff, then the Van Camp Group would be liable to MOWASA for contribution. The Van Camp Group had sold its water company to MOWASA in 1991. While the present suit was pending, MOWASA sold the water company to Moore County which was joined as a defendant. Plaintiff voluntarily dismissed the suit against Pinehurst Acquisition Corporation.

MOWASA and Van Camp Group filed motions for summary judgment and Moore County filed a motion to dismiss pursuant to N.C.

Gen. Stat. § 1A-1, Rule 12(b)(6) (1999). The basis for all motions was that the plaintiff's complaint was time barred based on the statute of limitations created in N.C. Gen. Stat. § 40A-5(a).

At the hearing, MOWASA and Van Camp Group submitted affidavits stating that the sewer pipe in question was installed through Lot 253 prior to 1989. Plaintiff submitted an affidavit in opposition to the motions which did not contradict the affidavits of MOWASA and Van Camp Group as to the 1989 date of installation of the sewer pipe. Plaintiff's affidavit did not contain any information regarding the date of the sewer pipe installation. The trial court granted the motions for summary judgment in favor of MOWASA and the Van Camp Group and granted Moore County's motion to dismiss under Rule 12(b)(6).

[1] Plaintiff first claims the inverse condemnation action against MOWASA should not have been dismissed. "Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so." *Smith v. City of Charlotte*, 79 N.C. App. 517, 521, 339 S.E.2d 844, 847 (1986). The remedy for inverse condemnation lies under N.C. Gen. Stat. § 40A-51(a) which states:

> If property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed the owner of the property, may initiate an action to seek compensation for the taking. The action may be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later.

Plaintiff contends that the "taking" or condemning of the easement across Lot 253 could not have occurred until 29 September 1997 when plaintiff "notified MOWASA that it would not accept the continued use of its property for MOWASA's sewer system." Plaintiff bases this assertion on the holding in *Construction Co. v. Charlotte*, 208 N.C. 309, 180 S.E. 573 (1935).

In *Construction Co.*, the evidence showed that possession of a water main by the city "was with the permission of [the land owner], and was at no time adverse to [the land owner]; and that such possession was pursuant to agreements with respect to said water mains by and between [the land owner] and the superintendent of the [city's] municipal water system." 208 N.C. at 312, 180 S.E. at 574-75.

Thus, the Court concluded that the taking by the city did not begin until the city refused to recognize the land owner as the rightful owner of the water mains. *Id.* at 312, 180 S.E. at 575.

The facts and circumstances of the present case are distinguishable from those presented in *Construction Co.* Here, plaintiff did not allege nor did it present any evidence which would show that, prior to 29 September 1997, the sewer pipe was running through Lot 253 pursuant to some agreement between MOWASA and the plaintiff or the plaintiff's predecessor-in-interest. The only evidence is that MOWASA's sewer pipe has been located in Lot 253 since 1989. Thus, *Construction Co.* is not applicable to the present case in determining the date of the "taking." Because there is no allegation that MOWASA was in possession of the land pursuant to an agreement or with permission of the plaintiff, a "taking" could only have occurred when the sewer pipe was installed across Lot 253.

Plaintiff has the burden of proving that the inverse condemnation action was filed within two years of the date of the "taking." *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 572, 372 S.E.2d 742, 743 (1988). Plaintiff presented no evidence nor did it allege the date of the "taking." However, MOWASA presented uncontroverted evidence, through the affidavit of Wayne Haddock, that the pipe located on plaintiff's property was installed prior to early 1989. Mr. Haddock oversaw the installation of sewer pipes in the area of the plaintiff's property. He stated that the sewer pipe in question "was in existence and already in place prior to our commencement of the sewer project at Fairwoods on 7 in or about June 1987." His project had ended by early 1989.

Therefore, any "taking" would have occurred when the sewer pipe was installed across Lot 253. Because there is undisputed evidence that the sewer pipe was installed by 1989, plaintiff must have filed suit by 1991. As the present suit was filed 16 April 1998, the claim against MOWASA for inverse condemnation was time barred.

[2] Plaintiff also claims that, notwithstanding the inverse condemnation claim, it has a viable claim for trespass against MOWASA. "The exclusive remedy for failure to compensate for a 'taking' is inverse condemnation under G.S. 40A-51 . . . . An owner has no common-law right to bring a trespass action against a city." *McAdoo*, 91 N.C. App. at 573, 372 S.E.2d at 744. Plaintiff has no claim for trespass against

MOWASA because it is a public utility with the power of eminent domain just as a municipality.

The trial court properly granted summary judgment in favor of MOWASA and the Van Camp Group. Plaintiff admits that Moore County "should share whatever outcome is appropriate for its predecessor, Moore Water and Sewer Authority." Because summary judgment was proper in favor of MOWASA and the Van Camp Group, the granting of Moore County's motion to dismiss was likewise proper.

Affirmed.

Judges WYNN and THOMAS concur.

STATE OF NORTH CAROLINA v. RUBY MICHELLE MOORE

No. COA00-1450

(Filed 5 February 2001)

Probation and Parole— violation report—signed within probation term—no revocation motion during probation

The trial court lacked jurisdiction to conduct a probation revocation hearing after defendant's period of probation had expired where a probation officer signed and dated a probation violation report prior to the expiration of defendant's period of probation, but there was no evidence that the report was filed with the clerk of court during defendant's probation and that the State filed during the probation period a written motion with the clerk of court indicating its intent to conduct a revocation hearing as required by N.C.G.S. § 15A-1344(f).

Appeal by defendant from judgment entered 6 July 2000 by Judge Richard Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 November 2001.

Attorney General Roy A. Cooper, by Assistant Attorney General Amar Majmundar, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Dean Paul Loven, for defendant-appellant.

EAGLES, Chief Judge.

On 3 June 1994, defendant Ruby Michelle Moore pled guilty to breaking and entering in violation of N.C.G.S. § 14-54 and larceny in violation of N.C.G.S. § 14-72. The same day, the Honorable Shirley L. Fulton imposed and suspended a six year term of imprisonment and placed defendant on supervised probation for five years.

On 3 November 1995, Probation Officer Pamela W. Gilchrist (Officer Gilchrist) signed and dated a probation violation report alleging that defendant failed to complete a drug treatment program, that she missed scheduled office appointments on two occasions, and that she had absconded from supervision. The probation violation report was found in the clerk's office files but it is not indorsed with a file stamp. An order for defendant's arrest was entered 6 August 1996. Return of service on the order for arrest was made on 9 May 2000. The five-year period of probation specified in the judgment expired on 3 June 1999.

At a probation revocation hearing on 6 July 2000, defendant stipulated to violating the specified conditions of probation. The Honorable Richard Boner found that the alleged violations were true and willful. Judge Boner ordered that defendant continue on probation and serve a split sentence of 120 days incarceration. Defendant appeals.

On appeal, defendant contends that the trial court (1) lacked jurisdiction over the subject matter of the hearing and (2) that the trial court erred by failing to dismiss the violation report because the official policy of the Department of Community Corrections as stated in the Division of Community Corrections Policy Manual is to have such cases transferred to unsupervised probation and reviewed for termination.

In *State v. Hicks*, this Court wrote:

> A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute. . . . "When a sentence has been suspended and defendant placed on probation on certain named conditions, the court may, *at any time during the period of probation*, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect. But the State may not do so *after the expiration of the period of probation* except as provided in G.S. 15A-1344(f)."

148 N.C. App. 203, 204-05, 557 S.E.2d 594, 595 (Dec. 28, 2001) (No. COA01-256) (quoting *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980) (citations omitted)).

Section 15A-1344(f) of the North Carolina General Statutes provides that once the period of probation has ended, the court may revoke probation only if:

> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

Hicks, 148 N.C. App. at 205, 557 S.E.2d at 595-96.

Here, defendant argues that the State lacked jurisdiction to revoke defendant's probation because the probationary period had expired and the violation report was not file stamped, and therefore not properly filed in accordance with N.C.G.S. § 15A-1344(f)(1). In the civil matter of *Bailey v. Davis*, 231 N.C. 86, 89, 55 S.E.2d 919, 921 (1949), our Supreme Court stated that "a paper writing is deemed to be filed within the meaning of the law when it is delivered for that purpose to the proper officer and received by him, and it is not necessary to the filing of a paper that it shall be indorsed as having been so filed." In a criminal case, however, North Carolina requires the State to prove jurisdiction beyond a reasonable doubt. *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993). In the absence of a file stamped motion or any other evidence of the motion's timely filing as required by N.C.G.S. § 15A-1344(f)(1) the trial court is without jurisdiction. On appeal, "[w]hen the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *Id.* at 175, 432 S.E.2d at 836 (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)).

Though Officer Gilchrist signed and dated the violation report on 3 November 1995, the record fails to provide evidence of the report having been filed prior to the expiration of defendant's period of probation. For a trial court to retain jurisdiction over a probationer after the probation period has expired, the plain language of N.C.G.S. § 15A-1344(f)(1) requires the State to file, before the expiration of the

period of probation, a written motion with the clerk indicating the State's intent to conduct a revocation hearing. *Hicks*, 148 N.C. App. at 205, 557 S.E.2d at 596. The burden of perfecting the trial court's jurisdiction for a probation revocation hearing after defendant's period of probation has expired lies squarely with the State. *See* N.C.G.S. § 15A-1344(f) (1999); *see also Petersilie*, 334 N.C. at 175, 432 S.E.2d at 835.

Here, the violation report was not file stamped and the record is without sufficient evidence to support the State's contention that defendant's violation report was filed before defendant's period of probation had expired. Consequently, we hold that the State failed to satisfy the plain language of N.C.G.S. § 15A-1344(f) and that the trial court was without jurisdiction to conduct a hearing. *See Hicks*, 148 N.C. App. 203, 557 S.E.2d 594. In light of this conclusion, other arguments on appeal need not be reached. Accordingly, the trial court's judgment that defendant violated terms of her probation is arrested and the order modifying the terms of her probation is vacated. *See Petersilie*, 334 N.C. at 175, 432 S.E.2d at 835.

Judgment arrested and order vacated.

Judges MARTIN and BIGGS concur.

DAIMLERCHRYSLER CORPORATION, PLAINTIFF v. H.C. KIRKHART, INDIVIDUALLY, AND THE LAW OFFICES OF H.C. KIRKHART, DEFENDANTS

No. COA00-1370

(Filed 19 February 2002)

Attorneys; Injunction— preliminary—solicitation of legal business using discovery material from a separate case

The trial court erred in an action alleging barratry, libel, tortious interference with contract, tortious interference with prospective economic advantage, and unfair and deceptive trade practices by granting a preliminary injunction that restricted the manner in which defendant attorney and his law practice could use information, obtained from plaintiff automobile corporation through discovery in a separate action in which defendants represented two individuals in a lawsuit against plaintiff under the Lemon Law Statute, to solicit clients and generate further litigation against plaintiff because: (1) plaintiff has failed to show a likelihood of success on its barratry claim since North Carolina does not recognize a civil cause of action for barratry and to the extent that plaintiff's first cause of action is an attempt to state a claim for champerty and maintenance, defendants' conduct is covered by the recognized exception for the relationship between attorney and client; (2) plaintiff has failed to show a likelihood of success on its libel claim since defendants' communications regarding whether plaintiff had defrauded those contacted, and whether a class action had been filed, were entitled to a qualified privilege; (3) plaintiff has failed to show a likelihood of success on its tortious interference with contract claim since plaintiff's complaint failed to identify any specific contract with plaintiff that a third party had been induced not to perform as a result of defendants' conduct; (4) plaintiff has failed to show a likelihood of success on its tortious interference with prospective advantage claim since plaintiff failed to identify any particular contract that a third party has been induced to refrain from entering into with plaintiff; (5) plaintiff's unfair and deceptive trade practices claim rests on its claim for the other four torts, and plaintiff has failed to establish a sufficient likelihood of success on the merits of these claims; and (6) the possibility that plaintiff may have to defend itself in a lawsuit or multiple lawsuits is not a sufficiently substantial injury to support the preliminary injunction since the sanctions under N.C.G.S. § 1A-1, Rule

11 are sufficient to protect plaintiff from the possibility that defendant attorney will assist clients in filing frivolous lawsuits against plaintiff.

Appeal by Defendants from orders entered 16 May 2000 and 27 June 2000 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 6 November 2001.

The Banks Law Firm, P.A., by R. Jonathan Charleston, John P. Roseboro, Lena D. Wade and Maricia L. Moye, for plaintiff-appellee.

Patterson, Dilthey, Clay & Bryson, L.L.P., by G. Lawrence Reeves, Jr., for defendant-appellants.

CAMPBELL, Judge.

This appeal arises from the trial court's grant of a preliminary injunction which restricts the manner in which Defendants, a licensed attorney and his law practice, may use information obtained from DaimlerChrysler through discovery in a separate action in which Defendants represented Peter and Frances Pleskach ("the Pleskaches") in a lawsuit against DaimlerChrysler ("the Pleskach case"). Specifically, the trial court's preliminary injunction restrains Defendants from using information obtained through discovery in the Pleskach case to solicit clients and generate further litigation against DaimlerChrysler. Defendants bring forward numerous assignments of error challenging the trial court's findings and conclusions, and also challenging the constitutionality of the preliminary injunction. Upon careful consideration of the briefs, oral argument, transcript, and record, we dissolve the preliminary injunction entered against Defendants.

I. Background

Defendant H.C. Kirkhart ("Kirkhart") is licensed to practice law in North Carolina and does business as The Law Offices of H.C. Kirkhart. On or about 19 April 1999, Kirkhart, as attorney for the Pleskaches, filed a complaint against DaimlerChrysler ("Plaintiff") asserting that Plaintiff had violated the New Motor Vehicles Warranties Act ("Lemon Law Statute"), *see* N.C. Gen. Stat. § 20-351 through § 20-351.10, by failing to make certain disclosures to the Pleskaches required by N.C.G.S. § 20-351.3(d), namely: that the Dodge Caravan ("Caravan") the Pleskaches had purchased from

Plaintiff had previously been repurchased by Plaintiff from its original owners as a result of the Caravan's defective condition.[1] Based on this alleged violation of the Lemon Law Statute, the Pleskaches asserted claims for fraud and unfair and deceptive trade practices. On or about 28 April 1999, DaimlerChrysler filed its answer denying the material allegations of the Pleskach complaint. DaimlerChrysler later filed a third-party complaint against A.E. Cox Corporation, d/b/a Cox Dodge, ("Cox Dodge"), the dealer from who the Pleskaches purchased the Caravan, alleging that it was Cox Dodge, rather than DaimlerChrysler, that had failed to give the Pleskaches the required disclosures.

Subsequent to filing the complaint in the Pleskach case, Kirkhart served DaimlerChrysler with a set of interrogatories and a request for production of documents, seeking, *inter alia*, the vehicle identification numbers of all vehicles that DaimlerChrysler had repurchased since 1994, the names and addresses of the original owners of these vehicles, the names and addresses of all subsequent purchasers of these buy-back vehicles, and the disclosure statements for all the buy-back vehicles that had been repurchased since 1994. DaimlerChrysler refused to produce the requested information, objecting on grounds that the request was vague, overly broad, unduly burdensome, and propounded for an improper purpose.

On 21 October 1999, Judge Gregory A. Weeks, ruling on a motion to compel discovery that had been filed by Kirkhart, ordered DaimlerChrysler to produce the materials and information requested by Kirkhart. On or about 26 November 1999, DaimlerChrysler responded to the discovery requests, but provided incomplete information, choosing to disclose only partial vehicle identification numbers, and failing to provide the names and addresses of the original and subsequent purchasers of buy-back vehicles. However, DaimlerChrysler did provide approximately 850 disclosure statements, the majority of which were not signed by the subsequent purchasers. Using these disclosure statements, which contained complete vehicle identification numbers, Kirkhart was able to determine the identity of current owners of vehicles that had previously been repurchased by DaimlerChrysler pursuant to the Lemon Law Statute. Kirkhart contacted these subsequent purchasers by letter to determine whether they had been advised that their vehicles were manu-

1. Kirkhart had previously represented the original owners of the Caravan, Leslie and Tiffany Clark, in an action against DaimlerChrysler which resulted in DaimlerChrysler's repurchase of the Caravan.

facturer's buy-backs. Several of the owners contacted by Kirkhart subsequently requested that he represent them in their own lawsuits against DaimlerChrysler for violations of the Lemon Law Statute. In March 2000, Kirkhart filed five additional lawsuits against DaimlerChrysler.

On 13 January 2000, DaimlerChrysler filed a motion for a temporary restraining order which was granted *ex parte* by Judge Stafford G. Bullock ("Judge Bullock"). Finding that Kirkhart had been "soliciting business in violation of the discovery rules and ethical rules applicable to all attorneys," Judge Bullock restrained him "from any actions that use discovery material to generate litigation," specifically prohibiting Kirkhart "from sending letters of solicitation to potential litigants." On 3 February 2000, Judge Henry V. Barnette ("Judge Barnette") converted this temporary restraining order into a preliminary injunction specifically prohibiting Kirkhart "from sending letters of solicitation to potential litigants whose names were discovered during discovery in [the Pleskach] case." On 2 March 2000, Judge Barnette granted the Pleskaches' motion to set aside the preliminary injunction and ordered that the injunction be withdrawn on the grounds that the trial court did not have personal jurisdiction over Kirkhart since he was not a party in the Pleskach case. On 3 March 2000, Judge Henry W. Hight, Jr., denied DaimlerChrysler's previously filed motion for a protective order, by which DaimlerChrysler sought the exact relief that had been granted by Judge Barnette's dissolved preliminary injunction.

On 6 March 2000, DaimlerChrysler filed its complaint in the instant case against Defendants alleging that Kirkhart's use of the information obtained through discovery in the Pleskach case to solicit potential clients violated N.C. Gen. Stat. § 84-38, which prohibits the solicitation of legal business, and the rules of civil discovery and ethics applicable to all attorneys. In addition to seeking a permanent injunction prohibiting Defendants from using discovery material from the Pleskach case to solicit potential litigants, DaimlerChrysler asserted the following five causes of action: (1) barratry, (2) libel, (3) prospective interference with contractual relationship, (4) tortious interference with business enterprise, and (5) unfair and deceptive trade practices.

On 2 May 2000, Judge Barnette entered a temporary restraining order identical to the injunction that had previously been entered and dissolved in the Pleskach case. On 16 May 2000, Judge Bullock

entered an order converting this temporary restraining order into a preliminary injunction. On 2 June 2000, Defendants filed a motion to dissolve or rescind the injunction, arguing (1) that no discovery rule prohibited attorneys from using information obtained through discovery in one case as the basis for instituting one or more new cases, (2) that the ethical rules of the legal profession did not prohibit the solicitation of clients, but, in fact, expressly permitted it, subject to certain restrictions, and (3) that the injunction violated Defendants' free speech rights under the First Amendment to the United States Constitution.

Defendants' motion to dissolve or rescind the injunction was heard by Judge Bullock on 12 June 2000. At the conclusion of the hearing, Judge Bullock stated:

> The motion to dissolve the injunction is denied; however, the injunction may be modified to the extent that it does not violate Rule 7.3, direct contact with prospective clients[,] and to the extent that it does not violate any of the ethical rules.

Both sides submitted proposed orders to Judge Bullock reflecting their respective interpretations of his ruling. On 27 June 2000, Judge Bullock entered the order prepared by Plaintiff's counsel, which read as follows:

> It is ORDERED that the defendants be and are hereby restrained from using information that the defendants obtained from the plaintiff through discovery requests to generate unrelated litigation against the plaintiff, and may not use such materials for illegal solicitation.
>
> It is also ORDERED that the defendants in their solicitation must obey laws relating to unfair and deceptive trade practices, common law barratry, G.S. Section 84-38, which prohibits the solicitation of legal business, and Rule 26(b)(1) of the North Carolina Rules of Civil Procedure.

Defendants appealed from the injunction entered on 16 May 2000 and the modification entered on 27 June 2000. Subsequent to docketing their appeal and filing their brief, Defendants filed a petition for writ of certiorari, seeking an alternative means of obtaining immediate appellate review of the trial court's preliminary injunction.

II. Appealability of a Preliminary Injunction

In *A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983), our Supreme Court addressed the appealability of preliminary injunctions as follows:

> A preliminary injunction is interlocutory in nature, issued after notice and hearing, which restrains a party pending final determination on the merits. G.S. § 1A-1, Rule 65. Pursuant to G.S. § 1-277 and G.S. § 7A-27, no appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination.

Id. at 400, 302 S.E.2d at 759. "Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment." *State v. School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913 (1980).

In the instant case, Defendants contend that they will be deprived of a substantial right—their First Amendment right to free speech—if the trial court's preliminary injunction escapes immediate appellate review. However, we need not determine whether the preliminary injunction affects a substantial right pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27(d), because we have elected to grant Defendants' petition for writ of certiorari pursuant to N.C. R. Civ. P. 21(a)(1) to address the merits of this appeal.

III. Standard of Review

Since Defendants have elected to appeal before the ultimate questions raised by the pleadings are decided at a trial on the merits, the sole question before us is whether the trial court erred in its issuance of the preliminary injunction.

As a general rule, a preliminary injunction

> is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a 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 a plaintiff's rights during the course of litigation.

Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (emphasis in original).

In reviewing a trial court's grant of a preliminary injunction, "an 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. However, while this Court is not bound by the findings or ruling of the lower court, there is a presumption that the lower court's decision was correct, and the burden is on the appellant to show error. *Conference v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 626-27 (1962). Thus, "a decision by the trial court to issue or deny an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings." *Wrightsville Winds Homeowners' Assn. v. Miller*, 100 N.C. App. 531, 535, 397 S.E.2d 345, 346 (1990).

"Finally, we note that the findings of fact and other proceedings of the trial court which hears the application for a preliminary injunction are not binding at a trial on the merits." *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16, 431 S.E.2d 828, 835 (1993). "The same is true of our decision upon this appeal and our statement of the facts upon which our conclusion rests." *Board of Elders v. Jones*, 273 N.C. 174, 181, 159 S.E.2d 545, 551 (1968).

IV. Analysis of Plaintiff's Claims

Defendants contend that Plaintiff cannot demonstrate the requisite likelihood of success on the merits of its case to support entry of the preliminary injunction. Plaintiff's complaint alleged five separate causes of action: (1) barratry; (2) libel; (3) prospective interference with contractual relationship; (4) tortious interference with business enterprise, and (5) unfair and deceptive trade practices. In granting the preliminary injunction, the trial court did not specifically reference any of these claims. Therefore, we will examine all five of Plaintiff's claims.

A. Barratry

Plaintiff alleged that Defendants had committed barratry by willfully, intentionally, and wantonly soliciting or attempting to solicit a large number of claims against Plaintiff in return for forty percent (40%) of the recovery from those claims. At common law, barratry was defined as " 'the offense of frequently exciting or stirring up suits and quarrels between his majesty's subjects, either at law or other-

wise.' " *State v. Batson*, 220 N.C. 411, 412, 17 S.E.2d 511, 512 (1941) (quoting 4th Blackstone, p. 134). The common law offense of barratry has also " 'been applied independently of statute to one soliciting a large number of claims of the same nature, and charging a fee for his services in connection with the claim contingent on the amount recovered.' " *Id.* at 413, 17 S.E.2d at 512 (quoting 10 Am. Jur. *Champerty and Maintenance*, par. 3, p. 551). In *Batson*, our Supreme Court held that the common law offense of barratry was still in full force and effect in this State, stating, in pertinent part:

> Barratry being a common law offense, and having never been the subject of legislation in North Carolina, and not being destructive nor repugnant to, nor inconsistent with, the form of government of the State, is in full force therein.

Id. Subsequent to the Court's decision in *Batson*, the General Assembly enacted N.C. Gen. Stat. § 84-38, which codified in part the common law offense of barratry. N.C.G.S. § 84-38 remains in effect, and reads in pertinent part:

> It shall be unlawful for any person . . . to solicit or procure through solicitation either directly or indirectly, any legal business whether to be performed in this State or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney . . . to perform or render any legal services, whether to be performed in this State or elsewhere.

N.C. Gen. Stat. § 84-38 (1999).

While the General Assembly has chosen to codify the common law offense of barratry in the context of the solicitation of legal business, we find no decision of the Supreme Court or this Court recognizing the existence of a civil cause of action based on the common law principle of barratry.

However, the courts of this State have applied the related common law principles of champerty and maintenance in the context of a civil action. *See Merrel v. Stuart*, 220 N.C. 326, 17 S.E.2d 458 (1941); *Smith v. Hartsell*, 150 N.C. 71, 63 S.E. 172 (1908); *Wright v. Commercial Union Ins. Co.*, 63 N.C. App. 465, 305 S.E.2d 190 (1983). "The term "maintenance" has been defined by our courts as 'an officious intermeddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it.' " *Wright*, 63 N.C. App. at 469, 305 S.E.2d at

192 (quoting *Smith v. Hartsell*, 150 N.C. 71, 76, 63 S.E. 172, 174 (1908)). " "Champerty" is a form of maintenance whereby a stranger makes a 'bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense.' " *Id.* (quoting same). While recognizing their continued force and effect in this State, our Supreme Court in *Smith* noted that many exceptions to the principles of champerty and maintenance have been recognized, "so that they may be adapted to the new order of things in the present highly progressive and commercial age." *Smith*, 150 N.C. at 77, 63 S.E. at 174. Among the exceptions recognized by the Court in *Smith* is that the relationship of attorney and client will often justify parties in giving each other assistance in lawsuits. *Id.* at 77, 63 S.E. at 175.

Based on our reading of the Supreme Court's decision in *Batson*, and other learned authorities on the subject, we conclude that the common law offense of barratry was a crime against the Crown (i.e, the State), but did not support a civil cause of action against a private individual, whereas the related principles of champerty and maintenance did create a civil cause of action that could be brought against another person. Therefore, our Supreme Court's recognition of the common law offense of barratry in *Batson*, and the General Assembly's subsequent codification of barratry in the context of the solicitation of legal business, do not support the existence of a civil cause of action for barratry. In addition, a mere violation of N.C.G.S. § 84-38 does not form the basis for a civil cause of action against the alleged violator. *See Wilson v. Bellamy*, 105 N.C. App. 446, 464, 414 S.E.2d 347, 357 (1992) (quoting 74 Am. Jur. 2d *Torts* § 1 (1974)) ("no civil right can be predicated upon a mere violation of a criminal statute, . . .; the crime is an offense against the public pursued by the sovereign, the tort is a private injury pursued by the injured party").[2] Therefore, we conclude that there does not exist in this State a civil cause of action for barratry. Further, to the extent that Plaintiff's first cause of action is an attempt to state a claim for champerty and maintenance, we conclude that Defendants' conduct is covered by the recognized exception for the relationship between attorney and client. For the foregoing reasons, we conclude that Plaintiff

2. We also note that application of N.C.G.S. § 84-38 to prohibit licensed attorneys from soliciting legal business through targeted, direct-mail solicitations would raise serious constitutional questions in light of the United States Supreme Court's decision in *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 100 L. Ed. 2d 475 (1988).

has failed to show a likelihood of success on the merits of its first cause of action.

B. Libel

In its complaint, Plaintiff's libel claim was set forth in the following paragraphs:

> 27. That, upon information and belief, Defendant intentionally, willfully, wantonly and maliciously sent letters to purchasers of previously owned vehicles sold by Plaintiff informing them of certain "rights" and intimating that there was a class action in effect against the Plaintiff concerning the resale of the vehicles. That, upon information and belief, there is no class action filed in any jurisdiction in the State of North Carolina.
>
> 28. That said statement and/or intimation of the Defendant in his letter was false, designed to mislead and did mislead or had the capacity to mislead. That the Plaintiff has sustained actual damages of $1.00 or more in counsel fees expended in an effort to stop and restrain further publication of the letter or further activities with regard to the letter. That the Plaintiff further seeks actual and punitive damages in an amount to be determined by the trier of fact.

In addition, Plaintiff alleged that Defendants had informed potential witnesses in the Pleskach case that they had been defrauded by Plaintiff without any judicial determination to support this assertion. In support of its allegations, Plaintiff attached as an exhibit to its complaint an affidavit by Jace Stowe, a customer relations manager for DaimlerChrysler, which contained the following paragraph:

> 5. The customer indicated as a result of the letter, he had a follow-up conversation with the attorney's [Defendants'] office, and was informed that counsel was looking into a class action lawsuit based on disclosure notices against DaimlerChrysler, and that counsel would make 40 cents on the dollar of any recovery.

Plaintiff also attached to its complaint a copy of a letter sent by Defendants to a subsequent purchaser of one of DaimlerChrysler's manufacturer's buy-backs, informing the subsequent purchaser of the requirements of the Lemon Law Statute and implying that the subsequent purchaser may not have received full disclosure of the defects in his vehicle. This letter asked the subsequent purchaser to contact Defendants, but did not expressly state that Defendants

would like to represent the subsequent purchaser in a suit against DaimlerChrysler.

In sum, Plaintiff's libel claim against Defendants is based on allegations that Defendants informed certain individuals that they had been defrauded by Plaintiff without any judicial determination to support the charge, and intimated to those individuals that a class action lawsuit had been filed against Plaintiff when no such lawsuit had in fact been filed.

"Libel is defined as written defamation." *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 149, 520 S.E.2d 570, 576 (1999). The three classes of libel long recognized under North Carolina law are:

> "(1) publications obviously defamatory which are called libel *per se*; (2) publications susceptible of two interpretations one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances become libelous, which are termed libels *per quod*."

Renwick v. News and Observer, 310 N.C. 312, 316, 312 S.E.2d 405, 408 (1984) (quoting *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979)).

Plaintiff's complaint in the instant case does not bring Defendants' communications within the second class of libel, since it is not alleged that the communications are "susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made." *Id.* at 317, 312 S.E.2d at 408; *see also Flake v. News Co.*, 212 N.C. 780, 785, 195 S.E. 55, 59 (1938). Further, Plaintiff does not have a reasonable likelihood of success on the merits of its claim under the third class of libel—libel *per quod*—since it does not appear that Defendants intended for the communications to be defamatory, or that those who received the communications understood them to be defamatory. *See Robinson v. Insurance Co.*, 273 N.C. 391, 394, 159 S.E.2d 896, 899 (1968); *U v. Duke University*, 91 N.C. App. 171, 181, 371 S.E.2d 701, 708 (1988). The record shows that the alleged defamatory communications were made to subsequent purchasers of Plaintiff's manufacturer's buy-backs in an attempt to secure them as witnesses in the Pleskach case, or to generate additional litigation against Plaintiff. There is no evidence that Defendants made the com-

munications with the intent to defame DaimlerChrysler or to injure its reputation in any way. Therefore, we focus our attention on the law relative to the first class of libel—libel *per se*.

Under the law of North Carolina, a libel *per se* is a publication which, when considered alone without innuendo or explanation: "(1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Renwick*, 310 N.C. at 317, 312 S.E.2d at 409.

"However, even where a statement is found to be actionable *per se*, the law regards certain communications as privileged." *Market America*, 135 N.C. App. at 150, 520 S.E.2d at 576. A qualified privilege exists when a communication is made:

> "(1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest."

Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 117 N.C. App. 274, 278, 450 S.E.2d 753, 756 (1994) (quoting *Clark v. Brown*, 99 N.C. App. 255, 262, 393 S.E.2d 137, 138 (1990)). "The essential elements for the qualified privilege to exist are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and publication in a manner and [to] the proper parties only." *Long v. Vertical Technologies, Inc.*, 113 N.C. App. 598, 602, 439 S.E.2d 797, 800 (1994). "Whether a communication is privileged is a question of law for the court to resolve, unless a dispute concerning the circumstances of the communication exists, in which case it is a mixed question of law and fact." *Market America*, 135 N.C. App. at 150, 520 S.E.2d at 576. Where the privilege exists, a presumption arises "that the communication was made in good faith and without malice." *Phillips*, 117 N.C. App. at 278, 450 S.E.2d at 756. To rebut this presumption, the plaintiff must show actual malice or excessive publication. *Harris v. Proctor & Gamble*, 102 N.C. App. 329, 401 S.E.2d 849 (1991).

In the instant case, we find that Defendants' communications regarding whether Plaintiff had defrauded those contacted, and

whether a class action had been filed, were entitled to a qualified privilege. As attorney for the Pleskaches, Kirkhart had a legitimate interest in contacting those individuals who might provide information useful to proving the allegations in the Pleskach case. Kirkhart also had an interest, although likely influenced by the selfish possibility of pecuniary gain, in determining whether those individuals contacted had been defrauded by Plaintiff and wished to hire Kirkhart to assist them in seeking legal redress. Those individuals contacted by Defendants had a definite interest in whether Plaintiff had complied with the law in its dealings with them. The communications took place in private letters, and appear to have been sent in good faith and in a manner fairly warranted under the circumstances. Finally, the record shows no evidence of actual malice or excessive publication. Therefore, we conclude that under these circumstances, Defendants' communications were protected by a qualified privilege.

For the foregoing reasons, we conclude that Plaintiff has failed to show a likelihood of success on the merits of its libel claim.

C. Tortious Interference With Contract

In its third cause of action, Plaintiff alleged that Defendants' solicitation, or attempted solicitation, of clients to file lawsuits against Plaintiff had interfered with the contractual relationships between Plaintiff and those individuals being solicited, thereby damaging the goodwill between Plaintiff and those solicited. While Plaintiff titles this cause of action prospective interference with contractual relationship, it appears to be based on alleged interference with the existing contractual relationships between Plaintiff and those individuals being contacted by Defendants. Thus, we analyze it as a claim for tortious interference with contract.

The five elements of tortious interference with contract were set forth by the Supreme Court in *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988), as follows:

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

Id. at 661, 370 S.E.2d at 387. Plaintiff's complaint fails to identify any specific contract with DaimlerChrysler that a third party has been

induced not to perform as a result of Defendants' conduct. Therefore, we conclude that Plaintiff has failed to show a likelihood of success on the merits of its tortious interference with contract claim.

D. Tortious Interference with Prospective Economic Advantage

Plaintiff's fourth cause of action asserts that Defendants' actions have interfered with public confidence in the quality of vehicles resold by Plaintiff, thereby damaging Plaintiff's goodwill. We read these allegations as an attempt to state a claim for tortious interference with prospective economic advantage.

In order to maintain an action for tortious interference with prospective advantage, Plaintiff must show that Defendants induced a third party to refrain from entering into a contract with Plaintiff without justification. *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917 (1982). Additionally, Plaintiff must show that the contract would have ensued but for Defendants' interference. *Id.*

Here, Plaintiff has failed to identify any particular contract that a third party has been induced to refrain from entering into with Plaintiff. Thus, Plaintiff has failed to establish a likelihood of success on the merits of its tortious interference with prospective advantage claim.

E. Unfair and Deceptive Trade Practices

In its final cause of action, Plaintiff alleged that Defendants' activities in soliciting and attempting to solicit clients constituted unfair and deceptive trade practices. N.C. Gen. Stat. § 75-1.1(a) ("the Act") provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1(a) (1999). Although the Act was intended to benefit consumers, its protections do extend to businesses in appropriate situations. *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 710 (2001). In order to prevail on a claim for unfair and deceptive trade practices, a plaintiff must show: "(1) 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." *Id.* at 656, 548 S.E.2d at 711.

Plaintiff's unfair and deceptive trade practices claim rests on its claims for barratry, libel, tortious interference with contract and tor-

tious interference with prospective economic advantage. Having concluded that Plaintiff has failed to establish a sufficient likelihood of success on the merits of these claims, we likewise find an insufficient likelihood of success on Plaintiff's unfair and deceptive trade practices claim.

In sum, we conclude that Plaintiff has failed to show a likelihood of success on the merits of any of its claims. Thus, the preliminary injunction was not properly entered and is hereby dissolved. To further support our decision to dissolve the preliminary injunction, we choose to analyze whether Plaintiff is likely to suffer irreparable loss if the injunction is dissolved.

V. Irreparable Loss

"A prohibitory preliminary injunction is granted only when irreparable injury is real and immediate." *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 235, 214 S.E.2d 49, 51 (1975). As stated by the Court in *Board of Elders v. Jones*, 273 N.C. 174, 159 S.E.2d 545 (1968):

> The burden is upon the applicant for an interlocutory injunction to prove a probability of substantial injury to the applicant from the continuance of the activity of which it complains to the final determination of the action. . . . An injunction *pendente lite* should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending the final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending.

Id. at 182, 159 S.E.2d at 551-52. Further, "[a]n applicant for a preliminary injunction must do more than merely allege that irreparable injury will occur[;] [t]he applicant is required to set forth with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur." *Telephone Co.*, 287 N.C. at 236, 214 S.E.2d at 52.

Plaintiff alleged that it would suffer irreparable injury from the continuance of Defendants' solicitation "in that it will have to defend multiple lawsuits instigated by the Defendant[s]." However, we conclude that the possibility that Plaintiff may have to defend itself in a lawsuit, or multiple lawsuits, is not a sufficiently substantial injury to support the preliminary injunction. First, the mere fact that an indi-

vidual or a corporation may have to defend itself against a lawsuit that is warranted under existing law and not brought for an improper purpose does not rise to the level of an injury sufficient to support the grant of a preliminary injunction. Second, the provisions of N.C. R. Civ. P. 11 ("Rule 11") adequately protect Plaintiff against the possibility that a large number of frivolous lawsuits will be filed as a result of Kirkhart's solicitation. Plaintiff is entitled to seek sanctions under Rule 11(a) if it appears that suits have been filed against it which are not warranted by existing law or a good faith extension of existing law. N.C. R. Civ. P. 11(a) (1999). These sanctions, which include reasonable expenses and attorney's fees, can be imposed not only on the party filing the suit, but also against the party's attorney. *Id.* Thus, we find that the provisions of Rule 11 are sufficient to protect Plaintiff from the possibility that Kirkhart will assist clients in filing frivolous lawsuits against Plaintiff. Finally, a serious constitutional question exists as to whether Defendants can be prohibited from engaging in the activity complained of by Plaintiff. Having weighed the equities and the advantages and disadvantages to the parties, we conclude that Plaintiff has failed to show a reasonable probability of substantial injury if the preliminary injunction does not stand.

VI. Conclusion

We conclude that Plaintiff has failed to show a reasonable likelihood of success on the merits of its case, and has failed to show a reasonable probability of substantial injury if the injunction does not stand. Thus, we hold that it was error to grant the preliminary injunction and it is hereby dissolved. Having so concluded, we need not consider the First Amendment arguments advanced by Defendants concerning the nature and scope of the injunctive relief.

For the reasons stated, the orders of the trial court granting the preliminary injunction are reversed and the case is remanded to the Superior Court of Wake County for trial on its merits. We reiterate that this Court's ruling dissolving the preliminary injunction has no bearing on the rights of the parties when the action is tried on its merits. *Telephone Co.*, 287 N.C. at 237, 214 S.E.2d at 52; *Board of Elders*, 273 N.C. at 181, 159 S.E.2d at 551.

Reversed and remanded.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. WILLIAM DONALD POLAND, DEFENDANT

No. COA01-228

(Filed 19 February 2002)

1. Constitutional Law— bench conference—outside defendant's hearing

The trial court did not err in an assault prosecution by moving a bench conference away from the bench to prevent defendant from hearing the conversation where the subject was defendant's record and defendant's attorney was presumably familiar with defendant's record.

2. Criminal Law— defendant admonished—mistrial denied

The trial court did not err by denying a mistrial to an assault defendant who was admonished by the court for listening to a bench conference. Two of the three witnesses called by defendant testified that they neither heard nor saw the admonishment and the third testified only that the judge raised his voice, frowned, and used a stern tone and look. Furthermore, the jury convicted defendant on a lesser assault charge and acquitted him on an accompanying trespass charge, which does not support the claim that jurors were led to see defendant as a "wrongdoer."

3. Assault— serious injury—sufficiency of evidence

The trial court did not err by refusing to dismiss an assault charge for insufficient evidence of serious injury where the victim sustained a knife wound which punctured his colon in two places, another that could have severed an artery, he was in intensive care for four days, had 27 or 28 stitches in his right index finger, and now has a limited grip.

4. Assault— self-defense—evidence of excessive force and aggression

The trial court correctly denied a motion to dismiss an assault prosecution where defendant argued self-defense but the State presented evidence that defendant was the aggressor and used excessive force.

5. Assault— conflicting evidence of aggression—evidence of excessive force

The trial court did not err by failing to arrest judgment on guilty verdicts on assault charges after the jury returned an

acquittal on a trespass charge arising from the same incident. Although defendant argued that the acquittal means that the jury believed his testimony that he was pulled back into the area where the fight began, the jury could have rejected defendant's self-defense theory on the ground that he used excessive force.

6. Evidence— hearsay—catch-all exception—statement from nontestifying witness—duplicative

There was no prejudice in an assault prosecution where the court refused defendant's motion to introduce a prior statement of a witness who refused to testify under the catch-all exception of N.C.G.S. § 8C-1, Rule 804(b) where defendant did not explain how the statement would have contributed to his defense, other than adding to the six descriptions of the events from those who testified.

Appeal by defendant from judgments entered 5 September 2000 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 5 December 2001.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.

John T. Hall, for defendant-appellant.

HUDSON, Judge.

Defendant appeals his convictions and sentence for two counts of assault with a deadly weapon and one count of assault with a deadly weapon inflicting serious injury. We find no prejudicial error.

The State's evidence tended to show that on the night of 24 April 1999, Defendant, Tammy Little, T. J. House, William Skinner, Ken Nichols, and Michelle Bullock, went to Pantana Bob's, a bar in Greenville, North Carolina. Michael Murphy was a bartender working at the back bar of Pantana Bob's. After Defendant was rude to Murphy, Murphy told him to leave the bar. Murphy signaled to Prentice Jackson, a "bouncer," to escort Defendant out of the premises.

Jackson escorted Defendant to the beach area. When Jackson and Defendant were about halfway across the beach area, House grabbed Jackson's right arm, and Bullock jumped on Jackson's back and tried to hit him on the head with a beer bottle. Jackson pushed House away and picked Bullock off his back and pushed her away.

Jackson then found himself fighting off Defendant, House, Bullock, and Skinner. Chris Carden, who had worked at Pantana Bob's, Ted Moche, who was working as a bouncer that night, and Murphy came to Jackson's assistance. They pushed Defendant, House, Bullock, and Skinner out of Pantana Bob's through the door in the beach area. The Pantana Bob's employees were unable to close the door, however, because Skinner was holding it open.

Skinner held the door open while kicking and throwing sand in the employees' faces, and the employees continued to attempt to close the door. Then, according to the State's evidence, Defendant, Skinner, and House forced their way into the beach area, and a fight ensued between them and the bouncers. During the fight, Defendant pulled out a knife and stabbed Murphy, Moche, and Carden. Defendant testified that he was holding onto Skinner, and Skinner stormed in, pulling Defendant with him. Defendant was hit and fell to the ground, and then five or six bouncers were on top of him, hitting and kicking him. Defendant pulled out the knife to defend himself.

Murphy, Moche, and Carden were taken to the hospital for treatment. Carden was stabbed below his left rib, in the left forearm, and in the right index finger. Dr. Janice Lalikos, a plastic surgeon, treated Carden. She performed exploratory surgery on his arm because, due to the location of the wound, she was concerned that he might have sustained an injury to a major nerve, which would cause permanent disability, or an injury to a major artery, which would be life-threatening. Dr. Lalikos did not find nerve or artery damage, but she did remove a clot to relieve swelling and prevent nerve damage. She also repaired a nerve and tendons in Carden's finger. Dr. Carl Haish performed an exploratory laparotomy to investigate the wound in Carden's abdomen. Carden had two stab wounds to his colon. Dr. Haish testified that if the wounds had been left untreated, Carden would have become septic, resulting in a high probability of infection, which would likely lead to intra-abdominal abscess or death. Carden was hospitalized for five days, four of which he spent in intensive care. Carden testified that he is now "disfigure[d]", with a big scar from the exploratory surgery near his rib, and he cannot straighten out his finger, so that he has a limited grip.

Defendant testified that after the fight his nose hurt, and he had knots on his head. He was immediately taken into custody, and when he arrived at the detention center on 25 April 1999, Defendant was

asked if he had any obvious pain, bleeding, or other symptoms requiring emergency service or other medical problems; he answered that he did not. On 30 April 1999, while Defendant was at the detention center, he was examined by Dr. Mark Cervi, who found swelling in Defendant's nose, and tenderness in his left hand. Later, on 13 May 1999, Defendant was diagnosed with a small crack in his nasal bone, a sprained right ankle, and a sprained finger.

Defendant was charged with three counts of assault with a deadly weapon with intent to kill inflicting serious injury, in violation of N.C. Gen. Stat. § 14-32(a) (1999), and one count of first degree trespass, in violation of N.C. Gen. Stat. § 14-159.12 (1999).

During the trial, while Defendant was on the stand, the court held a bench conference regarding the scope of permissible cross-examination on the subject of Defendant's criminal record. The judge realized that Defendant was listening to the conversation, admonished Defendant, and then moved the conference out of Defendant's hearing. When court recessed for the day, the defense made an oral motion for mistrial on the basis of the court's reaction to Defendant.

In response to Defendant's motion for mistrial, the court held a *voir dire* and allowed the defense to call three witnesses. The first two witnesses stated that they were not paying attention to the proceedings and did not see or hear the court admonish Defendant. The third witness testified in response to the defense counsel's questions as follows:

Q. What did you see and what could you hear?

A. You and the District Attorney went up and talked to the Judge, and [I] couldn't hear anything you were saying at that time; and the next thing I heard, the Judge hollered out, "sir" to the defendant, and then made—wrinkled up his forehead and—I couldn't hear what he said to the defendant.

Q. Did he point at the defendant?

A. Yes, sir.

Q. And what happened? Could you see the gestures on the Judge's face?

A. Yes, sir. He made some frowns in his forehead and he had a stern look on his face.

Q. Did he get up from his place on the bench?

A. Yes, sir. At that point he said something loud enough that it sounded like that the—whoever was sitting in this chair was not supposed to be hearing what was going on, and he would talk to you over at the side.

Q. What tone of voice could you hear?

A. Kind of stern.

Q. Did he get up quickly and move to the side-bar?

A. I don't know if he got up or if he was already up. I don't remember whether he was standing up or sitting down at that time.

Q. How loud was the word "sir"?

A. Pretty loud—"sir." I mean, it was loud enough that we heard it back there.

Q. Shouting, in other words?

A. Yes.

The court refused to grant a mistrial, but gave the following curative instruction to the jury when court reconvened the next day:

> Let me just say one thing to you before we resume the evidence in this case. Let me say this to you. That you're not to draw any inference from any ruling that I make, have made, or will make in this case, or any inflection in my voice, or any expression on my face, or any question that I have asked a witness, or anything else that I may have said or done during this trial, that I have an opinion or have intimated an opinion, as to whether any part of the evidence should be believed or disbelieved, or as to whether any fact has or has not been proven, or as to what your findings ought to be. It is your exclusive province, and will be your exclusive province, to find the true facts of this case and to render a verdict reflecting the truth as you find it.

The jury convicted Defendant of assault with a deadly weapon upon Theodore S. Moche; assault with a deadly weapon upon Michael Murphy; and assault with a deadly weapon inflicting serious injury upon Chris Larry Carden. The jury acquitted Defendant of first degree trespass.

Defendant made eight assignments of error, which he has combined into five arguments on appeal. We address each argument in turn.

I.

[1] In his first argument, Defendant contends that the trial court denied him his right to be present at and to participate in his trial when the court moved the bench conference away from the bench to prevent Defendant from overhearing the conversation. The State contends that Defendant failed to preserve this issue for review because he did not object on this specific ground at the trial, and that he waived the right to be present at this bench conference by failing to object to his exclusion from others. Assuming *arguendo* that Defendant properly preserved this issue for review and did not waive any right that he had to be present at bench proceedings, we hold that the court did not violate Defendant's rights by continuing the bench conference at issue out of Defendant's hearing.

In *State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832 (1991), our Supreme Court addressed the issue raised by Defendant here. The defendant in *Buchanan*, a capital case, argued that the trial court violated his state and federal rights by conducting bench conferences with his counsel and counsel for the State in his absence. *See* 330 N.C. at 208, 410 S.E.2d at 835-36. After observing that the right guaranteed in our State Constitution is broader than the federal right, the Court held that "a defendant's state constitutional right to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties," unless "the subject matter of the conference implicates the defendant's confrontation rights, or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend." *Id.* at 223-24, 410 S.E.2d at 845. The defendant has the burden to show that his confrontation rights are implicated or his presence would have a reasonably substantial relation to his opportunity to defend. *See id.* at 224, 410 S.E.2d at 845.

Defendant contends that because the subject of the bench conference at issue was Defendant's criminal record, his presence at the conference would have had a reasonably substantial relation to his opportunity to defend. We disagree. Defendant's attorney was presumably familiar with Defendant's record, and hence there was no need for Defendant to be present. We therefore find no error. *See id.*

at 212, 410 S.E.2d at 838 (" '[A] bench conference, attended by appellant's counsel and called to discuss an evidentiary matter relative to appellant's own cross-examination, is not a critical stage of the trial proceedings at which appellant has a right to be present.' " (quoting *United States v. Vasquez*, 732 F.2d 846, 849 (11th Cir. 1984) (per curiam))).

II.

[2] Defendant argues that the court's admonishment during the bench conference discussed above constituted an expression of opinion by the trial court that prejudiced Defendant before the jury. Thus, he contends that the court should have granted his subsequent motion for a mistrial.

By statute, "[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 Court has explained that "[t]rial judges . . . have a duty of absolute impartiality and must avoid even the 'slightest intimation of an opinion,' as 'every defendant in a criminal case is entitled to a trial before an impartial judge and an unbiased jury.' " *State v. Baldwin*, 141 N.C. App. 596, 602, 540 S.E.2d 815, 820 (2000) (quoting *State v. Sidbury*, 64 N.C. App. 177, 178-79, 306 S.E.2d 844, 845 (1983)) (citation omitted). However, "not every expression of opinion by the trial court constitutes prejudicial error. . . . In a criminal case, reversible error results where the jury may rationally infer from the trial judge's action an expression of opinion as to the defendant's guilt or the credibility of a witness." *Id.*

Here, Defendant claims that the judge conveyed to the jury an opinion that Defendant was a "wrongdoer." However, two of three witnesses called by Defendant after the incident testified that they neither heard nor saw the court admonish Defendant. The third witness testified only that the judge raised his voice, used a "stern" tone of voice, and "made some frowns in his forehead and he had a stern look on his face." We do not believe the jury could rationally infer from the judge's action that the judge was of the opinion that Defendant was guilty. Furthermore, the willingness of the jury to acquit Defendant on the trespassing charge and to convict Defendant of the lesser charges of assault does not support Defendant's claim that the jury was led to believe he was generally a "wrongdoer," but instead shows that the jury based its verdicts on the evidence in the case. We affirm the court's denial of Defendant's motion for mistrial.

III.

[3] Next, Defendant contends that the trial court erred in denying his motion, at the close of all the evidence, to dismiss the assault charges due to insufficiency of the evidence. On review of a trial court's denial of a defendant's motion to dismiss for insufficiency of the evidence, we must "review the evidence introduced at trial 'in the light most favorable to the State to determine if there is substantial evidence' " of each element of the offense. *Baldwin*, 141 N.C. App. at 604, 540 S.E.2d at 821 (quoting *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). "Substantial evidence is that which a reasonable juror would consider sufficient to support the conclusion" that each element of the offense has been proven. *Id.*

Defendant first argues that there was insufficient evidence to support the charges of assault with a deadly weapon inflicting serious injury, because there was insufficient evidence that he inflicted "serious injury" on Carden, Moche, and Murphy. Although Defendant was charged with three counts of assault with a deadly weapon with intent to kill inflicting serious injury, he was actually convicted of assault with a deadly weapon inflicting serious injury only upon Carden. He was convicted of the lesser charge of assault with a deadly weapon upon Moche and Murphy. Thus, any error with respect to the charges involving Moche and Murphy was harmless.

Defendant was convicted of violating N.C.G.S. § 14-32(a), but he argues that the definition of "serious injury" given in N.C. Gen. Stat. § 14-32.4 (1999) governs § 14-32(a) as well. The General Assembly did not define "serious injury" in § 14-32(a). Our Supreme Court has stated that the term

> means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case.

State v. Jones, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962); *see also, e.g.*, *State v. Hensley*, 90 N.C. App. 245, 248, 368 S.E.2d 208, 210 (1988) ("Whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question for the jury.").

In 1996, the General Assembly enacted N.C.G.S. § 14-32.4, which states that "[u]nless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts serious bodily injury is guilty of a Class F felony." Section 14-32.4 defines "serious bodily injury" as "bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." Defendant argues that the legislature intended for this definition of "serious bodily injury" to supersede any definition of "serious injury" developed in case law pursuant to § 14-32(a). The State maintains that passage of § 14-32.4 had no effect on the definition of "serious injury" as developed in the earlier case law.

We need not resolve this issue as we find that, even under the definition in § 14-32.4, there was sufficient evidence that Carden suffered serious injury to send the question to the jury. Carden sustained one knife-wound that punctured his colon in two places and another that could have severed a major artery. He was in intensive care for four days. In response to the district attorney's questions regarding the effects of his injuries, Carden testified as follows:

Q. Are you suffering from any of the effects from that now?

[Defense objection, overruled]

A. Yes, sir. My rib and obviously disfigurement.

Q. The actual stab wounds that you had were not very bid [sic], were they?

A. No, sir.

Q. After surgery you have a big scar now?

A. Yes, sir.

Q. How about your right index finger?

A. I had either 27 or 28 stitches in my right index finger. Severed all the nerves, tendons, ligaments and everything on the inside of my finger.

Q. What is the condition of your finger now?

A. It will never straighten out again. I am limited with a grip on it.

The court then allowed Carden to show the scars on his finger and abdomen to the jury. A reasonable juror could likely consider this evidence sufficient to conclude that Carden's injuries created a "substantial risk of death," or caused "serious permanent disfigurement," or caused a "serious . . . permanent or protracted . . . impairment of the function of [a] bodily member." N.C.G.S. § 14-32.4.

[4] Second, Defendant argues that there was insufficient evidence supporting the assault charges because he clearly acted in self-defense. "The theory of self-defense entitles an individual to use 'such force as is necessary or apparently necessary to save himself from death or great bodily harm. . . . A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief.' " *State v. Moore*, 111 N.C. App. 649, 653, 432 S.E.2d 887, 889 (1993) (quoting *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977)) (alteration in original). An aggressor is not entitled to the defense. *See State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) ("The right of self-defense is only available . . . to 'a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.' " (quoting *Marsh*, 293 N.C. at 354, 237 S.E.2d at 747)). The State has the burden of proving that a defendant is not entitled to the defense. *See State v. Price*, 118 N.C. App. 212, 219, 454 S.E.2d 820, 824, *disc. review denied*, 341 N.C. 423, 461 S.E.2d 766 (1995).

Here, the State presented evidence both that Defendant was the aggressor and that Defendant used excessive force. The State's witnesses testified that Defendant charged back into the beach area after having been evicted, thereby starting the fight. Additionally, witnesses testified that Defendant wielded a knife, while the bouncers were all unarmed. At most, Defendant received a broken nose, a fractured finger, a sprained ankle, and some scrapes and bruises, while the evidence showed that several of the bouncers were hospitalized for the injuries they sustained. In the light most favorable to the State, we consider this evidence sufficient to support the conclusion that Defendant did not act in reasonable self-defense, either because he was the aggressor or because he used excessive force. Accordingly, the trial court did not err in denying the motion to dismiss.

IV.

[5] Defendant also argues that the trial court erred in failing to arrest judgment after the jury returned guilty verdicts on all the assault charges, because these guilty verdicts on the assault charges were inconsistent with the verdict of not guilty on the trespassing charge. Defendant argues that the acquittal on the trespassing charge establishes that the jury believed Defendant's testimony that he was pulled back into the beach area and did not himself instigate the fight. Thus, Defendant concludes, he established that he acted in self defense.

We hold that the court did not err in failing to arrest judgment. The jury could have both found that Defendant was not the aggressor and rejected his self-defense theory on the ground that he used excessive force. *Cf. State v. Skeels*, 346 N.C. 147, 151-52, 484 S.E.2d 390, 392 (1997) (assuming without deciding that verdicts must be consistent, positing reasoning by the jury that would result in consistent verdicts of guilty on murder and robbery charges, and holding that trial court's refusal to arrest judgment was not error). Accordingly, the trial court did not err in failing to arrest judgment on the assault convictions.

V.

[6] Finally, Defendant argues that the trial court erred in denying his motion to introduce into evidence a prior statement of T. J. House. House had given a statement to police officers prior to his arrest. When House refused to testify at Defendant's trial, invoking his Fifth Amendment rights, Defendant sought to have House's prior statement admitted into evidence under various exceptions to the hearsay rules; he argues on appeal only that the court erred in denying his motion on the basis of the "catch-all" exception of Rule 804(b). *See* N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (1999).

The "catch-all" exception of Rule 804 provides that, if the declarant is unavailable to testify, then a statement that is not specifically covered by subsections (b)(1) through (b)(4) of the rule but has "equivalent circumstantial guarantees of trustworthiness," is admissible

> if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id. Our Supreme Court has held that the trial court must engage in a six-part inquiry in order to determine if the statement of an unavailable declarant is admissible under Rule 804(b)(5). *See State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 741 (1986). After finding that the declarant is unavailable to testify, the trial court must make the following determinations: (1) "that the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars"; (2) that the statement is not covered by the four exceptions expressly listed in Rule 804(b); (3) that the statement has "equivalent circumstantial guarantee[s] of trustworthiness" as the four listed exceptions; (4) "that the proffered statement is offered as evidence of a material fact"; (5) that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts"; and (6) that admission of the statement will best serve the "general purposes" of the rules of evidence and "the interests of justice." *Id.* at 9, 340 S.E.2d at 741 (internal quotation marks omitted).

Defendant argues that the court failed to make sufficient findings, as required by *Triplett*, before refusing to admit House's statement. Assuming without deciding that the court erred in excluding the statement, Defendant fails to show how he was prejudiced. Defendant asserts in his brief that House's statement was necessary because "Mr. House had been present at the scene and had witnesses [sic] the activities of the people involved. The defendant called House to testify in order to corroborate [Defendant's] version of events and to clarify activities seen from his unique point of view." Defendant contends that the court's ruling "cost [him] in the war of credible witnesses pro and con since testimony of individuals present was the key in this case." However, Defendant called six witnesses who gave an account of the events that was consistent with Defendant's. Defendant did not include House's statement in the record on appeal and fails to identify the unique point of view that House's statement would have provided. Defendant thus fails to explain how House's statement would have contributed to his defense, other than providing one more description of the events in addition to the descriptions given by those witnesses who did testify. Therefore, we hold that there was no prejudicial error in the exclusion of this statement.

No prejudicial error.

Judges TIMMONS-GOODSON and TYSON concur.

STATE OF NORTH CAROLINA v. ANTHONY ROCHELLE PARKS

No. COA01-247

(Filed 19 February 2002)

1. **Evidence— testimony of deputy regarding defendant's inculpatory statements—motion to suppress**

The trial court did not abuse its discretion in a trafficking in cocaine and conspiracy to traffic in cocaine case by summarily denying defendant's motion to suppress the testimony of a deputy regarding defendant's statements without conducting a voir dire, because: (1) the State complied with N.C.G.S. § 15A-903 by divulging the substance of defendant's statements as soon as that information was discovered through further questioning of the deputy; (2) the information provided by the reports which the State disclosed in advance of twenty working days prior to trial put defendant on notice that the State would attribute statements to defendant; (3) defendant's motion was untimely since he moved to suppress the deputy's testimony only after the deputy had testified about defendant's statements without objection; and (4) defendant's statements were not made in violation of his Miranda rights since defendant's inculpatory statements were not made during a custodial interrogation.

2. **Constitutional Law— right to remain silent—mentioning defendant's invocation of right**

Although the trial court erred in a trafficking in cocaine and conspiracy to traffic in cocaine case by allegedly allowing the State to elicit testimony regarding defendant's invocation of his right to remain silent and his refusal to be interviewed, defendant was unable to show there was plain error because: (1) there was testimony of officers who observed defendant throughout the transaction; (2) a witness identified defendant as the person from whom the witness had obtained the cocaine for an undercover officer on several occasions; (3) defendant made various voluntary inculpatory statements to a deputy, including that defendant wanted to help himself out of trouble, that defendant could show the deputy where defendant had gone in the woods and where defendant had put the jar that had contained the cocaine, and that defendant had thrown the money given to him by the witness out of defendant's car window when defendant realized that he was being followed by law enforcement officers; (4) defendant

retrieved the jar which appeared to contain cocaine residue; (5) at the time defendant invoked his right to remain silent, he had already inculpated himself through prior statements to the officers; and (6) the prosecutor did not imply that defendant's invocation of his right to remain silent was an admission of guilt.

Appeal by defendant from judgments entered 24 September 1999 by Judge Gregory A. Weeks in Wake County Superior Court. Heard in the Court of Appeals 22 January 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General W. Dale Talbert, for the State.

Ligon and Hinton, by Lemuel W. Hinton, for defendant-appellant.

HUNTER, Judge.

Anthony Rochelle Parks ("defendant") appeals from convictions of trafficking in cocaine by possession, trafficking in cocaine by delivery, and conspiracy to traffic in cocaine. We hold there was no prejudicial error in defendant's trial.

The State's evidence tended to establish that in May 1998, Officer Lance Anthony of the Wendell Police Department was working in his capacity as an undercover drug agent for the Wake County Drug Task Force. Officer Anthony was introduced to Robert Gullie, from whom he purchased several small amounts of cocaine. On 12 June 1998, Officer Anthony told Gullie he wished to buy a more substantial amount of powder cocaine, approximately one or two ounces. Gullie took Officer Anthony to the home of Ronald Jones. Jones told Officer Anthony to return in one hour for the drugs. Officer Anthony gave Jones $2,500.00, and returned in an hour to pick up two ounces of cocaine.

Jones testified at trial that on this occasion, he obtained the two ounces of cocaine from defendant in a residence off Oak Ridge Duncan Road. Jones testified that when he arrived at the residence with the $2,500.00, defendant went out the back door of the residence and returned a few minutes later with the cocaine. Jones also testified that he had purchased cocaine from defendant at this residence before, and that each time, defendant would leave the residence through the back door and return minutes later with the drugs.

On 17 June 1998, Officer Anthony again arranged through Gullie to purchase two more ounces of cocaine through Jones. Again, Jones instructed Officer Anthony to come back for the drugs in one hour. Officer Anthony complied. When Jones thereafter left his residence, law enforcement officers followed. Jones was observed driving to a residence off Oak Ridge Duncan Road. Jones testified that on this occasion, as on 12 June 1998, he met defendant at the Oak Ridge Duncan Road residence and gave defendant Officer Anthony's money, whereupon defendant left the residence through the back door and returned momentarily with two ounces of cocaine. The same chain of events occurred on 17 July 1998. Officer Anthony and Gullie met with Jones, who took Officer Anthony's money. Jones testified that defendant gave him cocaine in exchange for the money. Officer Anthony and Gullie returned later to pick up two ounces of cocaine.

On 22 July 1998, the Wake County Drug Task Force planned a "buy/bust" in which the officers planned to arrest the participants in the drug transaction at its conclusion. Law enforcement officers conducted surveillance throughout the transaction on Officer Anthony, Gullie, Jones, and defendant. Law enforcement officers, including Deputy Duncan Jaggers of the Harnett County Sheriff's Office, monitored the area around the Oak Ridge Duncan Road residence. Officer Anthony commenced the "buy/bust" by bringing $5,100.00 to Gullie and telling him he wished to buy four ounces of cocaine. Officer Anthony and Gullie met with Jones, gave him the money, and then returned to Gullie's residence. Jones testified that he contacted defendant on his beeper, and defendant confirmed that he could supply the drugs. Jones drove to the Oak Ridge Duncan Road residence and met with defendant. Jones testified defendant left the house momentarily and returned with four baggies containing four ounces of cocaine.

Deputy Jaggers testified that during the time Jones was meeting with defendant in the residence, he observed defendant leave the house alone and walk into a wooded area at the side of the house. Deputy Jaggers observed defendant enter the wooded area, kneel down, and bend over to where he could not see what defendant was doing. Deputy Jaggers testified that when defendant was bending down, he heard the sound of a "Mason jar lid when [it] get[s] rusted and [it's] been outside awhile, when you open [it] up how [it] squeak[s] when you open [it]." After hearing this noise, Deputy Jaggers observed defendant stand up, exit the woods, walk to the left

side of the house, and kneel down again. Although Deputy Jaggers could not see defendant when he knelt down, he heard the same noise of a rusted "Mason jar" opening when defendant knelt down. When defendant stood, Deputy Jaggers did not see anything in his hands, but stated there "was an extremely large bulge in his right front pocket of [his] pants." Defendant then re-entered the house. Jones testified that he then took the cocaine, and delivered it to Gullie and Officer Anthony at Gullie's house.

Approximately two or three minutes after Jones left the residence, defendant exited the house and got into a vehicle. Deputy Jaggers observed defendant pulling out of the driveway, and alerted the "car team" of officers that defendant was leaving. Defendant was apprehended shortly thereafter, and was returned to the Oak Ridge Duncan Road residence. Deputy Jaggers identified defendant as the person he had seen leave the residence moments before. Deputy Jaggers testified that defendant then initiated a conversation with him. When Deputy Jaggers approached defendant to identify him to the other officers, defendant addressed Officer Jaggers by name. Deputy Jaggers testified he did not recognize defendant from any prior time, but that defendant stated that he knew him. Deputy Jaggers testified that defendant then said to him, "[w]hat kind of trouble am I in?" Deputy Jaggers responded that he did not know. Defendant then continued to state to Deputy Jaggers that he did not "do that kind of stuff." Deputy Jaggers did not respond.

The law enforcement officers then searched the grounds and the residence after receiving a warrant. Deputy Jaggers testified that he was walking into the house when defendant "called [him] over" and initiated a conversation with him. Deputy Jaggers testified that defendant continued to ask him what kind of trouble he was in, to which Deputy Jaggers finally responded, "you're in a lot of trouble right now." Defendant then said, "what can I do to help myself?" Deputy Jaggers responded that he thought defendant had requested an attorney, and therefore he would not be able to talk to him. Defendant then said, "[n]o, I want to help myself now while I can." Deputy Jaggers verified that defendant wanted to speak without an attorney present. Defendant continued to ask how he could help himself, and Deputy Jaggers replied that defendant could show him where he had gone in the woods.

Defendant showed Deputy Jaggers where he had gone in the woods, but stated there was nothing there anymore. Deputy Jaggers observed a hole approximately eighteen inches deep in the ground.

Defendant stated there had been a jar in the hole, but that he had taken the jar and placed it at the side of the house. Defendant took Deputy Jaggers to the side of the house where he moved some dirt and retrieved the jar, which contained what appeared to be cocaine residue. Deputy Jaggers then asked defendant what he had done with the money Jones had given him in exchange for the drugs. Defendant responded that he threw it out his car window when it appeared to him that he was being followed by law enforcement, and he volunteered to show Deputy Jaggers where he had thrown the money.

Defendant was tried on four counts of trafficking in cocaine by possession, four counts of trafficking in cocaine by delivery, and four counts of conspiracy to traffic in cocaine. The trial court dismissed three counts of conspiracy to traffic in cocaine, but submitted the remaining charges to the jury. Defendant did not testify at trial, but put on evidence of his good character and the fact that no drugs or money were recovered during the search of the Oak Ridge Duncan Road residence. On 24 September 1999, the jury returned guilty verdicts on three counts of trafficking in cocaine by possession, three counts of trafficking in cocaine by delivery, and one count of conspiracy to traffic in cocaine. Defendant was sentenced to two consecutive terms of thirty-five to forty-two months in prison. He appeals.

Defendant brings forth two arguments on appeal: (1) the trial court erred in summarily denying his motion to suppress the testimony of Deputy Jaggers regarding defendant's statements without granting *voir dire*; and (2) the trial court erred in allowing the State to elicit testimony that defendant refused to be interviewed after he was placed in police custody and apprised of his constitutional rights.

[1] Defendant first argues the trial court erred in summarily denying his motion to suppress Deputy Jagger's testimony about the statements defendant made to him in the course of the investigation at Oak Ridge Duncan Road. Defendant moved to suppress the testimony at trial after it had been introduced without objection. A motion to suppress "must state the grounds upon which it is made." N.C. Gen. Stat. § 15A-977(a) (1999). A judge "may summarily deny the motion to suppress evidence if . . . [it] does not allege a legal basis for the motion." N.C. Gen. Stat. § 15A-977(c). " '[T]he decision to deny summarily a motion which fails to set forth adequate legal grounds is vested in the sound discretion of the trial court.' " *State v. Colbert*, 146 N.C. App. 506, 508, 553 S.E.2d 221, 223 (2001) (citation omitted).

Here, the basis of defendant's motion to suppress was two-fold: (1) the State failed to timely disclose within twenty working days of trial the substance of the statements made by Deputy Jaggers which the State intended to introduce; and (2) defendant's statements were made in violation of his *Miranda* rights. A defendant generally may only move to suppress evidence prior to trial. N.C. Gen. Stat. § 15A-975(a) (1999). However, a defendant may move to suppress for the first time during trial where "the State has failed to notify the defendant's counsel . . . sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is . . . a statement made by a defendant." N.C. Gen. Stat. § 15A-975(b).

Defendant made a written request for disclosure on 5 November 1998 in which he requested that the State divulge the substance of any oral statement made by defendant which the State intended to offer at trial. In response, the State provided a written report prepared by Special Agent Lacy Pittman of the State Bureau of Investigation ("SBI"). The report was a summary of Agent Pittman's telephone conversation with Deputy Jaggers following the 22 July 1998 "buy/bust," regarding the events of that day. Deputy Jaggers testified that he only gave Agent Pittman a "brief synopsis of what took place." Agent Pittman's notes from the conversation recounted that defendant retrieved the glass jar which appeared to contain cocaine residue, but the notes did not contain any information on the statements defendant made to Deputy Jaggers. The State also produced a written report prepared by SBI Special Agent Greg Tart concerning his surveillance observations from 22 July 1998. Agent Tart's report included information that defendant expressed that he knew Deputy Jaggers, and that defendant admitted to having thrown the money he obtained from Jones out of his car.

Deputy Jaggers was interviewed by the State on 1 September 1999 in preparation for trial. The State maintains that this was the first time Deputy Jaggers expressed in detail the extent of defendant's inculpatory statements, and that the State immediately informed defense counsel by telephone, followed by a written report on 3 September 1999, of the statements and the State's intent to use them. Deputy Jaggers was interviewed by Agent Pittman a few days later, at which time Deputy Jaggers provided even more detail about his surveillance activities on 22 July 1998, and the statements defendant made to him. Defense counsel was also provided with this information, although less than twenty working days before trial.

In denying defendant's motion, the trial court found that the State notified defendant in a timely fashion as soon as the details of defendant's statements became known to the State. Under N.C. Gen. Stat. § 15A-903 (1999), upon a motion of a defendant, the State must divulge in writing or recorded form, the substance of any of the defendant's oral statements relevant to the subject matter of the case "within the possession, custody or control of the State, the existence of which is known to the prosecutor or becomes known to him prior to or during the course of trial." N.C. Gen. Stat. § 15A-903(a)(2). The record reflects that the State complied with N.C. Gen. Stat. § 15A-903 in divulging the substance of defendant's statements as soon as that information was discovered through further questioning of Deputy Jaggers.

The trial court also found that the information provided by the reports which the State disclosed in advance of twenty working days prior to trial put defendant on notice that the State would attribute statements to defendant. Those reports included information that defendant retrieved the glass jar which appeared to contain cocaine residue, and that defendant admitted to having thrown away the money he received in exchange for the drugs. In addition, the trial court determined defendant's motion was not timely. Defense counsel moved to suppress Deputy Jagger's testimony only *after* he had testified about defendant's statements without objection. In fact, defense counsel vigorously cross-examined Deputy Jaggers on his testimony regarding defendant's statements.

We hold the trial court did not abuse its discretion in summarily denying defendant's motion. Aside from the untimely nature of defendant's motion, we agree with the trial court that the State complied as best it could with defendant's request for disclosure, and that the State provided defendant with the substance of the statements it intended to use as soon as those statements became known to the State. Moreover, we discern no substantive legal basis upon which the trial court should have granted the motion. We disagree with defendant that the motion should have been granted on the basis that defendant's statements were made in violation of his *Miranda* rights. Specifically, defendant argues the statements were made after defendant was in custody and had requested an attorney, but before he had been informed of his *Miranda* rights.

" '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. Kincaid*, 147 N.C. App. 94, 101, 555 S.E.2d 294, 300 (2001) (citations omitted) (emphasis added). " 'Neither *Miranda* warnings nor waiver of counsel is required when police activity is limited to general on-the-scene investigation.' " *Id.* (citation omitted).

In the present case, conceding defendant was "in custody," defendant's *Miranda* rights were not violated because his inculpatory statements were not made during a custodial interrogation as that term has been defined by our United States Supreme Court. *See Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966) (custodial interrogation requires questioning be initiated by law enforcement). Deputy Jagger's testimony clearly establishes that defendant initiated the conversation which led to his inculpatory statements. Defendant did not make the inculpatory statements in the context of a police-initiated interrogation, and thus was not required to have been informed of his *Miranda* rights. *See State v. Holcomb*, 295 N.C. 608, 611-12, 247 S.E.2d 888, 891 (1978) (although defendant was in custody, evidence did not result from "custodial interrogation" where police did not initiate questioning). Defendant has failed to show the trial court abused its discretion in summarily denying his motion to suppress. This argument is overruled.

[2] In his second argument, defendant contends he is entitled to a new trial because the trial court committed plain error in admitting testimony that defendant invoked his constitutional right to remain silent. Defendant failed to object to the introduction of the evidence when admitted, and we therefore may only review for plain error. Plain error is error " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (citation omitted), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000).

The following colloquy took place between the prosecutor and Agent Tart on his direct examination:

> Q. Okay. Did you at some point try to interview Mr. Parks after he was arrested?
>
> A. Yes.
>
> Q. And when was that?

A. That was on Thursday, July the 23rd at approximately 1:38 a.m. in the morning.

Q. Would this be after the delivery that occurred in Wake County?

A. Yes.

Q. And would this be after the search warrant and the statements that Mr. Parks had earlier made to you?

A. Yes.

Q. Okay. And could you tell the jury, please, where it was that you tried to interview Mr. Parks and if you did, in fact, interview him.

A. Yes. I attempted to interview Mr. Parks in an office in the Wake County Sheriff's Department Drug and Vice Unit.

. . .

Q. And did you read Mr. Parks his rights?

A. Yes.

Q. And did he execute a waiver of those rights?

A. He refused to waive his rights and refused to be interviewed.

Q. And did the interview cease at that time?

A. Yes.

We agree with defendant that the trial court's admission of this testimony regarding defendant's invocation of his right to remain silent was error. The State argues that our courts have recognized that such evidence is admissible when there is no specific incriminating accusation being leveled at the defendant because then there can be no inference of guilt by silence. However, an identical argument was recently rejected by this Court in *State v. Jones*, 146 N.C. App. 394, 553 S.E.2d 79 (2001).

In *Jones*, an officer testified that the defendant, who had been arrested and was in police custody, understood his rights and stated that he wanted an attorney before saying anything to the officers. *Id.* at 397, 553 S.E.2d at 81. The officer testified that defendant asserted his right to have counsel prior to speaking, but continued to state that he wanted to tell the officers what had happened. *Id.* at 397-98, 553

S.E.2d at 81-82. This Court observed that "[o]ur Supreme Court has held that the State may not introduce at trial evidence that a defendant exercised his constitutional rights." *Id.* at 398, 553 S.E.2d at 82.

We specifically rejected the State's argument, based on *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982), upon which the State relies here, that the admission of such testimony was not error because it was not used to infer guilt. *Jones*, 146 N.C. App. at 398-99, 553 S.E.2d at 82. We noted that *Williams* preceded *State v. Ladd*, 308 N.C. 272, 302 S.E.2d 164 (1983), in which our Supreme Court held that the admission of a defendant's statement in which he invoked his right to counsel was error. *Jones*, 146 N.C. App. at 399, 553 S.E.2d at 82. We held that "to the extent that *Williams* holds that a defendant's statement in which he invokes his right to counsel [or to remain silent] may be admissible, we find that it has been superseded by the holding in *Ladd*." *Id.* Nevertheless, we concluded the defendant was unable to show that the error in admitting the testimony amounted to plain error in light of the compelling evidence of the defendant's guilt presented at trial. *Id.* at 399, 553 S.E.2d at 82-83.

As in *Jones*, we hold in this case that while the trial court should not have admitted evidence that defendant refused to waive his constitutional rights and refused to be interviewed, defendant has failed to carry his burden of proving that the admission resulted in a miscarriage of justice and the denial of a fair trial, or that a different result would have occurred absent the error. The evidence against defendant in this case, as in *Jones*, was compelling. In addition to the testimony of officers who observed defendant throughout the "buy/bust," Ronald Jones identified defendant as the person from whom he had obtained the cocaine for Officer Anthony on several occasions, including during the "buy/bust" on 22 July 1998. Defendant made various voluntary inculpatory statements to Deputy Jaggers, including that he wanted to help himself out of trouble, that he could show Deputy Jaggers where he had gone in the woods and where he had put the jar, and that he had thrown the money given to him by Jones out of his car window when he realized he was being followed by law enforcement officers. Defendant did, in fact, retrieve the jar, which appeared to contain cocaine residue.

Moreover, defendant invoked his right to remain silent *after* he voluntarily made these various inculpatory statements. In *State v. Wilson*, 354 N.C. 493, 518-19, 556 S.E.2d 272, 289 (2001), the Supreme Court recently noted that even if admission of the defendant's invo-

cation of his right to remain silent was error, it was harmless in light of the fact that at the time the defendant invoked his right, he had already inculpated himself through prior statements to the officers, and the prosecutor never implied that the statement was an admission of guilt. *Id.* Likewise, the prosecutor in this case did not imply that defendant's invocation of his right to remain silent was an admission of guilt.

Even in *Ladd*, our Supreme Court held that although admission of the defendant's request to have counsel was error, in light of the overwhelming evidence of the defendant's guilt, any such error was harmless beyond a reasonable doubt. *Ladd*, 308 N.C. at 284, 302 S.E.2d at 172. In light of the compelling evidence of defendant's guilt presented in this case, we cannot hold that admission of Agent Tart's testimony that defendant would not be interviewed did not constitute error " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *See Parker*, 350 N.C. at 427, 516 S.E.2d at 118 (citation omitted).

No error.

Judges GREENE and TYSON concur.

R.J. REYNOLDS TOBACCO COMPANY, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, RESPONDENT

No. COA01-74

(Filed 19 February 2002)

1. Taxation— recycling credit—tobacco stems, scrap, and dust

Recovered tobacco stems, scrap and dust used in cigarette manufacturing are "solid waste" within the meaning of the statutes providing tax benefits for equipment used in resource recovery or recycling. The stems, scrap, and dust used in this process would otherwise be discarded. N.C.G.S. §§ 130A-290(35), 105-275(8)(b).

2. Administrative Law— superior court review—agency findings omitted

The trial court did not err by omitting all or part of respondent-agency's findings regarding a tax certification for re-using discarded tobacco stems, scrap, and dust where one finding involved the storage of the discarded tobacco materials, but there is no requirement that materials to be recycled be discarded; other findings merely showed that petitioner successfully incorporated its recycling process into its manufacturing program; and previous certifications were not relevant to the denial of this application.

3. Administrative Law— denial of recycling tax certification—arbitrary and capricious

Respondent-agency's denial of an application for a recycling tax certification without an inspection of the facility evinced a lack of fair and careful consideration under the circumstances and was arbitrary and capricious.

Appeal by respondent from order entered 20 September 2000 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 26 November 2001.

Kilpatrick Stockton LLP, by Alan H. McConnell and Theodore C. Edwards, II, for petitioner-appellee.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Nancy E. Scott, for respondent-appellant.

MARTIN, Judge.

On 16 April 1998, petitioner, R.J. Reynolds Tobacco Company ("Reynolds") applied to respondent, North Carolina Department of Environment and Natural Resources ("DENR") for tax certification of certain newly installed equipment as solid waste recycling or resource recovery equipment, pursuant to G.S. §§ 105-275(8)(b), 105-122(b), 105-130.5, and 105-130.10. By letter dated 4 September 1998, DENR denied Reynolds' tax certification application, based upon its assertion that the materials processed by the equipment were not waste materials. Reynolds petitioned for a contested case hearing pursuant to G.S. § 150B-23.

The Tax Certification Program, codified at G.S. §§ 105-275(8)(b), 105-122(b), 130A-290(35), 105-130.5, and 105-130.10 provides tax

benefits for capital investments in facilities and equipment used exclusively for resource recovery or recycling of or from solid waste. These tax benefits include the exclusion of real and personal property from the local city and county ad valorem tax base, deduction of the value of the facilities and equipment from the value of property upon which the corporate franchise tax is levied, and rapid amortization of the construction, purchase and installation cost of the facilities, resulting in increased deductions from corporate taxable income. DENR must certify a facility's eligibility for participation before a facility receives any tax benefits for its recycling program.

Reynolds first submitted a request to DENR for tax certification for a resource recovery facility and equipment in Building 603 at its Whitaker Park manufacturing facility in 1982. DENR issued Reynolds a tax certification covering the building, land, and equipment listed in the application. From 1986 until 1995, Reynolds applied for and received eight additional tax certifications from DENR for new equipment purchased and installed in Building 603 at Whitaker Park. DENR conducted an inspection before granting certification upon each of these applications. DENR issued its 4 September 1998 letter denying Reynolds' April 1998 application, the first time it had denied an application for tax certification for Building 603, without conducting any inspection.

In manufacturing tobacco products, Reynolds buys tobacco leaves at auction. The tobacco is sent to a stemmery, where the stems (hard, woody part of the leaf) are separated from the lamina portion of the leaf (material in between the stems). The separation process also generates small scraps of tobacco (scraps) and very fine scraps of tobacco (dust). The usable tobacco lamina material is sent to the manufacturing operation where it is blended and processed into cigarettes. The stems, scraps and dust are packed into containers and sent to a storage facility until they are either processed into reconstituted sheet tobacco, through a process known as the G-7 process, or are discarded. The reconstituted sheet tobacco is shredded and blended with the processed lamina strips and made into filler for cigarettes. The reconstituted tobacco filler is part of most brands of cigarettes made by Reynolds, and enables cigarettes to be made with lower tar and nicotine content which has been demanded by smoking consumers.

Reynolds uses approximately seventy million pounds of tobacco stems, scrap and dust each year in making reconstituted sheet

tobacco. Reynolds also disposes of between five and seven million pounds of tobacco waste materials in landfills each year. This material is of a lower quality than the stems, scrap and dust used in the G-7 process; much of it is generated by the manufacturing process, rather than the stemmery, though some tobacco waste generated by the stemmery is also disposed of.

In order to keep up with its production requirements for reconstituted tobacco, Reynolds imports tobacco stems purchased overseas. Reynolds sells reconstituted tobacco to other manufacturers of tobacco products, and manufactures reconstituted sheet tobacco for other tobacco manufacturers, using stems, scraps and dust supplied by them. One of Reynolds' witnesses testified that even if there were no tax incentives for recycling and resource recovery of or from solid waste, Reynolds would still operate the G-7 process because of its cost-effectiveness.

An administrative law judge issued a recommended decision upholding DENR's denial of Reynolds' 1998 application for tax certification. DENR subsequently issued its final agency decision, in which it adopted the recommended decision of the administrative law judge and denied certification. Reynolds filed a timely petition for judicial review of the final agency decision pursuant to G.S. § 150B-43 *et seq.* The Forsyth County superior court reversed the final agency decision and ordered DENR to approve Reynolds' application for tax certification. The superior court concluded that the tobacco scrap, stems and dust used to make reconstituted sheet tobacco are "solid waste" within the meaning of G.S. § 130A-290(35) and therefore Reynolds' resource recovery and recycling equipment qualified for inclusion in the North Carolina Tax Certification Program. The court also concluded that DENR's final agency decision was not supported by substantial evidence, was in excess of its statutory authority because DENR had failed to inspect the Reynolds facility after receiving a complete application for tax certification as required by 15A NCAC 13B.1508(d), and was arbitrary and capricious. DENR appeals.

Judicial review of administrative agency decisions is governed by the North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988). The superior court is authorized to reverse or modify an agency's final decision under G.S. § 150B-51(b)

if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

The proper standard of review by the superior court is determined by the particular issues presented on appeal. *In re Appeal by McCrary*, 112 N.C. App. 161, 435 S.E.2d 359 (1993). When the petitioner contends the agency decision was affected by an error of law, G.S. § 150B-51(b)(1)(2)(3) & (4), *de novo* review is the proper standard; if it is contended the agency decision was not supported by the evidence, G.S. § 150B-51(b)(5), or was arbitrary and capricious, G.S. § 150B-51(b)(6), the whole record test is the proper standard. *Dillingham v. N.C. Dept. of Human Resources*, 132 N.C. App. 704, 513 S.E.2d 823 (1999). The reviewing court may be required to utilize both standards of review if warranted by the nature of the issues raised. *McCrary*, 112 N.C. App. 161, 435 S.E.2d 359.

In seeking judicial review of DENR's decision in this case, Reynolds alleged that the decision was based on an error of law, that the decision was not supported by the evidence, and that the decision was arbitrary and capricious. Therefore, the superior court was required to employ both a *de novo* review for errors of law, and a whole record review to determine whether DENR's decision was supported by substantial evidence and whether it was arbitrary and capricious. Our review of the superior court's decision requires that we review the order for error of law to determine whether that court employed the appropriate standard of review and whether it did so correctly. *ACT-UP Triangle v. Comm'n for Health Services*, 345 N.C. 699, 483 S.E.2d 388 (1997).

I.

[1] In those cases where the superior court is required to employ a *de novo* standard of review of the agency's decision, appellate review of the superior court's order requires that this Court also review the agency's decision *de novo*. *McCrary, supra*. *De novo* review requires the court to " 'consider a question anew, as if not considered or decided by the agency' previously . . . ." and to "make its own findings of fact and conclusions of law . . ." rather than relying upon those made by the agency. *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 577, 528 S.E.2d 927, 929 (2000) (citation omitted).

The Tax Certification Program provides an exemption from taxation for

> *[r]eal or personal property that is used or, if under construction, is to be used exclusively for recycling or resource recovering of or from solid waste*, if the Department of Environment and Natural Resources furnishes a certificate to the tax supervisor of the county in which the property is situated stating the Department of Environment and Natural Resources has found that the described property has been or will be constructed or installed, complies or will comply with the rules of the Department of Environment and Natural Resources, and has, *or will have as its primary purpose recycling or resource recovering of or from solid waste.*

N.C. Gen. Stat. § 105-275(8)(b) (emphasis added). Thus, whether the tobacco stems, scraps and dust used in Reynolds' G-7 process is "solid waste" is critical to a determination of this matter.

G.S. § 130A-290(35) provides in pertinent part:

> "Solid waste" means any hazardous or nonhazardous garbage, refuse or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, domestic sewage and sludges generated by the treatment thereof in sanitary sewage collection, treatment and disposal systems, *and other material that is either discarded or is being accumulated, stored or treated prior to being discarded,* or has served its original intended use and is generally discarded, including solid, liquid, semisolid or contained gaseous material resulting from industrial, institutional, commercial and agricultural operations, and from community activities . . . (emphasis added).

Whether the tobacco stems, scrap and dust used by Reynolds in its G-7 process to make reconstituted sheet tobacco comes within the statutory definition, then, is a question of law. *McCrary, supra.* (Incorrect statutory interpretation constitutes an error of law). In reviewing DENR's denial of Reynolds' 1998 application for tax certification, the superior court found the evidence in the official record with respect to Reynolds' use of the G-7 process to make reconstituted sheet tobacco from stems, scrap and tobacco dust supported a conclusion that such materials are "solid waste" within the meaning of G.S. § 130A-290(35). The superior court concluded that DENR's conclusion to the contrary in its Final Agency Decision was an error of law. In so doing, the superior court correctly utilized the *de novo* standard of review. In order for this Court to properly conduct its review of the superior court order, we must also review *de novo* DENR's conclusion that "[t]obacco scrap, tobacco stems, and tobacco dust used in the G-7 process are not 'solid waste' within the meaning of N.C. Gen. Stat. § 130A-290(35)." *McCrary, supra.*

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). "If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993). "[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant." *Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). "It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage." *Id.* (citations omitted). Though we have held that "tax exemption statutes must be strictly construed against exemption . . .," we have observed "that such statutes should not be given a narrow or stingy construction." *In re Wake Forest University*, 51 N.C. App. 516, 521, 277 S.E.2d 91, 94, *disc. review denied*, 303 N.C. 544, 281 S.E.2d 391 (1981) (citations omitted).

Applying these tenets to the statutory definition of "solid waste," we conclude that the tobacco scrap, stems and dust used in Reynolds' G-7 process fall within it. The statutory definition includes "material that is either discarded or is being accumulated, stored or treated prior to being discarded . . . ." The language of the statute is clear and we must interpret the statute according to the plain meaning of its

terms. The record evidence before DENR is undisputed that the tobacco stems, scrap and dust are waste materials generated in the stemmery, that Reynolds accumulates and stores such materials after the tobacco lamina leaves the stemmery, and that such materials remain in storage until they are either used in the G-7 process or discarded. Were it not for the G-7 process, all of the stems, scrap and dust generated by the stemmery process would be discarded. Thus, we hold that the tobacco stems, scrap and dust utilized in Reynolds' G-7 process are "solid waste" within the meaning of G.S. § 130A-290(35).

In so holding, we reject DENR's argument that our decision should be guided by federal case law interpreting the definition of "solid waste" as used in the federal Resource Conservation and Recovery Act (RCRA), 42 USC § 6901 *et seq.* North Carolina's statute contains broader language than the federal statute in defining "solid waste," expanding the phrase "other discarded material" contained in the federal definition, 42 USC § 6903(27), to include "and other material that is either discarded or is being accumulated, stored or treated prior to being discarded, or has served its original intended use and is generally discarded." N.C. Gen. Stat. § 130A-290(35). Because the state definition is broader than the federal definition, we will not rely on federal case law in our interpretation.

II.

[2] In reviewing Reynolds' contentions that DENR's final decision was not supported by substantial evidence and was arbitrary and capricious, the superior court was required to conduct a whole record review. In its order, the superior court asserted that it had "reviewed the entire record in this matter and applied the 'whole record' test . . . ."

"The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Ins. v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). In applying the whole record test, the reviewing court must "take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached." *Lackey v. Dept. of Human*

Resources, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). Under this test, the reviewing court is not allowed to replace the agency's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different conclusion had the matter been before it *de novo*. *Meads v. N.C. Dept. of Agric.*, 349 N.C. 656, 509 S.E.2d 165 (1998). Additionally, a decision by an administrative agency "is arbitrary and capricious if it clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decisionmaking." *Joyce v. Winston-Salem State Univ.*, 91 N.C. App. 153, 156, 370 S.E.2d 866, 868, *cert. denied*, 323 N.C. 476, 373 S.E.2d 862 (1988).

DENR contends that there was substantial evidence to support its denial of Reynolds' application for tax certification and that the superior court misapplied the whole record test by impermissibly substituting its judgment for that of the agency by omitting all or part of many of DENR's findings of fact, by adding new findings of fact, and by basing its conclusions of law on the court's findings rather than the agency's findings. We reject DENR's contentions.

DENR specifically argues that the trial court erred in omitting DENR's findings that Reynolds has not discarded the tobacco stems, scrap and dust used to make reconstituted sheet tobacco but instead has aged and stored these materials before reconstituting them into sheet tobacco. However, whether Reynolds has discarded the materials is irrelevant to the inquiry of whether the tobacco stems, scrap and dust are "solid waste;" the definition of "solid waste," as discussed earlier, includes ". . . material that is either discarded *or is being accumulated, stored or treated prior to being discarded* . . . ." N.C. Gen. Stat. 130A-290(35) (emphasis added). Therefore, there is no requirement that the materials actually be discarded. DENR's argument, carried to its logical conclusion, would mean that taxpayers who successfully recycle waste materials would no longer qualify for tax certification because they no longer discard the waste materials. Such a proposition would be absurd and clearly contrary to the legislative intent to encourage the recovery and recycling of solid waste.

For similar reasons, we reject DENR's arguments that the superior court erred in omitting DENR's findings: (1) that reconstituted sheet tobacco is integral and necessary to almost all of Reynolds' brands of cigarettes, where it has been a major tool for designing cigarettes with lower tar and nicotine content, as demanded by the

smoking public; (2) that Reynolds buys tobacco stems overseas to keep up with its production requirements for reconstituted tobacco; (3) that Reynolds finds it is economical to utilize as much of the tobacco leaf as possible in its products; (4) that tax incentives were not determinative of whether Reynolds operated the G-7 process and that Reynolds would continue to operate the G-7 process without the tax certification program; and (5) that reconstitution of tobacco stems, scrap, and dust is widespread throughout the tobacco industry. These findings merely show that Reynolds has successfully incorporated its recycling process into its manufacturing program; such findings have no bearing on whether the materials should be considered "solid waste." Therefore, it was unnecessary for the superior court to have included these findings in its order.

DENR further contends the superior court erred in omitting its findings of fact with respect to its previous certifications of Reynolds' G-7 facility and equipment, and DENR's explanation for denying the 1998 application when it had approved nine similar applications, beginning in 1982. None of these findings were relevant, however, to a determination of whether there was substantial evidence supporting the agency's denial of Reynolds' 1998 application for tax certification.

DENR additionally contends the superior court erred by finding the following facts in its order:

> 18. Without the G-7 process, the tobacco scrap, stems and dust could not be used to make cigarettes.
>
> 19. Without the G-7 process, most of Reynolds' tobacco scrap, stems, and dust would be discarded in landfills.

Such facts, however, were made in regard to the superior court's determination that the materials were "solid waste," a matter of law to be decided under *de novo* review, as previously discussed.

For the foregoing reasons, we conclude that the superior court did not impermissibly apply its judgment for that of the agency in conducting the whole record review in this case. After carefully reviewing the whole record before the agency in this matter, we agree with the trial court that there was not substantial evidence to support the agency's decision that the materials utilized in Reynolds' G-7 process were not "solid waste" and denying tax certification to the land and equipment associated with that process.

[3] The superior court also concluded that DENR's failure to inspect the Building 603, Whitaker Park facility, as required by 15A NCAC 13B.1508(d), prior to its decision to deny the application was "indicative of a lack of fair and careful consideration by DENR" and that its denial of Reynolds' 1998 application was arbitrary and capricious. 15A NCAC 13B.1500 *et seq.* sets forth standards for the special tax treatment given resource recovery equipment and facilities. Applications for tax certification are governed by rule .1508 which provides, in pertinent part, that upon "proper receipt" of the information required by the rule "a representative of the Division of Solid Waste Management shall inspect said facilities and equipment." 15A NCAC 13B.1508(d).

DENR argues that if the application discloses on its face that the facility is not eligible for certification, no inspection is required, as there has been no "proper receipt" of an application. We need not decide, in this case, what constitutes a "proper receipt" or when inspection is required; the record shows that DENR had inspected this same facility on nine previous occasions, had approved certification for the facility after each of those inspections, and denied certification of the 1998 application after erroneously characterizing the materials utilized in the process as "home scrap," an error which would have been apparent upon inspection. Under these circumstances, we agree with the trial court's conclusion that DENR's denial of the application without inspection evinced a lack of fair and careful consideration and was arbitrary and capricious.

Because the superior court is authorized to reverse an agency decision upon any of the grounds specified in G.S. § 150B-51(b), and we have determined the court in this case was correct in its conclusion that DENR's denial of Reynolds' application was affected by an error of law and was arbitrary and capricious, we need not discuss DENR's remaining arguments with respect to the superior court's order. For the foregoing reasons, we affirm the superior court's reversal of DENR's final agency decision denying Reynolds' 16 April 1998 application for tax certification of the land and equipment associated with its G-7 process for reconstituted sheet tobacco and its order requiring DENR to approve the application.

Affirmed.

Chief Judge EAGLES and Judge BIGGS concur.

LLOYD M. COCHRANE v. CITY OF CHARLOTTE

No. COA00-1368

(Filed 19 February 2002)

Police Officers— special separation allowance—disability retirement—service retirement

The trial court erred in a declaratory judgment action by finding that plaintiff former police officer was eligible for a special separation allowance under N.C.G.S. §§ 143-166.41 and 143-166.42, because: (1) the officer retired on a disability retirement, and an initial requirement of eligibility is retirement on a basic service retirement; (2) N.C.G.S. § 128-26 does not allow creditable service for disability retirement; and (3) the time the officer spent on disability retirement does not qualify as either prior service or membership service under N.C.G.S. § 128-21(8).

Judge GREENE concurring in a separate opinion.

Appeal by respondent from judgment entered 22 August 2000 by Judge L. Oliver Noble, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2001.

DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for petitioner-appellee.

Assistant City Attorney Hope A. Root for respondent-appellant.

Special Deputy Attorney General Alexander McC. Peters, Amicus Curiae for The Board of Trustees of the North Carolina Local Government Employees' Retirement System, the Teachers' and State Employees' Retirement System of North Carolina, and of the Retirement Systems Division, Department of State Treasurer.

THOMAS, Judge.

Respondent, the City of Charlotte (City), appeals a declaratory judgment finding a former police officer to be eligible for a special separation allowance.

The separation allowance is a monthly supplemental payment lasting up to seven years that is payable to officers who, among other requirements, retire before reaching age sixty-two.

Petitioner, Lloyd M. Cochrane, Jr. (Cochrane), retired from the City of Charlotte police force on a disability retirement in 1983 under the Law Enforcement Officers' Retirement System (LEORS), governed by Chapter 143 of the North Carolina General Statutes. On 1 January 1986, all assets of LEORS were transferred to the Local Government Employees' Retirement System (LGERS), with members and beneficiaries of LEORS becoming members and beneficiaries of LGERS. *See* N.C. Gen. Stat. § 143-166.50(b) (1999). Cochrane's benefits are therefore now payable by LGERS, governed by Chapter 128 of the North Carolina General Statutes.

In March, 2000, having never received the separation allowance, Cochrane filed a petition for declaratory judgment asking the court to determine the rights and responsibilities of the parties under N.C. Gen. Stat. § 143-166.41. That section is titled "Special separation allowance."

The City answered that an initial eligibility requirement for the allowance, before any other factors need be considered, is that the officer retire on a service retirement. Cochrane, the City argues, retired on a disability retirement and therefore is not among those eligible.

After a hearing during the 27 July 2000 term of Mecklenburg County Superior Court, the trial court denied the City's motion for summary judgment and found Cochrane eligible for the special separation allowance under N.C. Gen. Stat. §§ 143-166.41 and 143-166.42. Section 143-166.42 extends the special separation allowance statute to law enforcement officers employed by the local government.

The trial court based its decision on a finding of ambiguities in Chapter 128. The trial court determined that: "Since the statute is ambiguous regarding whether or not a police officer who is on disability retirement is a member of the retirement system while on disability, the Court resolves the ambiguity in favor of the Petitioner and finds that the term 'creditable service' includes the time spent on disability retirement as credit allowed under the retirement system and therefore, the Petitioner meets the requirements of N.C.G.S. § 143-166.41."

The City appeals, arguing that under the plain language of both special separation allowance statutes, an initial requirement of eligibility is retirement on a service retirement. Cochrane, the City argues, fails to meet this fundamental requirement because he retired on a

disability retirement. The City also contests the trial court's conclusions that: (1) the term "creditable service" is ambiguous under section 143-166.41; and (2) Chapter 128 is ambiguous regarding whether an officer who is retired on a disability retirement is a "member" or a "beneficiary" of LGERS, and regarding whether that distinction makes a difference in this case.

For the reasons herein, we agree with the City that eligibility for the special separation allowance requires the officer to have retired on a basic service retirement.

On appeal, a trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive if supported by competent evidence. *State v. Coronel*, 145 N.C. App. 237, 250, 550 S.E.2d 561, 570 (2001). Conclusions of law drawn by the court from the facts found, however, involve legal questions and are always reviewable *de novo* by the appellate court. *Mann Contr'rs, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999).

I.

Our initial inquiry is whether Cochrane was precluded from consideration for the special separation allowance because he retired on a disability retirement.

Section 143-166.41 provides:

> (a) [E]very sworn law-enforcement officer . . . employed by a State department, agency, or institution who qualifies under this section shall receive, beginning on the last day of the month in which he retires on a basic service retirement under the provisions of G.S. 135-5(a) or G.S. 143-166(y), an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to him for each year of creditable service. The allowance shall be paid in 12 equal installments on the last day of each month. To qualify for the allowance the officer shall:
>
> (1) Have (i) completed 30 or more years of creditable service or, (ii) have attained 55 years of age and completed five or more years of creditable service; and
>
> (2) Not have attained 62 years of age; and

> (3) Have completed at least five years of continuous service as a law enforcement officer . . . immediately preceding a service retirement. Any break in the continuous service required by this subsection because of disability retirement . . . shall not adversely affect an officer's qualification to receive the allowance, provided the officer returns to service within 45 days after the disability benefits cease and is otherwise qualified to receive the allowance.

N.C. Gen. Stat. § 143-166.41 (1999).

Effective 1 January 1987, N.C. Gen. Stat. § 143-166.42 extended the coverage of the special separation allowance statute to law enforcement officers employed by local government:

> On and after January 1, 1987, the provisions of G.S. 143-166.41 shall apply to all eligible law-enforcement officers . . . who are employed by local government employers, except as may be provided by this section. As to the applicability of the provisions of G.S. 143-166.41 to locally employed officers, the governing body for each unit of local government shall be responsible for making determinations of eligibility for their local officers *retired under the provisions of G.S. 128-27(a)* . . . .

N.C. Gen. Stat. § 143-166.42 (1999) (emphasis added). We note there is no assignment of error or contention by any party that section 143-166.42 is inapplicable to Cochrane because he retired prior to 1 January 1987, and therefore we do not address it.

Section 128-27(a), referenced in the foregoing statute, is entitled "Service Retirement Benefits," and does not include disability retirement. Disability retirement has different requirements and is found in N.C. Gen. Stat. § 128-27(c), entitled "Disability Retirement Benefits." Cochrane retired under 128-27(c), not 128-27(a).

Additionally, section 143-166.41 provides that the separation allowance begins on "the last day of the month in which [the officer] retires on a *basic service retirement* under the provisions of G.S. 135-5(a) or G.S. 143-166(y)." N.C. Gen. Stat. § 143-166.41(a) (1999) (emphasis added). Section 135-5(a) sets forth the service retirement benefits for the *State* retirement system. Section 143-166 has been repealed. Act of June 27th, 1985, ch. 479, sec. 196(t), para.(t), 1985 N.C. Sess. Laws 412, 509. As with section 128-27(a), section 135-5(a) does not include disability retirement. The plain language of both special separation allowance statutes provides that the allowance is

for former local and state law enforcement officers who retired on a basic service retirement and not, as Cochrane contends, a disability retirement.

Moreover, in order to be eligible for the separation allowance, an officer must have completed five years of continuous service as a law enforcement officer "immediately preceding a service retirement." N.C. Gen. Stat. § 143-166.41(a)(3) (1999). The subsection goes on to state that disability retirement will not adversely affect the continuous service requirement, "provided the officer returns to service within 45 days after the disability benefits cease and is otherwise qualified to receive the allowance." *Id.* If disability retirement did not affect the continuous service requirement, such language would not be needed. Here, Cochrane did not return to work.

II.

Although we agree with the City that Cochrane does not qualify for the allowance because he did not retire on a service retirement, we proceed to address the trial court's conclusions: (1) that the term "creditable service" is ambiguous under section 143-166.41 and includes time spent on disability retirement; and (2) that statutory ambiguities exist regarding a disability retiree's status as a member or beneficiary and whether the distinction affects eligibility for the separation allowance.

The definition of "creditable service" is first found in section 143-166.41 itself, which provides:

> As used in this section, "creditable service" means the service for which credit is allowed under the retirement system of which the officer is a member. . . .

N.C. Gen. Stat. § 143-166.41(b) (1999). Cochrane receives his disability retirement benefits from LGERS. LGERS defines "creditable service" at N.C. Gen. Stat. § 128-21(8), which provides:

> "Creditable service" shall mean "prior service" plus "membership service" for which credit is allowable as provided in G.S. 128-26.

N.C. Gen. Stat. § 128-21(8) (1999). Section 128-26 does not allow creditable service for disability retirement. Instead, the statute credits service for actual time of employment, and also details the circumstances under which an employee may purchase creditable service. *See, e.g.*, N.C. Gen. Stat. § 128-26(a) (1999) (time taken off for military service); N.C. Gen. Stat. § 128-26(e) (unused sick leave); N.C. Gen.

Stat. § 128-26(h) (employment with the General Assembly); N.C. Gen. Stat. § 128-26(l) (approved leaves of absence); N.C. Gen. Stat. § 128-26(o) (federal employment); N.C. Gen. Stat. § 128-26(p) (part-time service); N.C. Gen. Stat. § 128-26(s) (actual time of employment).

Moreover, the time Cochrane spent on disability retirement qualifies as neither "prior service" nor "membership service" under section 128-21(8). Prior service is "service of a member rendered before . . . he becomes a member of the System." N.C. Gen. Stat. § 128-21(17) (1999). Membership service is "service as an employee rendered while a member of the Retirement System." N.C. Gen. Stat. § 128-21(14) (1999). Cochrane's time on disability retirement is not service rendered before he became, or while he was, a member of LGERS.

Section 128-21(13) defines "member" as "any person included in the membership of the Retirement System as provided in G.S. 128-24." N.C. Gen. Stat. § 128-21(13). Section 128-24, entitled "Membership," provides that, "The membership of this Retirement System shall be composed as follows: (1) All employees entering or reentering the service of a participating employer after the date of participation in the Retirement System of the employer." N.C. Gen. Stat. 128-24(1) (1999). Membership is also contingent on continuing in that employment or, if employment has been terminated other than by retirement, on leaving one's accumulated contributions in LGERS. *See* N.C. Gen. Stat. § 128-24(1a) (1999). A member ceases to be a member only if he "withdraw[s] his accumulated contributions or should he become a beneficiary or die." *Id.* A beneficiary of LGERS is statutorily defined as "any person in receipt of a pension, an annuity, a retirement allowance or other benefit as provided by this Article." N.C. Gen. Stat. § 128-21(6) (1999). Cochrane is in receipt of a disability retirement allowance. He is, therefore, a beneficiary. Consequently, his time spent on disability is not counted toward creditable service.

Cochrane also contends that officers on a disability retirement should be given "creditable service" because the term was used to calculate disability benefits. N.C. Gen. Stat. § 143-166, which is now repealed, was used to calculate Cochrane's disability retirement income. The statute provided in pertinent part:

> [[T]he officer] shall receive a disability retirement equal to one and fifty-five one hundredths percent (1.55%) of his average final compensation . . . multiplied by the number of *years of creditable*

> *service which he would have had if he had continued in service* until his 55th birthday.

N.C. Gen. Stat. § 143-166(y) (emphasis added).

The statutory language Cochrane refers to is used solely for the calculation of the amount of the disability benefit payment. When calculating the amount, an officer is given the benefit of assuming he would have had creditable service until age 55. There is no statutory support for the contention that the above language is to be used in determining the number of years of creditable service. The statutory definition of "creditable service" does not refer to the calculation of disability benefits. Time spent on disability retirement does not qualify as "creditable service" and cannot be credited toward the thirty years of creditable service that is required under section 143-166.41(a)(1).

III.

Cochrane further contends that, even if there is a distinction between service retirement and disability retirement, N.C. Gen. Stat. § 128-27(e)(6) eventually dissolves the distinction by converting his disability retirement to a service retirement upon the earliest date on which he would have qualified for an unreduced service retirement allowance. We disagree.

Section 128-27(e)(6) specifies that a disability beneficiary is entitled to a service retirement allowance on the "date on which he would have qualified for an unreduced service retirement allowance." N.C. Gen. Stat. § 128-27(e)(6) (1999). It does not grant creditable service for the years spent on disability, however. Had the General Assembly intended to give creditable service to local law enforcement officers for time spent on disability retirement, it could have used the language utilized for those in the State retirement system:

> [T]he long-term disability benefit is payable so long as the beneficiary is disabled until the earliest date at which the beneficiary is eligible for an unreduced service retirement allowance from the Retirement System, at which time the beneficiary would receive a retirement allowance calculated on the basis of the beneficiary's average final compensation at the time of disability as adjusted to reflect compensation increases subsequent to the time of disability *and the creditable service accumulated by the beneficiary, including creditable service while in receipt of benefits under the Plan.*

N.C. Gen. Stat. § 135-106(b) (emphasis added). Likewise, the General Assembly could have expressly stated in the provisions under "Creditable Service" its intention to grant creditable service for time spent on disability retirement. The General Assembly did not, but such language was included in the provisions of the State retirement system. *See* N.C. Gen. Stat. § 135-4(y) (1999).

IV.

Cochrane does raise a public policy issue. He argues that public policy mandates inclusion of disabled officers among those eligible for the special separation allowance. Whether or not we agree that they *should* be included as part of a preferred public policy, however, is irrelevant. Our authority is limited. "It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures." *State v. Arnold*, 147 N.C. App. 670, 673, 557 S.E.2d 119, 121 (2001). Normally, questions regarding public policy are for legislative determination. *See Martin v. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970).

Cochrane does not argue that the General Assembly exceeded its constitutional limits. Under statutes properly enacted by our General Assembly, Cochrane is not eligible for the special separation allowance. Accordingly, the order of the trial court is reversed.

REVERSED.

Judge HUNTER concurs.

Judge GREENE concurs in a separate opinion.

GREENE, Judge, concurring in the result.

I agree with the majority's conclusion that Cochrane did not retire under a service retirement pursuant to N.C. Gen. Stat. §§ 128-27(a) and 135-5(a) and is thus ineligible for the special separation allowance authorized by N.C. Gen. Stat. §§ 143-166.41 and 143-166.42 but write separately to address two aspects of the majority's analysis.

Section 143-166.41(a) provides that "every sworn law-enforcement officer . . . shall receive, beginning on the last day of the month in which he *retires on a basic service retirement* under the provisions of G.S. 135-5(a) or G.S. 143-166(y), an annual separation

allowance [(special separation allowance)]," provided the law-enforcement officer shall:

> (1) [h]ave (i) completed 30 or more years of creditable service or, (ii) have attained 55 years of age and completed five or more years of *creditable service*; and
>
> . . . .
>
> (3) [h]ave completed at least five years of continuous service as a law enforcement officer . . . immediately preceding a service retirement.

N.C.G.S. § 143-166.41(a) (1999) (emphasis added).

Cochrane argues that even if there is a distinction between a disability and a service retirement, N.C. Gen. Stat. § 128-27(e)(6) operates to transform a law-enforcement officer's disability retirement into a service retirement. I agree. According to the statute, "a beneficiary in receipt of a disability retirement allowance until the earliest date on which he would have qualified for an unreduced service retirement allowance shall thereafter . . . (iii) be considered a beneficiary in receipt of a service retirement allowance." N.C.G.S. § 128-27(e)(6) (1999). "[A] beneficiary in receipt of a disability retirement allowance," *id.*, is, as the majority implicitly concedes, a beneficiary of a disability retirement plan. Likewise, "a beneficiary in receipt of a service retirement allowance," *id.*, must necessarily be a beneficiary of a service retirement plan. Thus, a disability retirement is transformed into a service retirement when the requisite qualifications are met, as occurred in this case in respect to Cochrane's disability retirement.

Cochrane further contends a person on disability retirement can accrue creditable service. "[C]reditable service" is defined as "the service for which credit is allowed under the retirement system of which the officer is a member." N.C.G.S. § 143-166.41(b) (1999). N.C. Gen. Stat. § 143-166(y), which was used to calculate Cochrane's disability retirement income, gives credit for "the number of years of creditable service which he would have had if he had continued in service until his 55th birthday." N.C.G.S. § 143-166(y) (1981) (repealed 1985). Thus, "creditable service," in the context of section 143-166.41, includes actual service as well as service a law-enforcement officer could have performed but for his disability and can be accrued during a person's disability retirement. Assuming Cochrane was a member of the disability retirement system at the time his dis-

ability benefits were calculated,[1] the time spent on disability retirement, until Cochrane's 55th birthday, counts as creditable service under section 143-166.41.

Thus, I believe, Cochrane met his burden of showing that he is in receipt of a service retirement and accrued creditable service during his years on disability retirement. He nevertheless fails to overcome the requirement that a law-enforcement officer seeking the special separation allowance must "*retire*[] on a basic service retirement." N.C.G.S. § 143-166.41(a) (1999) (emphasis added). To retire means to "withdraw from one's occupation." *American Heritage College Dictionary* 1165 (3d ed. 1993). For Cochrane, this occurred when he assumed a disability retirement, not when his disability retirement was transformed into a service retirement. Consequently, for this reason, I agree with the majority that Cochrane is not eligible for the special separation allowance.

SUZANNE ENGLISH McCRARY, BY AND THROUGH HER GENERAL GUARDIAN, CHARLES W. McCRARY, JR., PLAINTIFF v. TERESA BYRD AND HAM'S RESTAURANTS, INC., (FORMERLY HAM'S OF BURLINGTON, INC.), DEFENDANTS

No. COA00-1400

(Filed 19 February 2002)

1. Appeal and Error— appealability—denial of arbitration

An order denying arbitration is immediately appealable even though interlocutory because it involves a substantial right which might be lost if appeal is delayed.

2. Insurance— underinsured motorist—partial reimbursement—exhaustion of coverage

The trial court erred by concluding that Farm Bureau's limits of liability had not been exhausted and that underinsured motorist provisions had not been triggered where Farm Bureau had insured defendant Byrd for $100,000 per person, Farm Bureau paid $100,000 to plaintiff in a settlement with Byrd, and Farm Bureau received a $35,000 reimbursement from defendant

1. The majority holds that once Cochrane's disability retirement commenced, his status changed from a member of the retirement system to a beneficiary.

Ham's. The focus is not on Farm Bureau's net payout, but whether it paid plaintiff the full dollar amount set in the policy as the limit of liability.

3. Insurance— underinsured motorist—subrogation rights—approval of settlements

The trial court erred by concluding that plaintiff breached her underinsured motorist contract with Nationwide by not giving Nationwide the opportunity to approve her settlement with defendants. Nationwide had agreed to waive any and all subrogation rights it had in the action and the consent clause no longer served the primary purpose of protecting Nationwide's right to subrogation. There was no evidence of collusion between the tortfeasor and the insured; indeed, collusion was not raised before the trial court.

4. Arbitration and Mediation— failure to submit to depositions—waiver

The trial court erred by holding that plaintiff breached her underinsured motorist insurance contract with Nationwide and was not entitled to arbitration where she failed to voluntarily submit to depositions after she had filed a motion to compel arbitration. Plaintiff had a well-founded belief that her participation in a deposition after she had requested arbitration may have resulted in waiving arbitration.

5. Contribution— insurance carrier—not a tortfeasor—no right of contribution

The trial court erred by concluding that plaintiff's release of a restaurant from a dram shop claim extinguished any claims Nationwide would have had for contribution against the restaurant; Nationwide was not a tortfeasor and had no right of contribution.

6. Arbitration and Mediation— waiver—delay—expenditure of funds

The trial court erred by finding that plaintiff had waived arbitration based upon findings that Nationwide had expended $60,000 defending the claim and that evidence was lost as a result of plaintiff's alleged delay in seeking arbitration, but there was no finding about whether any of those expenditures resulted from plaintiff's delay in demanding arbitration, there is no indication that plaintiff's objections to depositions in 1998 could have caused records to be destroyed in 1996, and the court did not find

or conclude that plaintiff's delay in seeking arbitration caused evidence to be destroyed.

Appeal by plaintiff from order dated 12 June 2000 by Judge C. Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 4 December 2001.

Thomas L. Nesbit, P.C., by Thomas L. Nesbit; and Womble Carlyle Sandridge & Rice PLLC, by Burley B. Mitchell, Jr., for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, LLP, by Kenneth B. Rotenstreich and Paul A. Daniels, for unnamed defendant-appellee Nationwide Mutual Insurance Company.

No brief filed for defendant-appellee Byrd.

GREENE, Judge.

Suzanne English McCrary (Plaintiff) by and through her general guardian, Charles W. McCrary, Jr., appeals an order dated 12 June 2000 in favor of Nationwide Mutual Insurance Company (Nationwide) denying Plaintiff's motion to compel arbitration.

On 23 October 1997, Plaintiff filed a complaint (the Complaint) together with attached interrogatories against Teresa Byrd (Byrd), Ham's Restaurants, Inc. (Ham's), and Nationwide.[1] Plaintiff also served N.C. Farm Bureau Insurance Company (Farm Bureau), Byrd's liability insurer.[2] In the Complaint, Plaintiff alleged negligence on the part of Ham's and Byrd for an incident occurring in the early morning hours of 19 October 1991. As a result of the incident, Plaintiff sustained serious physical injuries.

Nationwide provided uninsured/underinsured motorist coverage to Plaintiff. In order to provide coverage to Plaintiff, Nationwide's policy required that it be notified promptly of how, when, and where an accident occurred. Any person seeking coverage had the responsibility to: cooperate with Nationwide in the investigation, settlement, or defense of any claim or suit; authorize Nationwide to obtain medical reports and other pertinent records; and submit, as often as

1. After Nationwide filed a motion, the trial court deleted Nationwide's name from the caption of the proceeding and Nationwide was allowed to defend as an unnamed defendant.

2. Farm Bureau insured Byrd in a policy of automobile liability insurance providing liability limits in the amount of $100,000.00 per person/$300,000.00 per occurrence.

reasonably required, to examinations under oath. Nationwide would not provide uninsured or underinsured motorist coverage for bodily injury sustained by any person if that person or legal representative "settle[d] the **bodily injury** . . . claim without [Nationwide's] written consent." Nationwide also provided that if it and an insured did not agree as to whether that person was entitled to coverage or as to the amount of damages, the insured had the right to demand arbitration. If an insured, however, declined to arbitrate, Nationwide's "liability [would] be determined only in a legal action."

Prior to Byrd's deposition, Nationwide wrote a letter to Byrd dated 12 March 1998 which stated that pursuant to Byrd's request, "and after an asset check was performed, Nationwide has agreed to waive any and all subrogation rights they may have in the matter above captioned."[3] Nationwide later filed notices of deposition for five non-party witnesses. Plaintiff's attorney attended all five depositions and examined the witnesses.

In addition to the above noticed depositions, Nationwide noticed the depositions of Plaintiff and her parents on 13 April 1998. Subsequently, Nationwide filed a notice on 9 June 1998 to take the deposition of Dr. Andrew P. Mason (Dr. Mason). All four depositions were scheduled to take place at the office of Plaintiff's attorney. Plaintiff objected to Dr. Mason's deposition subpoena arguing the subpoena was not properly issued, it was not properly served on Dr. Mason, it was "overbroad," and there was no court order in place permitting the deposition of Dr. Mason. In response, Nationwide filed a motion for sanctions against Plaintiff for failure to comply with discovery requests and also filed a motion to compel the deposition testimony of Dr. Mason.

Between 30 April 1998 and 24 June 1998, Plaintiff entered into settlement negotiations with Byrd and Ham's, unbeknownst to Nationwide. On 24 June 1998, Plaintiff informed Nationwide of its tentative settlement with Byrd and Ham's by which Plaintiff would receive $100,000.00 from Farm Bureau, the amount equal to Byrd's limit of liability. As part of the settlement, Ham's also agreed to pay $35,000.00 to Farm Bureau and $5,000.00 to Plaintiff. By letter dated 24 June 1998, Plaintiff demanded the dispute between Plaintiff and Nationwide be resolved by arbitration and requested that no further discovery be permitted.

3. The caption listed Byrd, Ham's, and Nationwide as defendants.

In an affidavit dated 22 July 1998, Nationwide's attorney stated Plaintiff had engaged in substantial discovery, including: Plaintiff serving numerous interrogatories on Ham's, Byrd, and Nationwide; the depositions of non-party witnesses were noticed by the agreement of Plaintiff and Nationwide; Plaintiff noticed the deposition of Byrd; and Plaintiff deposed non-party witnesses, all of whom would be able to attend any arbitration meeting. As of 23 June 1998, Nationwide had accrued at least $8,396.19 in legal fees and expenses.

On 22 July 1998, the trial court heard arguments on Nationwide's motion to compel discovery and its motion to prohibit arbitration, and also heard arguments on Plaintiff's motion for a protective order and her demand for arbitration. The trial court found, in pertinent part, that Plaintiff "wilfully failed to present [herself or her parents] or Andrew Mason for the depositions at the time and place properly noticed . . . without just cause and . . . without a filed objection or motion for protective order." On 28 July 1998, the trial court filed an order requiring Plaintiff, her parents, and Dr. Mason to present themselves for their depositions on or before 31 July 1998. The motions with respect to arbitration were reserved to be heard by the trial court at a later date.

After an appeal to this Court, the depositions of Plaintiff and her parents were taken on 29 February 2000. Subsequently, on 14 April 2000, the depositions of administrators and nursing staff at the University of North Carolina Hospitals were taken. During the depositions of hospital administrators, it was learned that certain records concerning the chain of custody for Plaintiff's blood sample had been destroyed in 1996.

On 14 April 2000, Plaintiff's case against Nationwide was set to be tried during the week of 5 June 2000. On 28 April 2000, a Nationwide claims adjuster filed an affidavit stating Nationwide had incurred approximately $30,970.19 for the handling of Plaintiff's tort action against Byrd and Ham's, and it had expended approximately $29,859.14 in Nationwide's claims against Plaintiff for breach of contract, bad faith, and a declaratory judgment action. Subsequently, Plaintiff brought her motion to compel arbitration before the trial court on 2 June 2000. In an order dated 12 June 2000, the trial court found facts consistent with the above stated facts, including:

> 29. During the period of October 22, 1997, and the date of the hearing of the motion to compel arbitration, [Nationwide] has

expended more than $60,000.00 in the defense of this claim and the prosecution of a companion case.

The trial court then concluded: the payment of $100,000.00 by Farm Bureau was not an exhaustion of limits; Nationwide's underinsured motorist coverage provision was not triggered; Plaintiff breached her contract of insurance with Nationwide by not submitting to her deposition when noticed, not giving Nationwide an opportunity to approve the settlement between Plaintiff and Byrd and Ham's, and releasing Ham's "from a viable dram shop claim . . . [because it] extinguished any claims that [Nationwide] would have had for contribution against Ham's"; Nationwide has been prejudiced by the actions of Plaintiff, including expending $60,000.00 in litigation costs, a declaratory judgment, as well as on a prior appeal; and Nationwide was "prejudiced by the delay of . . . Plaintiff in proceeding forward with certain depositions, as evidence that could have been gained at an earlier time was lost, due to the destruction of records."

The issues are whether: (I) Plaintiff breached the terms of the policy with Nationwide by failing to: (A) exhaust the limits of Byrd's liability insurance; (B) give Nationwide an opportunity to approve the settlement between Plaintiff and Ham's and Byrd; (C) submit to her depositions when noticed; and (D) preserve Nationwide's claims for contribution against Ham's; and (II) Plaintiff waived her contractual right of arbitration by: (A) Nationwide expending $60,000.00 in litigation costs; and (B) her delay in appearing for noticed depositions.

[1] "Initially, we note that an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991).

I

Contractual Entitlement to Arbitration

Nationwide argues in its brief to this Court that Plaintiff's failure to abide by her contract with Nationwide precluded Plaintiff's right to arbitrate. We need not decide whether an alleged failure by Plaintiff to abide by the contract precludes arbitration as we determine Plaintiff has abided by the terms of the contract.

A

Exhaustion

[2] Plaintiff argues the trial court erred in concluding Plaintiff failed to exhaust the limits of Byrd's liability insurance. We agree.

Underinsured motorist coverage is available to an insured after the "payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted." N.C.G.S. § 20-279.21(b)(4) (1999). Exhaustion occurs "when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid." *Id.* " 'Exhaust' is a broad term meaning to use up, consume or deplete." *Brown v. Lumbermens Mut. Cas. Co.*, 90 N.C. App. 464, 475, 369 S.E.2d 367, 373, *disc. review denied*, 323 N.C. 363, 373 S.E.2d 541 (1988), *aff'd*, 326 N.C. 387, 390 S.E.2d 150 (1990).

In this case, Farm Bureau insured Byrd for $100,000.00 per person. In Byrd's settlement with Plaintiff, Farm Bureau was to pay $100,000.00 to Plaintiff. At the time Farm Bureau paid the $100,000.00 to Plaintiff, it paid its limits of liability per person; Byrd's limits of liability under the Farm Bureau policy were thus "use[d] up, consume[d] or deplete[d]." Plaintiff has therefore exhausted Byrd's liability limits with Farm Bureau, regardless of whether Farm Bureau received additional payment from Ham's, as the $100,000.00 payment to Plaintiff represented Farm Bureau's limits of liability.[4] As Farm Bureau's limits of liability had been exhausted, the provisions of Plaintiff's underinsured motorist contract with Nationwide applied. Accordingly, the trial court erred in concluding Farm Bureau's limits of liability had not been exhausted and, thus, the underinsured motorist coverage provisions had not been triggered.

B

Notice of Settlement

[3] Plaintiff argues the trial court erred in concluding Plaintiff breached her contract with Nationwide by not giving Nationwide an

4. Nationwide argues there has been no exhaustion as Farm Bureau received reimbursement of $35,000.00 from Ham's, thus, Farm Bureau's net payout was $65,000.00. In determining exhaustion, the focus is not on Farm Bureau's net payout but whether Farm Bureau paid to Plaintiff the full dollar amount its policy set as the limits of liability.

opportunity to approve the settlement Plaintiff had with Byrd and Ham's. We agree.

The primary purpose of a consent-to-settlement clause is to "protect the insurer's right of subrogation." *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 298, 378 S.E.2d 21, 27 (1989). If an insurer has waived its right to subrogation, an insured's failure to obtain the insurer's consent before entering into a settlement agreement does not, as a matter of law, bar the insured's recovery against the insurer for underinsured motorist coverage. *Id.* Consent-to-settlement clauses, however, also serve the secondary purpose of protecting the underinsured motorist carrier "against collusion between the tort[-]feasor and the insured and noncooperation on the part of the tort[-]feasor after his or her release by the insured." *Id.* at 299, 378 S.E.2d at 27.

In this case, in a letter dated 12 March 1998, Nationwide agreed to waive any and all subrogation rights it had in Plaintiff's action against Byrd and Ham's. Since Nationwide waived its right of subrogation, the consent-to-settlement clause no longer served the primary purpose of protecting Nationwide's right to subrogation. As to the secondary purpose, there is no evidence of collusion in the record to this Court. Indeed, collusion was not raised before the trial court nor addressed by the trial court. Accordingly, the trial court erred in concluding Plaintiff's failure to obtain Nationwide's consent before entering into the settlement with Byrd and Ham's barred her recovery against Nationwide. *See id.* at 298, 378 S.E.2d at 27.

C

Depositions

[4] Plaintiff argues her failure to voluntarily submit to depositions after she had filed a motion to compel arbitration was not a breach of her contract with Nationwide. We agree.

Discovery during arbitration, as opposed to litigation, is designed to be minimal, informal, and less extensive. *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 491, 499 S.E.2d 801, 803 (1998). Thus, contrary to a civil case, where a broad right of discovery exists, discovery during arbitration is generally at the discretion of the arbitrator. *Id.* at 492, 499 S.E.2d at 804. Moreover, participation in discovery not available at arbitration may constitute a waiver of a party's right to arbitrate. *Prime South*, 102 N.C. App. at 260-61, 401 S.E.2d at 826.

In this case, Plaintiff's deposition, although scheduled prior to Plaintiff filing her motion to compel arbitration, was scheduled to take place at a date beyond the time Plaintiff had filed her motion to compel arbitration. Although Plaintiff refused to attend the scheduled deposition until after a court order and her appeal to this Court, Plaintiff nevertheless submitted to the noticed deposition. Based on case law, Plaintiff had a well-founded belief that her participation in a deposition after she had already requested arbitration may have resulted in her waiving her right to arbitration. Moreover, the provision in Nationwide's contract required that an insured submit to examinations under oath as cooperation to the defense, settlement, or investigation of a claim. At the time Nationwide sought to depose Plaintiff, there was no indication Nationwide wished to settle with Plaintiff, rather, Nationwide appeared to be assuming an adversarial role. Likewise, there is no provision in Nationwide's contract with Plaintiff that if Plaintiff failed to submit to a deposition she would waive either coverage or her right to arbitrate. Accordingly, the trial court erred in holding Plaintiff breached her contract with Nationwide and thus was not entitled to arbitration.

D

Nationwide's Right to Contribution

[5] Plaintiff argues the trial court erred in concluding Plaintiff's release of Ham's "from a viable dram shop claim . . . extinguished any claims that [Nationwide] would have had for contribution against Ham's." We agree.

"The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability." N.C.G.S. § 1B-1(b) (1999); *Johnson v. Hudson*, 122 N.C. App. 188, 190, 468 S.E.2d 64, 66 (1996). An underinsured motorist carrier is not a tort-feasor and thus has no right of contribution. *Johnson*, 122 N.C. App. at 190, 468 S.E.2d at 66.

In this case, Nationwide, an underinsured motorist insurance carrier, is not a tort-feasor and thus has no right of contribution against Ham's. Accordingly, the trial court erred in concluding Plaintiff's release of Ham's extinguished any claims Nationwide would have had for contribution against Ham's.

II

Waiver of Arbitration

[6] Nationwide next argues that even if Plaintiff were entitled to arbitration, she nonetheless waived her right to arbitrate. We disagree.

A party "impliedly waive[s] its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration." *Cyclone Roofing Co., Inc. v. Lafave Co., Inc.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (footnote omitted). A party is prejudiced if, for example,

> it is forced to bear the expenses of a lengthy trial . . . ; evidence helpful to a party is lost because of delay in the seeking of arbitration . . . ; a party's opponent takes advantage of judicial discovery procedures not available in arbitration . . . ; or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

Id. at 229-30, 321 S.E.2d at 876-77 (citations omitted). A party, however, does not waive her contractual right to arbitration or prejudice the other party by the mere filing of pleadings. *Prime South*, 102 N.C. App. at 259, 401 S.E.2d at 825.

A

Litigation Costs

Plaintiff contends the trial court incorrectly held Nationwide was prejudiced by its expenditure of $60,000.00 due to Plaintiff's delay in seeking arbitration, as "there are no findings Nationwide could have avoided these expenses through an earlier request for arbitration, or that such expenses were incurred after the right to demand arbitration accrued." We agree.

In this case, prior to Plaintiff's demand for arbitration, Nationwide had expended only $8,396.19 in legal fees and expenses. The amount of money expended by Nationwide prior to Plaintiff demanding arbitration occurred primarily from Nationwide noticing depositions and examining witnesses, as well as examining the scene of the accident. Although the trial court found Nationwide had expended more than $60,000.00 in the defense of Plaintiff's case during the period between 22 October 1997 and the date of the hearing before the trial court, there was no finding whether any of those fees

resulted from Plaintiff's delay in demanding arbitration. Indeed, almost half of the $60,000.00 constituted Nationwide's pursuit of claims against Plaintiff in a separate action. Accordingly, as Nationwide had expended only $8,396.19 in legal fees prior to Plaintiff's demand for arbitration, the trial court erred in concluding Nationwide was prejudiced by having expended $60,000.00 in litigation costs.

B

Delay in Depositions

Plaintiff contends the trial court erred in finding evidence was lost as a result of Plaintiff's alleged delay in seeking arbitration. We agree.

In this case, the trial court concluded Nationwide was "prejudiced by the delay of . . . Plaintiff in proceeding forward with certain depositions, as evidence that could have been gained at an earlier time was lost, due to the destruction of records." As the trial court found the records were destroyed in 1996 and all the depositions Plaintiff objected to were scheduled to take place in 1998, there is no indication that Plaintiff's delay in proceeding with the depositions as scheduled in 1998 could have caused records to be destroyed in 1996. We note that the trial court did not find or conclude that Plaintiff's delay in seeking arbitration caused evidence to be destroyed, only that Plaintiff's delay in proceeding with the depositions caused evidence to be destroyed. In addition, as previously stated in part I(C) of this opinion, Plaintiff did not waive arbitration by failing to submit to depositions. Accordingly, the trial court erred in concluding Plaintiff's delay in proceeding with the depositions caused certain evidence to be lost.

We note both parties presented arguments in their brief to this Court concerning Plaintiff's waiver of arbitration by participating in discovery not available at arbitration. While making extensive findings regarding Plaintiff's participation in discovery, the trial court neither found nor concluded Plaintiff waived her contractual right of arbitration by participating in discovery not available at arbitration. Because Nationwide has failed to cross-appeal or cross-assign error to this omission by the trial court, we do not address the issue of whether Plaintiff waived her right to arbitrate by participating in discovery.

Reversed and remanded.

Judges McCULLOUGH and CAMPBELL concur.

ANGELA DAWES, ADMINISTRATRIX OF THE ESTATE OF EFFIE HENDRICKS, PLAINTIFF V. NASH COUNTY AND NASH COUNTY EMERGENCY MEDICAL SERVICES, A DIVISION OF NASH COUNTY, DEFENDANTS

No. COA01-85

(Filed 19 February 2002)

Immunity— sovereign—medical malpractice—county ambulance service

The trial court did not err in a medical malpractice action by granting summary judgment in favor of defendant county and its emergency medical service based on the defense of sovereign immunity, because: (1) county-operated ambulance service is a governmental activity shielded from liability by governmental immunity; and (2) the county has not waived governmental immunity since the exclusionary clause in its insurance policy operates to remove from coverage all claims against the county arising out of the rendering of medical services and merely retains coverage for the personal liability of emergency medical technicians employed by the county.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 2 November 2000 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 27 November 2001.

Duffus & Melvin, P.A., by R. Bailey Melvin, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, a Professional Limited Liability Company, by Burley B. Mitchell, Jr. and Mark A. Davis, for defendant-appellees.

CAMPBELL, Judge.

Plaintiff appeals the trial court's granting of defendants' motion for summary judgment based on defendants' qualification for sovereign (hereinafter, "governmental") immunity. We affirm.

On 30 May 2000, Angela Dawes, as administratrix of the estate of Effie Hendricks, filed a medical malpractice action against defendant Nash County EMS, a county-operated ambulance service, based on the alleged negligence of paramedics and emergency medical technicians ("EMTs") employed by Nash County EMS. Specifically, Plaintiff alleged that Nash County EMS was negligent in the following respects:

> (a) The paramedics who arrived on the scene failed to supply Ms. Hendricks with supplemental oxygen between 3:34 p.m. and 3:48 p.m.
>
> (b) The Valium, which was given to Ms. Hendricks, was given in too small of a dose to have the desired effect of helping the paramedics intubate Ms. Hendricks.
>
> (c) The paramedics made repeated attempts at intubation which greatly delayed Ms. Hendricks' arrival at Nash General Hospital.
>
> (d) Defendant's employees who cared for and treated Ms. Hendricks failed to exercise reasonable and ordinary care and diligence in the use of their skill and the application of their knowledge to Ms. Hendricks' case.
>
> (e) Defendant's employees who cared for and treated Ms. Hendricks failed to exercise their best judgment in the treatment and care of Ms. Hendricks.
>
> (f) Defendant's employees who cared for and treated Ms. Hendricks failed to possess the required degree of learning, skill and ability necessary to the practice of their profession which others similarly situated normally possess.
>
> (g) Defendant was negligent in such other respects as may be shown at trial.

Nash County EMS filed an answer denying the essential allegations of the complaint and asserting, *inter alia*, the defenses of governmental immunity, lack of subject matter jurisdiction, and lack of personal jurisdiction. Plaintiff thereafter amended its complaint to add Nash County as a named defendant. Nash County and Nash County EMS ("Defendants") filed an answer to Plaintiff's amended complaint asserting many of the same defenses that were asserted in Nash County EMS' original answer, including governmental immunity.

On 19 September 2000, Defendants filed a motion for summary judgment based on the doctrine of governmental immunity. In support of their motion, Defendants submitted an affidavit by Lynne Anderson, Finance Officer of Nash County, stating that the only liability insurance policy in effect for Defendants at the time of Defendants' alleged negligence was an insurance policy issued to Nash County by the North Carolina Counties and Property Insurance Pool Fund ("the Policy"). Defendants also submitted a copy of the Policy with their motion for summary judgment.

On that same day, Nash County EMS moved for judgment on the pleadings pursuant to N.C. R. Civ. P. 12(c) on the ground that it was not an entity capable of being sued. Both of Defendants' motions were granted by order entered 2 November 2000. Plaintiff appealed, assigning error to the trial court's ruling on both motions. However, Plaintiff presents no argument in its brief against the trial court's grant of judgment on the pleadings in favor of Nash County EMS. Thus, the only issue on appeal is whether Nash County is entitled to summary judgment based on governmental immunity.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. R. Civ. P. 56(c)(2000). Summary judgment may also be granted when the non-moving party cannot survive an affirmative defense. *McIver v. Smith*, 134 N.C. App. 583, 584, 518 S.E.2d 522, 524 (1999). Sovereign immunity is such an affirmative defense. *Id.* "To affirm the trial court's granting of [D]efendants' motion for summary judgment, [Nash County] must demonstrate that [it is] entitled to the insurmountable affirmative defense of governmental immunity." *Id.*

"In North Carolina the law on governmental immunity is clear." *Id.* at 585, 518 S.E.2d at 524. In the absence of some statute that subjects them to liability, the State, its municipalities, and the officers and employees thereof sued in their official capacities, are shielded from tort liability when discharging or performing a governmental function. *See id.*; *Houpe v. City of Statesville*, 128 N.C. App. 334, 340, 497 S.E.2d 82, 87 (1998). "Like cities, counties have governmental immunity when engaging in activity that is clearly governmental in nature and not proprietary." *McIver*, 134 N.C. App. at 585, 518 S.E.2d at 524. This Court has previously held that "county-operated am-

bulance service is a governmental activity shielded from liability by governmental immunity." *Id.* at 588, 518 S.E.2d at 526. Thus, Nash County would be entitled to governmental immunity from Plaintiff's claim, unless Nash County has in some way waived its governmental immunity.

Pursuant to N.C. Gen. Stat. § 153A-435, a county may waive its governmental immunity for tort actions by the purchase of liability insurance for certain actions and specific claim amounts. N.C.G.S. § 153A-435(a) states:

> A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.
>
> Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. Participation in a local government risk pool pursuant to Article 39 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section . . . .

N.C. Gen. Stat. § 153A-435(a) (2000). Thus, pursuant to N.C.G.S. § 153A-435(a), a county may waive its governmental immunity for tort liability by purchasing liability insurance, but only to the extent that the county is indemnified by the insurance contract for the acts alleged. *Davis v. Messer*, 119 N.C. App. 44, 61-62, 457 S.E.2d 902, 913 (1995) (citation omitted). Therefore, Plaintiff's action in the instant case is barred by governmental immunity unless Nash County was covered by an insurance policy on the date of the alleged negligence which provided coverage for the claim asserted by Plaintiff.

In the instant case, it is undisputed that Nash County was covered by the Policy at the time of the alleged negligence. Section II of the Policy, which provides "General Liability Coverage," states:

A. Coverage Agreement

The Fund agrees, subject to the limitations, terms, and conditions hereunder mentioned:

1. to pay on behalf of the Participant all sums which the Participant shall be obligated to pay by reason of the liability imposed upon the Participant by law or assumed by the Participant under contract or agreement for damages on account of Personal Injuries, including death at any time resulting therefrom, suffered or alleged to have been suffered by any person or persons (excepting employees of the Participant injured in the course of their employment),

and/or damage to or destruction of property or the loss of use thereof arising out of any Occurrence from any cause other than as covered by Section III (Auto) Section IV (Crime) and Section V (Law Enforcement) of the Contract,

including, but not limited to, Products Liability and/or Completed Operations, Host Liquor Liability, Incidental Malpractice, broad form Property Damage liability and employee benefits liability;

. . . .

Under Section II of the Policy, the term "Incidental Malpractice"

means emergency professional medical services rendered or which should have been rendered to any person or persons (excepting employees of the Participant injured in the course of their employment) by any duly qualified medical practitioner (except any physician, radiologist, osteopath, dentist, pharmacist, medical resident or student, or any individual licensed to practice medicine), nurses, or Technicians employed by or acting on behalf of the Participant. Professional medical services shall include medical, surgical, dental, x-ray, or nursing services, or food and beverages in connection with these services; or drugs or medical, surgical, or dental supplies, or appliances.

Included within Incidental Malpractice coverage is coverage for any employee while acting independent of that person's activities as the Participant's employee or acting as a volunteer with another emergency unit or organization but only when the person encounters the scene of an accident or medical emergency requiring sudden action.

The term "Technician" is defined as "a certified first responder, certified emergency medical technician, certified intravenous technician, certified paramedic, or ambulance driver." Plaintiff contends that these provisions and definitions cover the action in the instant case—a wrongful death action based on the negligence of paramedics and EMTs in providing emergency professional medical services.

However, Section II of the Policy contains certain enumerated exclusions from coverage, including the following:

> E. Exclusions Applicable to General Liability
>
> This coverage does not apply to any of the following:
>
> . . . .
>
> 18. Hospital and Health Clinic Professional Liability
>
> To Personal Injury to any person arising out of the rendering of or failure to render any of the following professional services:
>
> a. medical, surgical, dental, or nursing treatment to such person or the person inflicting the injury including the furnishing of food or beverages in connection therewith; or
>
> b. furnishing or dispensing of drugs or medical, dental, or surgical supplies or appliances; or
>
> c. handling of or performing post-mortem examinations on human bodies; or
>
> d. service by any person as a member of a formal accreditation or similar professional board or committee participant, or as a person charged with the duty of executing directives of any such board or committee.
>
> ** **However, this exclusion shall not apply to liability of county employed or county volunteer Emergency Medical Technicians.**

(Emphasis in original).

Nash County contends that this exclusionary clause removes from coverage all claims arising out of Nash County's rendering of professional medical services to members of the public, but the exception to the exclusion (**) grants back coverage for personal liability claims brought against county employed EMTs in their individual capacity. Stated differently, the Policy provides coverage for the

personal liability of county employed EMTs sued in their individual capacity, while excluding from coverage Nash County's liability for suits against EMTs in their official capacity, as well as suits against Nash County itself for injuries arising out of the rendering of medical services by county employed EMTs. Nash County argues that its interpretation of the exclusionary clause is consistent with the framework of governmental immunity in North Carolina, because counties, and their agents and employees sued in their official capacities, are already protected from tort liability arising out of the provision of ambulance service to the public by operation of the doctrine of governmental immunity, whereas governmental immunity does not apply to protect governmental employees sued in their individual capacities from personal liability. *See Warren v. Guilford County*, 129 N.C. App. 836, 838, 500 S.E.2d 470, 472 (1998). Plaintiff counters by arguing that the Policy specifically covers the acts for which Plaintiff is seeking to recover.

In determining whether Nash County has waived its governmental immunity in the instant case, we keep in mind the general rule that "[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983). We also reiterate that N.C.G.S. § 153A-435(a) plainly states that a county's waiver of governmental immunity only extends "to the extent of insurance coverage." N.C.G.S. § 153A-435(a).

In determining whether the Policy covers the claim asserted by Plaintiff, we likewise keep in mind certain general principles of insurance policy interpretation. When the language in a policy provision is clear and unambiguous, it will be accorded its plain meaning. *Houpe*, 128 N.C. App. at 342, 497 S.E.2d at 88 (citing *Walsh v. Insurance Co.*, 265 N.C. 634, 639, 144 S.E.2d 817, 820 (1965)). However, when language is subject to more than one interpretation, a policy provision is to be liberally construed so as to afford coverage whenever possible by reasonable construction. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). Further, exclusionary clauses are not favored in the law and will be construed against the insurer if ambiguous. *Id.*

Applying these general principles to the instant case, we agree with Nash County that the exclusionary clause operates to remove from coverage all claims against Nash County arising out of the ren-

dering of medical services, but the exception to the exclusionary clause operates to retain coverage for the personal liability of EMTs employed by Nash County. We conclude that the exception to the exclusionary clause is not ambiguous, in that it expressly states that the exclusion shall not apply to the "liability" of county employed EMTs. By its terms, the exception only applies to the personal liability of county employed EMTs, and not to the liability of Nash County arising out of the provision of medical services by its EMTs.[1] Further, the exclusionary clause unambiguously removes from coverage all claims against Nash County arising out of the provision of medical services by EMTs. Thus, having found no ambiguity in the exclusionary clause or its exception, and keeping in mind the general rule that waiver of governmental immunity is not to be lightly inferred, we conclude that the trial court was correct in its conclusion that the Policy does not cover the acts complained of by Plaintiff, and that Nash County is entitled to governmental immunity as a defense to Plaintiff's suit.

Affirmed.

Judge McCULLOUGH concurs.

Judge GREENE dissents in a separate opinion.

GREENE, Judge, dissenting.

As I believe the trial court erred in granting Defendants' motion for summary judgment based on the doctrine of governmental immunity, I dissent.

When the language used in a provision of an insurance policy is clear and unambiguous, it will be accorded its plain meaning. *Walsh v. Ins. Co.*, 265 N.C. 634, 639, 144 S.E.2d 817, 820 (1965).

1. The only way in which the individual EMTs employed by Nash County can be found personally liable is if they are sued in their individual capacity. Suits against governmental employees in their official capacity do not lead to "liability" against the individual governmental employee. *See Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997) ("[a] suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent"); *see also Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) (holding that claims against the City of Creedmoor police chief and a member of the City of Creedmoor Board of Commissioners in their official capacities were merely another way of bringing suit against the City of Creedmoor).

In this case, Defendants' insurance policy excludes coverage for "[p]ersonal injury to any person arising out of the rendering of . . . any . . . medical . . . treatment" but states unambiguously that "this exclusion shall not apply to liability of county employed or county volunteer Emergency Medical Technicians [(EMTs)]." The policy contains no language from which one could infer, as Defendants contend, that the EMT exception to the exclusion of coverage applies only to an EMT's personal liability. As such, the policy provision should be accorded its plain meaning of providing coverage for personal injuries arising out of the medical treatment provided by Defendants' EMTs.

Even if the term "liability" were ambiguous, it would have to be "construed liberally so as to provide coverage[] whenever possible by reasonable construction." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). It is reasonable to construe the term "liability" as including an individual's personal liability as well as liabilities incurred in an individual's official capacity. Consequently, I believe the trial court erred in finding Defendants were shielded by governmental immunity and summary judgment should therefore be reversed.

DEBORAH W. HAY, PLAINTIFF v. EDWARD C. HAY, JR., DEFENDANT

No. COA 01-187

(Filed 19 February 2002)

1. Divorce— equitable distribution—post-separation mortgage payments—distributional factor

The trial court did not err by failing to give an equitable distribution defendant a dollar for dollar credit for post-separation mortgage payments and did not overrule an earlier judge where the earlier judge's order requiring continuation of the payments did not state an intent to grant a credit, that judge was without authority to conclusively determine equitable distribution matters on the issues before him, and the second court had discretion to consider payments made to preserve the marital estate as a distributional factor rather than giving defendant a credit. N.C.G.S. § 50-20(c)(11a).

2. Divorce— equitable distribution—post-separation mortgage payments—appreciation not divisible property

The trial court did not err in an equitable distribution action by not considering post-separation mortgage payments as divisible property. Appreciation resulting from the activities or actions of one spouse is not treated as divisible property under N.C.G.S. § 50-20(b)(4)a, and it was within this trial court's discretion to treat post-separation mortgage payments made to preserve the marital estate as a distributional factor. Moreover, defendant's mortgage payments have not increased the marital debt, financing charges, or interest on the marital debt and N.C.G.S. § 50-20(b)(4)d has no application.

3. Divorce— equitable distribution—debts paid during separation—property to be divided

The trial court did not err in a equitable distribution action in its treatment of debts incurred during the marriage and paid by defendant following the separation. The trial court in its discretion properly considered the debts as property to be divided, taking into account as a distributional factor defendant's payments. The law simply requires that the marital debt be valued and distributed; the manner in which the court elects to apportion those debts is within its sound discretion.

4. Divorce— equitable distribution—unequal division—debts—consideration of

The trial court did not abuse its discretion in an equitable distribution action in its unequal division of the marital estate where the debts and mortgage payments to which defendant pointed in arguing that he did not receive an unequal division in his favor are merely factors the court considered in determining an equitable distribution, and are not valued for purposes of determining the net marital estate to be divided.

Appeal by defendant from judgments entered 3 July 2000, 19 July 2000 and 16 August 2000 by Judge Danny E. Davis in Buncombe County District Court. Heard in the Court of Appeals 6 December 2001.

Kelly & Rowe, P.A., by E. Glenn Kelly, for plaintiff-appellee.

Robert E. Riddle, PA, by Robert E. Riddle, for defendant-appellant.

HUNTER, Judge.

Edward C. Hay, Jr. ("defendant") appeals from an equitable distribution judgment, amended equitable distribution judgment, and a second amended equitable distribution judgment awarding an unequal division of the marital estate in defendant's favor. For reasons stated herein, we affirm the judgments of the trial court.

Defendant and Deborah W. Hay ("plaintiff") were married on 6 August 1972. Three children were born of the marriage. On 17 July 1997 the parties separated, and on 9 September 1998 the parties were divorced. On 7 January 1998, plaintiff filed a complaint seeking alimony, temporary and permanent post-separation support, attorney's fees, writ of possession, equitable distribution, child custody, and child support. The issues of child support and custody, post-separation support, writ of possession and attorney's fees were heard on 17 April 1998 and are not a part of this appeal. Plaintiff's claim for equitable distribution was not heard on that date.

Following the hearing, the trial court entered an order on 23 April 1998 in which it stated that defendant "shall make the monthly mortgage payments of $1,900 on the marital home." Upon defendant's motion to amend the order, the trial court entered an order on 29 June 1998 in which it noted that "[t]he court did not intend the obligation to continue the mortgage payment to be in the nature of child support nor as postseparation support and to avoid any confusion at the time of equitable distribution should clear up this ambiguity." The trial court ordered that defendant should make the monthly mortgage payments ". . . 'in order to preserve the marital estate.' "

Plaintiff's claim for equitable distribution was heard on 1 June 2000, and the trial court entered judgment on 3 July 2000. The trial court made extensive findings of fact regarding the assets and liabilities of the parties, including that defendant had continued to pay the monthly mortgage payments on the marital home following the parties' separation. The trial court concluded the marital property should be divided in favor of defendant and awarded defendant $111,684.32 in marital property, and awarded plaintiff $92,362.18 in marital property. The trial court then assessed the marital debts, and assigned $28,215.00 of the debts to defendant and $16,000.00 to plaintiff. The trial court noted defendant had paid three of the debts assigned to him, and that this fact was considered as a distributional factor.

Defendant filed a motion for a new trial or amendment of the judgment on 10 July 2000. On 19 July 2000, the trial court entered an amended equitable distribution judgment wherein it amended one finding of fact unrelated to this appeal. On 4 August 2000, defendant's motion for new trial or amendment of the judgment was heard. The trial court entered a second amended equitable distribution judgment on 16 August 2000 which attempted to clarify the debt distributed to the parties. The trial court amended its findings of fact to remove from defendant's list of debts assigned to him those debts which he had paid. The trial court noted that defendant's payment of the debts was either considered as a distributional factor or the amount of the debts was deducted from assets distributed to him. The trial court made adjustments accordingly in the amount of marital property distributed to each party, awarding plaintiff $91,162.18 of the marital property, and defendant $110,484.32. Defendant appeals.

Defendant brings forth four assignments of error on appeal: (1) the trial court erred in failing to award defendant a dollar for dollar credit of the total sum of monthly mortgage payments which defendant paid post-separation; (2) alternatively, the trial court erred in failing to treat the payments and the depreciation in the mortgage balance as divisible property; (3) the trial court erred in treating the marital debts paid by defendant as distributional factors as opposed to marital property to be divided; and (4) the trial court erred in failing to order an unequal division of the assets in defendant's favor after finding that an unequal division in his favor would be equitable.

Initially, we note "the trial court is vested with wide discretion in family law cases, including equitable distribution cases." *Wall v. Wall*, 140 N.C. App. 303, 307, 536 S.E.2d 647, 650 (2000). "Thus, a trial court's ruling 'will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (citation omitted).

[1] Defendant first argues the trial court erred in failing to give him a dollar for dollar credit for his monthly mortgage payments following the parties' separation. Specifically, defendant maintains the trial court's failure to do so was a failure to follow the mandate of the order regarding child support and post-separation support and resulted in one trial judge overruling another. In the alternative, defendant argues the trial court should have at least treated the payments and the decrease in the mortgage balance as divisible property. We disagree with both arguments.

We first reject defendant's argument that the trial court effectively overruled a prior ruling of another trial court when it failed to give defendant a dollar for dollar credit for post-separation mortgage payments, but instead considered the payments as a distributional factor. The original trial court order regarding child support and post-separation support ordered defendant to make monthly mortgage payments of $1,900.00 on the marital home. The trial court thereafter entered an amended order to clarify this issue, stating that "[t]he court did not intend the obligation to continue the mortgage payment to be in the nature of child support nor as postseparation support." It entered a clarification which ordered defendant to pay the mortgage ". . . 'in order to preserve the marital estate.' "

Nowhere in the original order or amended order did the trial court state its intent that defendant receive a dollar for dollar credit for such payments. Nor will we read such an intent into the trial court's order, particularly where the trial court was without authority to conclusively determine issues pertaining to equitable distribution when the matters before it were child support and custody, post-separation support, writ of possession and attorney's fees. The trial court which subsequently considered plaintiff's motion for equitable distribution was in no way bound by the decision regarding child support and post-separation support in making its determination of an equitable distribution. We therefore do not interpret the trial court's equitable distribution judgment as overruling the prior order.

Moreover, the trial court had discretion to consider defendant's payments ". . . 'to preserve the marital estate' " as a distributional factor, as opposed to giving defendant a credit. N.C. Gen. Stat. § 50-20(c)(11a) (1999) plainly states that in distributing the marital property, the court shall consider "[a]cts of either party to maintain, preserve, develop, or expand . . . the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution." N.C. Gen. Stat. § 50-20(c)(11a). "Payment by one spouse on a marital home mortgage after the date of separation is a factor appropriately considered by the trial court under G.S. 50- 20(c)(11a) and (c)(12) in determining what division of marital property is equitable." *Fox v. Fox*, 103 N.C. App. 13, 21, 404 S.E.2d 354, 358 (1991) (rejecting defendant's argument that he was entitled to credit for mortgage payments on marital home and for taxes and insurance on home).

This Court has recently reiterated that post-separation payments on marital debts may be treated as a distributional factor. *Khajanchi*

v. Khajanchi, 140 N.C. App. 552, 564, 537 S.E.2d 845, 853 (2000). Further, "even if post-separation debt payments are treated as a distributional factor, the trial court may, in its discretion, choose to give no weight to that particular factor." *Id.* We held in *Khajanchi* that the trial court was well within its discretion in treating the defendant's post-separation mortgage payments and payments on other marital debts as a distributional factor. *Id.*; *see also Wall*, 140 N.C. App. at 313, 536 S.E.2d at 653-54 (trial court did not abuse discretion in treating post-separation mortgage and other payments required to maintain marital property as distributional factor to which it gave little weight); *Miller v. Miller*, 97 N.C. App. 77, 80-81, 387 S.E.2d 181, 184 (1990) (rejecting plaintiff's argument that he was entitled to credit for post-separation mortgage payments; such payments are properly considered as distributional factors under N.C. Gen. Stat. § 15-20(c)).

[2] By his second argument, defendant contends in the alternative that the trial court should have at least considered the payments made and the decrease in the mortgage debt as divisible property under N.C. Gen. Stat. § 50-20(b)(4) (1999). He argues that his mortgage payments resulted in an appreciation in the value of the marital property, and should therefore fall within the following category of divisible property:

> All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

N.C. Gen. Stat. § 50-20(b)(4)a. We likewise reject this argument.

The Equitable Distribution Act was amended in 1997 to include this category of "divisible property" in an effort to equitably account for post-separation events. *Khajanchi*, 140 N.C. App. at 556, 537 S.E.2d at 848. Although the issues in *Khajanchi* were decided under pre-1997 law, we noted:

> As a result of those amendments, the trial courts were directed to classify, value and distribute certain real and personal property received after the date of separation, including the appreciation and diminution in the value of marital property, passive income from marital property, and certain increases in marital debt.

Id. However, under the plain language of N.C. Gen. Stat. § 50-20(b)(4)a, appreciation that results from the activities or actions of one spouse is not treated as divisible property. Therefore, assuming defendant's mortgage payments resulted in an appreciation in the value of the marital home, it was the result of his actions, and any resulting appreciation does not fall within the category of "divisible" property as defined by N.C. Gen. Stat. § 50-20(b)(4).

It is not clear from the plain language of N.C. Gen. Stat. § 50-20(b)(4) how the legislature intends for trial courts to treat property falling within the subsection (a) "actions or activities of a spouse" exception. For instance, such property cannot constitute separate property, as it does not fit within the definition of separate property as set forth in N.C. Gen. Stat. § 50-20(b)(2). What is clear, however, is that the law affords trial courts wide discretion in determining how to treat post-separation mortgage payments by one spouse. As discussed above, a trial court may treat such payments as a distributional factor. *See* N.C. Gen. Stat. § 50-20(c)(11a); (12). A trial court may also give the payor a dollar for dollar credit in the division of the property, or require that the non-payor spouse reimburse the payor for an appropriate amount. *See Loving v. Loving*, 118 N.C. App. 501, 505-06, 455 S.E.2d 885, 888 (1995). Our legislature has not expressed a preference for one particular method of treatment. In the present case, it was within the trial court's discretion to treat defendant's post-separation mortgage payments to preserve the marital estate as a distributional factor.

Moreover, defendant's argument that the payments are divisible property within the meaning of N.C. Gen. Stat. § 50-20(b)(4)d, defining such property as "[i]ncreases in marital debt and financing charges and interest related to marital debt" is also without merit. Defendant's mortgage payments have not increased the marital debt, financing charges, or interest on the marital debt. This provision therefore has no application to this issue. These assignments of error are overruled.

[3] In his third argument, defendant argues the trial court erred in failing to treat some of the marital debts as marital property to be divided, instead treating the debts solely as distributional factors. He contends the trial court neglected to properly value and distribute three debts incurred during the marriage—Wachovia Visa, Citibank, and Colorado College—which defendant paid following the parties' separation. We disagree.

" 'The court has the discretion, when determining what constitutes an equitable distribution of the marital assets, to also apportion or distribute the marital debts in an equitable manner.' " *Smith v. Smith*, 111 N.C. App. 460, 510, 433 S.E.2d 196, 226 (1993) (citation omitted), *reversed in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). "The manner in which the court distributes or apportions marital debts . . . is a matter committed to the discretion of the trial court." *Id.*

As with the post-separation payment of a mortgage debt, the trial court has discretion to consider the post-separation payment of credit card debts as a distributional factor. *See* N.C. Gen. Stat. § 50-20(c)(12); *Khajanchi*, 140 N.C. App. at 564, 537 S.E.2d at 853. In *Khajanchi*, we noted that "the trial court had discretion to treat defendant's post-separation payments of the Hallmark debt, the mortgage payments, the car payments, and other marital debts as distributional factors." *Id.* As previously noted, the trial court also has discretion to give a dollar for dollar credit to the post-separation debt payor or to require reimbursement from the non-payor spouse. *See Loving*, 118 N.C. App. at 505-06, 455 S.E.2d at 888.

The trial court's judgment in the case *sub judice* reveals it properly treated the marital debts as property to be divided, taking into account as a distributional factor that defendant had already paid some of the debts. In its original judgment, the trial court added all of the marital assets and determined their total value to be $204,046.50. It then listed and totaled all of the marital debts. The trial court proceeded to divide the marital assets between the parties, noting that an unequal distribution of property in favor of defendant was equitable. The trial court gave plaintiff $92,362.18 of the marital assets, and defendant $111,684.32 in marital assets. The trial court then divided all of the marital debts, with the majority of debt going to defendant. The trial court noted, however, that three of the debts assigned to defendant had been paid by him since the date of separation, and that this fact was considered by the trial court as a distributional factor. Therefore, it properly considered the decrease in the marital debts by virtue of defendant's payments. The Wachovia Visa, Citibank, and Colorado College debts were nonetheless valued and listed under the category of marital debts assigned to defendant.

Following the 4 August 2000 hearing on defendant's motion for new trial or amendment of the judgment, the trial court entered its second amended equitable distribution judgment in an effort to clarify its treatment of the debts. The trial court's original finding of

the total value of all marital debts, including the Wachovia Visa, Citibank, and Colorado College debts remained unchanged. Therefore, it is clear from both the trial court's original judgment and second amended judgment that it treated those debts as divisible property, in that they were classified as part of the marital debts to be distributed.

However, in its second amended judgment, the trial court did not list the paid debts in its finding of debts to be distributed to defendant, but stated instead that debts which defendant had paid were either subtracted from the assets distributed to him, or the fact that defendant paid them was considered as a distributional factor. The trial court was well within its discretion to treat defendant's post-separation payment on the marital debts in this manner.

As part of this argument, defendant further contends the trial court did not consider the debts as marital property because it treated them separately and failed to include them in the "net marital estate." During the 4 August 2000 hearing on defendant's motion for new trial or amendment of the judgment, the trial court explained that it elected to first value and distribute all marital assets, and second, to value and distribute all marital debts. We see no reason why the trial court cannot account for and distribute the marital assets in one step, then account for and distribute the marital debts in a second step, so long as all marital property and debts are being valued and distributed in a manner which the court determines to be equitable. The law simply requires that the marital debt be valued and distributed; the manner in which the trial court elects to apportion those debts is within its sound discretion. *See Smith*, 111 N.C. App. at 510, 433 S.E.2d at 226. These arguments are overruled.

[4] By his fourth assignment of error, defendant claims the trial court erred in failing to order an unequal division of the marital estate in favor of defendant after it found an unequal division in his favor would be equitable. We likewise reject this argument. In finding of fact number eleven, the trial court did find that an unequal division of the marital property in favor of defendant would be equitable. The trial court did, in fact, award an unequal division of the marital property in defendant's favor. In its second amended judgment, defendant received $110,484.32 of the marital property after the trial court subtracted $2,400.00 in marital debt assigned to defendant. Plaintiff received $91,162.18 of the marital property and $7,400.00 in debt. Although defendant argues he did not receive an unequal division in his favor considering the debts and mortgage payments which the

court properly considered as distributional factors, such factors are merely items which the court considers in determining an equitable distribution, and are not valued for purposes of determining the net marital estate to be divided. *See* N.C. Gen. Stat. § 50-20(c).

Moreover, the fact that the final judgment was not significantly in defendant's favor does not constitute an abuse of the trial court's discretion. As the trial court noted at the 4 August 2000 hearing, although the unequal division was probably not to the extent desired by defendant, "it's not overwhelming in [defendant's] favor . . . . It's not overwhelming in [plaintiff's] favor . . . . [I]t was a little more in his favor . . . but not a great deal." We discern no abuse of discretion in the trial court's judgment.

Finally, defendant includes in his heading to argument two in his brief the statement that the trial court erred in failing to include as divisible property the fair market rental value of the marital residence. However, defendant fails to set forth any argument or authority in support of this assertion, and it is therefore deemed abandoned. N.C.R. App. P. 28(b)(5).

Affirmed.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA v. BELVIN E. WAGNER

No. COA01-144

(Filed 19 February 2002)

1. Constitutional Law— due process—prosecutorial vindictiveness

A defendant's due process rights were not violated based on alleged prosecutorial vindictiveness even though defendant was indicted for the additional crime of felonious possession of drug paraphernalia after defendant successfully challenged his guilty plea for his initial conviction for attempted possession of cocaine while having a status as an habitual felon based on an error in the calculation of his sentence, because: (1) the timing of the indict-

ment by itself does not necessarily lead to a conclusion that the indictment was likely to have been brought for a retaliatory purpose; (2) when a guilty plea is set aside, the State is entitled to evaluate all of the facts and circumstances in order to determine what charges it should proceed with against a defendant, and the decision to bring an additional indictment is likely attributable to this evaluation process rather than to a retaliatory motive; and (3) the prosecutor who sought the felonious possession of drug paraphernalia indictment had not previously been involved in defendant's case.

2. Sentencing— bargained-for guilty plea set aside

A defendant's consecutive sentences of 135 to 171 months for felonious possession of drug paraphernalia, attempted possession of cocaine, and his status of being an habitual felon did not violate the express provisions of N.C.G.S. § 15A-1335 after defendant's bargained-for guilty plea and sentence of 101 to 131 months had been set aside, because: (1) the setting aside of defendant's plea agreement returned the parties to the pretrial setting, and thus, the trial court was not faced with resentencing but instead with sentencing defendant anew; and (2) any application of N.C.G.S. § 15A-1335 to his sentence would have effectively allowed defendant to keep the benefits of his original plea agreement while at the same time permitting him to proceed to trial.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 17 October 2000 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 5 December 2001.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

J. Clark Fischer for defendant-appellant.

WALKER, Judge.

Defendant appeals his conviction and sentence as an habitual felon for attempted possession of cocaine and felonious possession of drug paraphernalia. The pertinent facts are as follows: On 18 July 1998, officers of the Winston-Salem Police Department's Street Drug Enforcement Unit conducted an undercover operation designed to target drug buyers. As part of this operation, an officer posed as a

street drug dealer and sold counterfeit crack cocaine to soliciting customers. At approximately 5:00 p.m. that day, defendant approached an undercover officer and asked for some "breaks" (a street term for a small piece of crack cocaine broken from a larger piece). The officer displayed three counterfeit pieces and asked defendant, "How much?" Defendant responded that he had $30, and a sale of three counterfeit pieces resulted. Defendant was searched and officers retrieved the three counterfeit pieces and a chrome pipe commonly used for smoking crack cocaine. Defendant was arrested for attempted possession of cocaine and possession of drug paraphernalia.

At the time of defendant's arrest, the Forsyth County District Attorney's Office had procedures in place which sought to expedite repeat offenders' cases by offering them a mitigated sentence if they agreed early in the process to plead guilty. Pursuant to a plea agreement, on 17 August 1998, defendant appeared before the trial court and, based on a bill of information, entered a guilty plea to attempted possession of cocaine while having a status as an habitual felon. He then received a mitigated sentence of 101 to 131 months.

Approximately one year later, defendant filed a Motion for Appropriate Relief (MAR) alleging an error in the calculation of his sentence. On 2 May 2000, the trial court granted defendant's MAR, vacating his guilty plea and setting aside his sentence. Thereafter, defendant's case was assigned to another prosecutor, who, after reviewing the file, obtained indictments which charged defendant with attempted possession of cocaine, felonious possession of drug paraphernalia, and being an habitual felon. This prosecutor then offered defendant a second plea agreement which would have resulted in a sentence identical to the one he had previously received. However, defendant rejected the offer and moved to dismiss the indictment for felonious possession of drug paraphernalia. The trial court denied defendant's motion and he was convicted of both charges. After defendant was determined to have the status of habitual felon on each charge, he received consecutive sentences of 135 to 171 months.

With his appeal, defendant raises two issues: (1) whether his being indicted for felonious possession of drug paraphernalia was the result of prosecutorial vindictiveness; and (2) whether his being sentenced to consecutive terms of 135 to 171 months violates the expressed provisions of N.C. Gen. Stat. § 15A-1335.

I. Prosecutorial Vindictiveness

[1] Defendant first contends his being indicted for felonious possession of drug paraphernalia violates his right to due process in that it was the result of prosecutorial vindictiveness. He maintains that since the indictment was only intended to punish him for having successfully challenged his prior sentence, it should have been dismissed.

Defendant bases his argument on *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656 (1969), a U.S. Supreme Court case which arose out of this State. *Pearce* and its progeny form the framework from which a court is to determine whether a defendant has been unconstitutionally penalized for exercising a protected statutory or constitutional right. *See Blackledge v. Perry*, 417 U.S. 21, 40 L. Ed. 2d 628 (1974); *Bordenkircher v. Hayes*, 434 U.S. 357, 54 L. Ed. 2d 604 (1978); *United States v. Goodwin*, 457 U.S. 368, 73 L. Ed. 2d 74 (1982); *and Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989). In *Pearce*, the Court held due process of law requires that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Pearce*, 395 U.S. at 725, 23 L. Ed. 2d at 669. Accordingly, in cases involving allegations of prosecutorial vindictiveness, a defendant is constitutionally entitled to relief from judgment if he can show through objective evidence that either: (1) his prosecution was *actually* motivated by a desire to punish him for doing what the law clearly permits him to do, or (2) the circumstances surrounding his prosecution are such that a vindictive motive may be presumed and the State has failed to provide affirmative evidence to overcome the presumption. *See Goodwin*, 457 U.S. at 374-76, 73 L. Ed. 2d at 81-82; *see also United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2001). Here, defendant concedes he has no direct evidence of actual vindictiveness on the part of the prosecutor. Rather, he urges this Court to presume a vindictive motive from the circumstances leading up to his felonious possession of drug paraphernalia indictment.

In *Blackledge*, the U.S. Supreme Court noted "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal but only by those that pose a realistic likelihood of 'vindictiveness.' " *Blackledge*, 417 U.S. at 27, 40 L. Ed. 2d at 634. Consequently, prosecutorial vindictiveness is to be presumed only where the circumstances reasonably suggest a conclusion that the charges brought were likely the result of a retaliatory motive. *Goodwin*, 457 U.S. at 375, 73 L. Ed. 2d at 82. Further, the prophylac-

tic nature of the presumption is such that its imposition is warranted only when it is applicable to *all* cases which present the same circumstances. *Id.* at 381, 73 L. Ed. 2d at 85; *see also Wilson*, 262 F.3d at 315. For example, *Blackledge* holds a presumed motive of vindictiveness exists in all cases where a defendant appeals a misdemeanor conviction, entitling him to a trial *de novo*, and the State subsequently charges him with a felony for the same conduct. *Blackledge*, 417 U.S. at 28-29, 40 L. Ed. 2d at 634-35. The Court reasoned the presumption is warranted since, under the circumstances, the State, when it brought the subsequent felony charge, was operating within the same general considerations as it had when it brought the misdemeanor charge. Thus, absent any other explanation, the difference in charges was presumed to have been vindictively motivated. *Id.* at 27, 40 L. Ed. 2d at 634.

However, in *Smith*, the U.S. Supreme Court held the mere fact that a defendant received a greater sentence following a trial after he had successfully challenged a guilty plea did not warrant a similar presumption. *Smith*, 490 U.S. at 795, 104 L. Ed. 2d at 870. There, the Court reasoned that in many such cases the greater sentence was more likely attributed to factors which were not considered at the time of the guilty plea but had been following a trial. *Id.* at 801, 104 L. Ed. 2d at 873-74.

With this background in mind, we turn to whether the circumstances presented in this case present a realistic likelihood of vindictiveness for all similarly situated cases. Defendant relies on two facts which he contends are sufficient to support such a presumption: (1) the State did not proceed on the charge of felonious possession of drug paraphernalia in the plea agreement but only after he successfully challenged his guilty plea, and (2) the present indictment was based upon facts known by the State for more than two years.

At its core, defendant's argument centers on the timing of his indictment for felonious possession of drug paraphernalia. Although the State could have originally sought an indictment for this offense after his arrest, it did so only after he successfully challenged his guilty plea. This timing, by itself, does not necessarily lead to a conclusion that the indictment was likely to have been brought for a retaliatory purpose. When a guilty plea is set aside, the State is entitled to evaluate all of the facts and circumstances in order to determine what charges it should proceed with against a defendant. Therefore, the decision to bring an additional indictment is likely

to be attributable to this evaluation process rather than to a retaliatory motive. *See generally Goodwin*, 457 U.S. at 381, 73 L. Ed. 2d at 85.

Defendant's case reflects this proposition. The initial prosecutor, desiring to expedite the case, elected to forego indicting defendant but instead proceeded on a bill of information. A plea agreement was then offered to defendant by which he would only plead guilty to the charge of attempted possession of cocaine. After defendant successfully challenged his guilty plea, a second prosecutor evaluated the evidence and determined that defendant should be indicted for felonious possession of drug paraphernalia, attempted possession of cocaine, and being an habitual felon. He then offered defendant a plea agreement with terms whereby the sentence would not exceed the previous sentence. These actions on the part of the State cannot be said to have likely been the product of a vindictive motive but rather the result of an evaluation of the evidence and how defendant's case should proceed to trial. This is especially true in light of our criminal justice system's respect for the exercise of prosecutorial discretion which itself enjoys a "background presumption" of regularity. *See generally United States v. Armstrong*, 517 U.S. 456, 464, 134 L. Ed. 2d 687, 698 (1996); *and Bordenkircher*, 434 U.S. at 364, 54 L. Ed. 2d at 611 ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion").

Additionally, the facts and circumstances here are at odds with those present in the cases where a presumption of vindictiveness was found. Most notably, in *Pearce* and *Blackledge*, the individuals directly involved were presumed to have a vindictive motive by reason of having a personal stake in the outcome of the defendant exercising his protected right. Thus, the Court determined they were likely to engage in self-vindication. In contrast, here the prosecutor who sought the felonious possession of drug paraphernalia indictment had not previously been involved in defendant's case. Indeed, the record shows the prosecutor who had been involved was no longer with the Forsyth County District Attorney's Office. Accordingly, we conclude that while *Pearce* and *Blackledge* are instructive as to when a vindictive motive is to be presumed, their holdings do not control the disposition of this case.

Finally, defendant suggests the failure to apply a presumption of vindictiveness to his case would deter future defendants from exercising their rights to challenge improper sentences. However, the due process concerns of *Pearce* and *Blackledge* "lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." *Bordenkircher*, 434 U.S. at 363, 54 L. Ed. 2d at 610 (internal citations omitted). Defendant's assertion must be weighed against the State's discretion to re-evaluate the evidence once a guilty plea is set aside and to make a decision on what charges to pursue. We decline to presume prosecutorial vindictiveness on the part of the State; therefore, in light of the absence of any evidence of actual vindictiveness, we overrule defendant's assignment of error.

II. Violation of N.C. Gen. Stat. § 15A-1335

[2] Defendant next contends his consecutive sentences of 135 to 171 months violate the expressed provisions of N.C. Gen. Stat. § 15A-1335 which states:

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

N.C. Gen. Stat. § 15A-1335 (1999). Defendant maintains that pursuant to this statute, the maximum sentence he could have received for his two convictions would be 101 to 131 months or the same sentence he had previously received.

In order to properly address defendant's argument, we are to consider each of defendant's convictions and corresponding sentence separately to determine whether the restrictions set forth in N.C. Gen. Stat. § 15A-1335 apply. *State v. Hemby*, 333 N.C. 331, 332, 426 S.E.2d 77 (1993); *State v. Nixon*, 119 N.C. App. 571, 573, 459 S.E.2d 49, 51 (1995). Defendant does not dispute his status as an habitual felon or that the trial court properly calculated his prior criminal record. Nevertheless, he contends that because he successfully challenged his prior guilty plea, N.C. Gen. Stat. § 15A-1335 applies and prohibits the trial court from imposing a sentence for his two convictions which would be more severe than his original sentence of 101 to 131 months.

In support of his argument, defendant cites our Supreme Court's decision in *Hemby* and this Court's decision in *State v. Mitchell*, 67 N.C. App. 549, 313 S.E.2d 201 (1984). However, neither *Hemby* nor *Mitchell* involved the imposition of a sentence after a bargained-for guilty plea had been set aside. To the contrary, in both cases the defendant had been convicted and sentenced, and, following a successful appeal, had his case remanded for re-sentencing. Under such circumstances N.C. Gen. Stat. § 15A-1335 requires that "on resentencing, a trial judge cannot impose a term of years greater than the term of years imposed by the original sentence. . . ." *Mitchell*, 67 N.C. App. at 551, 313 S.E.2d at 202.

We find that defendant's case is notably distinguishable from *Hemby* and *Mitchell*. Unlike those cases, the setting aside of defendant's plea agreement returned the parties to the pre-trial setting. *See generally State v. Mercer*, 84 N.C. App. 623, 628, 353 S.E.2d 682, 685 (1987). Thus, upon his conviction on both charges, the trial court was not faced with re-sentencing but instead with sentencing defendant anew. Furthermore, any application of N.C. Gen. Stat. § 15A-1335 to his sentence would have effectively allowed defendant to keep the benefits of his original plea agreement, while at the same time permitting him to proceed to trial. Therefore, we conclude N.C. Gen. Stat. § 15A-1335 is not available to defendant in this case.

In sum, we conclude defendant's indictment for felonious possession of drug paraphernalia was not the result of vindictive prosecution and find no error in defendant's sentence.

No error.

Judge THOMAS concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

It is undisputed that defendant's initial sentence and guilty plea were vacated as a result of the trial court improperly assigning defendant a prior record level of VI instead of his actual prior record level of V. Defendant thus received "the minimum mitigated sentence of 101 months for his criminal history" of Level VI, when defendant's actual prior record level of V would translate to a minimum mitigated sentence of 90 months. Because defendant challenged this inaccu-

racy, he ended up being sentenced to two consecutive terms of 135 to 171 months, when the State, in defendant's second trial, indicted him on the additional charge of felonious possession of drug paraphernalia, of which he was found guilty.

But for the mere fact that defendant chose to exercise his right to challenge his improperly-calculated initial sentence by filing a motion for appropriate relief, he would be serving a lesser sentence (even considering that defendant's original sentence was excessive given the error in calculating his prior record level). Defendant is essentially being punished for attempting to correct a sentencing error made not by him, but by the trial court.

In my view, the State's conduct in charging defendant with an additional offense following his successful appeal, based on the same conduct for which he was originally sentenced, contravened the United States Supreme Court's holding in *Blackledge v. Perry*, 417 U.S. 21, 40 L. Ed. 2d 628 (1974), as well as N.C. Gen. Stat. § 15A-1335 (1999) (generally embodying the rule of *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656 (1969)) and our courts' interpretations thereof. *See State v. Harris*, 115 N.C. App. 42, 444 S.E.2d 226 (1994) (holding that, where the defendant's original sentence was the result of a negotiated plea agreement, the trial court did not err by correcting an error on the judgments and re-sentencing the defendant according to his original plea agreement); *see also State v. Nixon*, 119 N.C. App. 571, 459 S.E.2d 49 (1995).[1]

As I believe that the majority's decision in effect punishes defendant for challenging his improperly determined sentence, and accordingly chills the exercise of the right to appeal by similarly-situated individuals, I dissent.

1. It is unclear why the trial court, in considering defendant's motion for appropriate relief, vacated both defendant's original sentence as well as his guilty plea, rather than simply vacating the sentence and re-sentencing defendant according to his prior record level V, rather than level VI. What is clear is that simply correcting defendant's sentence to reflect his prior record level V would not have violated his original plea arrangement. *See Harris*.

JULIE SHINGLETON, EMPLOYEE, PLAINTIFF v. KOBACKER GROUP, EMPLOYER; CONTINENTAL INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA01-232

(Filed 19 February 2002)

Workers' Compensation— change in condition—disability—evidence insufficient

The Industrial Commission erred by concluding that a workers' compensation plaintiff had sustained a substantial change in condition warranting an award of additional compensation where plaintiff's testimony about her physical restrictions was virtually identical to that at the original hearing and her assertion that she is wholly incapable of employment was contrary to the unanimous and unchanged medical evidence. A plaintiff asserting a substantial change in condition and an inability to work must produce medical evidence that she is no longer capable of any employment.

Appeal by defendants from an opinion and award entered 4 October 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 January 2002.

Shipman & Associates, L.L.P., by Gary K. Shipman and Carl W. Thurman III, for plaintiff-appellee.

Hedrick, Blackwell & Criner, L.L.P., by G. Grady Richardson, Jr. and P. Scott Hedrick, for defendant-appellant Kobacker Group.

HUNTER, Judge.

Kobacker Group and Continental Insurance Company (collectively, "defendants") appeal an opinion and award of the Industrial Commission concluding Julie Shingleton ("plaintiff") has sustained a substantial change in condition entitling her to further disability compensation. For the reasons stated herein, we reverse the Commission's opinion and award.

The facts pertinent to this appeal are as follows. On 15 June 1989, plaintiff sustained an injury to her lower back while working for defendant, Kobacker Group, as the manager of a shoe store in Wilmington, North Carolina. Plaintiff was diagnosed as having suffered a back strain, and she was released to work at light duty.

Plaintiff finished working for defendant in August 1989 when she moved to West Virginia. In September 1989, plaintiff was examined by osteopathic physician George Tokodi, Jr., who diagnosed her with a lumbar strain, and recommended she receive physical therapy.

Plaintiff moved to Ohio in late 1989. In early 1990, plaintiff began experiencing problems sleeping, and she complained of numbness in her leg. Plaintiff contacted defendants to ask for a referral, and defendants referred her to Dr. James Dauphin, an orthopedic surgeon. Dr. Dauphin examined plaintiff in May 1990. He determined she had a "possible herniated disc at L-5 with lumbar sprain." Plaintiff was pregnant at this time, and Dr. Dauphin recommended she begin an exercise program. Plaintiff visited Dr. Dauphin in October and November 1990 following the birth of her child, complaining that her pregnancy worsened her back pain. Dr. Dauphin determined plaintiff had a "chronic SI joint sprain with a superimposed lumbar disc bulge which is probably subclinical and of no relevance." Dr. Dauphin released plaintiff to return to work as of 8 November 1990.

In February 1991, plaintiff obtained employment as a shoe store clerk. According to the finding of the Commission, plaintiff only worked for six weeks. Plaintiff returned to Dr. Dauphin in January 1992, complaining of pain radiating from her hip to her foot. Dr. Dauphin was of the opinion that plaintiff could return to work at that time. Dr. Dauphin was never of the opinion that plaintiff could not work throughout the four years she was under his care.

Plaintiff's claim for disability compensation was originally heard in 1993. At that hearing, plaintiff complained that her back pain caused her to have trouble standing, lifting, and bending. She stated that in her opinion, she was unable to perform the normal duties she had performed during her employment in defendant's shoe store. The Full Commission entered an opinion and award on 18 July 1994 concluding that plaintiff had sustained a compensable injury, and awarding her temporary total disability payments, three hundred weeks of temporary partial disability payments, and all medical expenses, including future expenses, resulting from her 15 June 1989 injury.

Plaintiff visited Dr. Dauphin for the final time in September 1994, complaining of hip pain, headaches, and depression. Dr. Dauphin was of the opinion that plaintiff would not be able to return to her previous job which included bending and lifting, but he recommended she undergo job retraining so she could obtain employment in a different type of job. He also recommended that plaintiff attend a pain clinic.

Plaintiff also began visiting osteopathic physician Ernest Miller in 1994. Dr. Miller continued to treat plaintiff until at least January 1999, during which time he diagnosed her with depression, meralgia paresthetica, cervical, thoracic, and lumbar myositis, sinusitis, lumbar, sacral and thoracic somatic dysfunction, lumbar strain, arthritis, possible lumbar disc disease, bronchitis, cerviothoracic strain, cervical strain, cervical, dorsal, and sacroiliac somatic dysfunction, somatic dysfunction of the cervical and lumbosacral spine, fibromyalgia, middle ear infection, right hip strain with piriformis syndrome, thoracic outlet syndrome, hypoglycemia, tachycardia, carpal tunnel syndrome, and bursitis of the hips. In 1998, plaintiff also began seeing Dr. Michael Shramowiat, a specialist in physical medicine rehabilitation and pain medicine.

On 29 March 1996, defendants filed a Form 28B to establish that all compensation awarded to plaintiff in the opinion and award filed 18 July 1994 had been paid. On 22 August 1996, plaintiff filed a request for a rehearing, contending that she was entitled to further compensation because her condition had worsened. A hearing was held before a deputy commissioner on 11 December 1998. The deputy commissioner concluded the evidence failed to show that plaintiff had sustained a substantial change in condition which would entitle her to additional compensation, and that plaintiff had failed to show a causal link between her original 1989 back injury and her myriad of additional health problems, including carpal tunnel syndrome, thoracic outlet syndrome, fibromyalgia, and cervical complaints.

On 4 October 2000, the Full Commission filed an opinion and award reversing the deputy commissioner and concluding that plaintiff had sustained a substantial change in condition under the law, and is therefore entitled to additional compensation from defendant. One commissioner dissented, concluding plaintiff's physical complaints and ability to earn wages had not changed since the original hearing, and that, in any event, any change in condition was not related to plaintiff's 1989 back injury. The Commission awarded plaintiff temporary total disability compensation from 29 September 1994 until further order of the Commission, as well as all medical expenses incurred or to be incurred as a result of her injury, including her chronic pain syndrome and depression. Defendants appeal.

Defendants bring forth five arguments on appeal, contending: (1) the Commission erred in concluding plaintiff sustained a substantial change in condition under the Worker's Compensation Act; (2) the

Commission's findings of fact that plaintiff's 1989 injury caused her subsequent medical conditions are unsupported by competent evidence; (3) plaintiff has attained maximum medical improvement; (4) plaintiff is not entitled to additional temporary total disability benefits; and (5) the Commission's findings of fact are unsupported by competent evidence.

Although on appeal the Commission's findings of fact are conclusive where supported by competent evidence, *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999), "findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them," *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000). " 'Whether the facts amount to a change of condition pursuant to N.C. Gen. Stat. § 97-47 is a "question of law," ' and thus, is subject to de novo review." *Cummings v. Burroughs Wellcome Co.*, 130 N.C. App. 88, 90, 502 S.E.2d 26, 28 (citations omitted), *disc. review denied*, 349 N.C. 355, 517 S.E.2d 890 (1998).

Section 97-47 of the North Carolina General Statutes provides that upon the application of an interested party "on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded." N.C. Gen. Stat. § 97-47 (1999). A change of condition for purposes of N.C. Gen. Stat. § 97-47, is "a *substantial* change in physical *capacity to earn wages*, occurring after a final award of compensation, that is different from that existing when the award was made." *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 654, 508 S.E.2d 831, 835 (1998) (emphasis added). A change in condition may consist of either: "a change in the claimant's physical condition that impacts his earning capacity"; "a change in the claimant's earning capacity even though claimant's physical condition remains unchanged"; "or a change in the degree of disability even though claimant's physical condition remains unchanged." *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996).

"The party seeking to modify an award based on a change of condition bears the burden of proving that a new condition exists and that it is causally related to the injury upon which the award is based." *Cummings*, 130 N.C. App. at 91, 502 S.E.2d at 29. A plaintiff must prove the element of causation "by the greater weight of the evi-

dence." *Bailey*, 131 N.C. App. at 654, 508 S.E.2d at 835. A decrease in earning capacity may be shown by the production of: (1) medical evidence that the claimant is "physically or mentally, as a consequence of the work related injury, incapable of work in any employment"; (2) evidence that the claimant "is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment"; (3) evidence that the claimant "is capable of some work but that it would be futile because of preexisting conditions i.e., age, inexperience, lack of education, to seek other employment"; or (4) evidence that the claimant "has obtained other employment at a wage less than that earned prior to the injury." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

In the present case, plaintiff sought to prove a substantial change in condition based upon her inability to work in any employment. Plaintiff satisfies this burden "by producing medical evidence showing '[s]he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment.' " *Grantham v. R. G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997) (citation omitted), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). Plaintiff failed to present any medical evidence which could support a finding that she is physically or mentally incapable of work in any employment.

The medical evidence consists of the depositions of doctors Tokodi, Dauphin, Miller, and Shramowiat. The medical evidence presented from depositions taken in 1992 in preparation for the original hearing and from those taken for the current matter in February 1999 is identical: all of plaintiff's doctors were of the opinion in 1992 and in 1999 that although plaintiff should not perform the duties involved in her former employment with defendants, which involved much bending and lifting, plaintiff is capable of gainful employment in light duty work. There is no medical evidence that plaintiff has ever been incapable of gainful employment.

Dr. Tokodi was the first osteopathic doctor to examine plaintiff shortly after her 1989 injury. His examination revealed that plaintiff had some "back spasm" and that she had lost some of the normal curvature to her back, but that "otherwise, the exam was essentially negative." Dr. Tokodi diagnosed plaintiff with a lumbar strain and recommended she seek physical therapy. He testified in 1992 that based upon his examination of plaintiff's injury, he would object to

her performing the bending and lifting duties required in a shoe store clerk position, but that he "would have no objection to her performing a clerical or cash register running-type job."

Dr. Dauphin, who examined plaintiff from 1990 until 1994, testified that in 1994, he was of the opinion that although plaintiff should not return to her prior job as a shoe store clerk due to the bending and lifting involved, she was capable of undergoing job retraining to obtain other employment that would not require such movements. Dr. Dauphin testified in 1999 that his thoughts about her condition and course of treatment did not change throughout the time he treated her, and that his recommendation to plaintiff was the same early on as it was in 1994: that "she go to work in a different sort of job." Although Dr. Dauphin made clear that in his opinion, plaintiff would have difficulty performing a job involving a lot of bending or twisting with weights up to fifty pounds, he was never of the opinion that plaintiff was wholly incapable of work altogether. He testified that he "did not want her to return to her own job [as a shoe store clerk], but [he] certainly had no objection to her returning to a light duty work."

Moreover, Dr. Dauphin's testimony as to plaintiff's capability to earn wages did not change from the 1993 hearing to his testimony in the current matter. Dr. Dauphin testified repeatedly during his 1992 deposition, as in his 1999 deposition, that plaintiff was totally capable of working in a job that did not require a lot of bending and lifting. Dr. Dauphin stated that plaintiff "should do very well in light work," and that she should "simply find employment that does not involve constant bending, stooping or lifting."

Dr. Miller, who examined plaintiff from 1994 through 1999, and throughout the time that plaintiff was claiming a change in condition, was of the same opinion as doctors Tokodi and Dauphin. Dr. Miller opined in February 1999 that plaintiff could *presently* perform a sedentary type of job, and that, despite the numerous ailments with which he had diagnosed plaintiff over the years, he would not even object to her "performing the duties of a clerk in a shoe store" unless "she was having to do some heavy lifting of boxes."

Similarly, Dr. Shramowiat, who began examining plaintiff in 1998, testified that as of the time of his deposition in February 1999, he was of the opinion that plaintiff had been inactive for a decade, that she needed to get out and engage in some activity, and that she "is physi-

cally capable of gainful employment." He testified that as of "[r]ight now, [plaintiff] would be at light duty" but that with some physical therapy to regain strength lost due to extreme inactivity, he hopes she can return to a job "where she can perform some lifting." Dr. Shramowiat testified that as of the time of his February 1999 deposition, plaintiff was capable of employment "[i]f she was in a light duty job with lifting of ten to twenty pounds; something that involved, you know, no spectacular lifting activities or a lot of trunk rotation." When further questioned as to whether plaintiff could *presently* be gainfully employed, Dr. Shramowiat reiterated that she is indeed fully capable of gainful employment "as long as it's not a job that's very physically demanding." Dr. Shramowiat went further, testifying that if plaintiff could get out and become more active, "she should be able to progress well beyond a light duty job."

In summary, according to *all* of the medical evidence which plaintiff presented, she has not sustained a change in her ability to earn wages since the original hearing on this matter. Indeed, the unanimous medical testimony from all of plaintiff's doctors is identical to the medical evidence presented for the 1993 hearing. Quite clearly, plaintiff has failed to carry her burden of producing "medical evidence showing '[s]he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment.' " *See Grantham*, 127 N.C. App. at 534, 491 S.E.2d at 681 (citation omitted).

The only evidence in the record which could possibly support the Commission's conclusion that plaintiff is totally disabled is plaintiff's own testimony that she can no longer work in any capacity. However, we re-emphasize that in proving an inability to work in any employment due to a physical or mental condition in the context of asserting a substantial change in condition, a plaintiff must produce medical evidence that she is no longer capable of any employment. *See id.*; *see also Chisholm v. Diamond Condominium Constr. Co.*, 83 N.C. App. 14, 19, 348 S.E.2d 596, 600 (1986) (Commission properly denied plaintiff's claim to further compensation based on theory of substantial change in condition where plaintiff's evidence consisted entirely of plaintiff's own testimony and there was no medical evidence concerning the cause and extent of his injuries), *disc. review denied*, 319 N.C. 103, 353 S.E.2d 106 (1987).

We further observe that the nature of plaintiff's testimony regarding her physical ailments barely changed from the 1993 hearing to the

hearing at issue here. Although plaintiff testified at the subsequent hearing that her pain was "more widespread," plaintiff's complaints regarding her physical restrictions were the same at both hearings: that she has trouble sitting and standing for long periods of time, that she has trouble bending and lifting, and that she has trouble sleeping. "A change of condition ' "refers to conditions different from those" ' in existence when an award was originally made and ' "a continued incapacity of the same kind and character and for the same injury is not a change in condition." ' " *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996) (citations omitted).

In conclusion, we disagree with the Commission that plaintiff's own assertion that she is wholly incapable of employment is competent evidence to carry her burden of showing a substantial change in condition where her opinion is contrary to the unanimous and unchanged medical evidence, and where plaintiff's testimony about her physical restrictions is virtually identical to that of the 1993 hearing. We therefore reverse the Commission's conclusion that plaintiff has sustained a substantial change in condition warranting an award of additional compensation.

In light of this holding, we need not address defendants' additional arguments, including that plaintiff failed to prove by the greater weight of the evidence that her 1989 back injury caused her subsequent medical problems for which she now seeks additional compensation. Even if plaintiff established that her 1989 injury caused her subsequent medical problems, plaintiff did not prove that the subsequent problems resulted in a substantial change in her capacity to earn wages.

Reversed.

Judges GREENE and TYSON *concur.*

FRANCISCO RUIZ, EMPLOYEE, PLAINTIFF-APPELLEE v. BELK MASONRY COMPANY, INC., EMPLOYER, AND COMPANION PROPERTY AND CASUALTY, CARRIER, DEFENDANT-APPELLANTS

No. COA01-98

(Filed 19 February 2002)

1. Workers' Compensation— illegal alien—demonstrated earning capacity—eligibility for benefits

The Industrial Commission did not err by awarding workers' compensation benefits to an illegal alien where plaintiff was employed by defendant prior to his accident and received wages for his work. N.C.G.S. § 97-2(2).

2. Workers' Compensation— illegal aliens—no conflict with federal law

The North Carolina workers' compensation statute does not conflict with federal immigration laws in its inclusion of illegal aliens.

3. Workers' Compensation— attendant care—necessity—sufficiency of findings

The Industrial Commission did not err by awarding benefits for attendant care in a workers' compensation action. The Commission is the sole judge of the credibility of witnesses and there was competent evidence to support the findings made by the Commission.

4. Workers' Compensation— attendant care—pre-approval

The Industrial Commission did not err by awarding attendant care benefits to a workers' compensation plaintiff who was cared for by his brother, despite plaintiff's failure to seek approval of the care before it was performed. N.C.G.S. § 97-90(a) does not require pre-approval of fees charged by health care providers other than physicians, hospitals, or other medical facilities, exceptions which do not apply here.

5. Workers' Compensation— disability—sufficiency of evidence

The Industrial Commission did not err by finding a workers' compensation plaintiff permanently and totally disabled where a vocational rehabilitation expert testified that plaintiff could not perform even sedentary work due to his educational deficits; physical limitations including limited use of his left arm and the

inability to walk short distances without help; and impaired concentration, attention, memory, and reasoning.

Appeal by defendants from opinion and award of the North Carolina Industrial Commission filed 13 September 2000. Heard in the Court of Appeals 17 October 2001.

Mark T. Sumwalt, Vernon Sumwalt, and Stefan R. Latorre, for plaintiff-appellee.

Morris York Williams Surles & Barringer, LLP, by G. Lee Martin and Keith B. Nichols, for defendant-appellants.

McGEE, Judge.

Defendants appeal from the award of workers' compensation benefits to plaintiff Francisco Ruiz. Plaintiff sustained an injury while employed as a construction worker for defendant Belk Masonry Company, Inc. on 7 October 1997. Plaintiff fell approximately seventy feet from a forklift onto a concrete floor and sustained a traumatic brain injury, a kidney contusion, and several fractures. He was transported to Carolinas Medical Center and was hospitalized until 7 November 1997. Plaintiff was then transferred to the Charlotte Institute of Rehabilitation where he received physical, occupational, and speech therapy, along with psychological counseling. Plaintiff was placed in an outpatient program under the care of his brother, Jose Ruiz, on 3 December 1997, and continued to participate in follow-up treatment with his treating physician, Dr. James T. McDeavitt. Dr. McDeavitt testified plaintiff reached maximum medical improvement on 9 February 1998. Dr. McDeavitt also testified plaintiff did not require twenty-four hour attendant care, and that with a vocational rehabilitation plan, plaintiff might be able to return to work.

Plaintiff presented the testimony of a vocational rehabilitation expert and a certified life care planner. The life care planner testified that plaintiff needed twenty-four hour care. Patrick Clifford (Mr. Clifford), a vocational rehabilitation expert, testified that plaintiff could not even perform sedentary work, had limited ability to walk or drive, and had limited cognitive abilities.

Plaintiff was an illegal or undocumented alien at the time of his hiring and at the time of the accident. Plaintiff presented a false social security card and I-9 form to defendant-employer when he was employed.

I.

[1] Defendants first argue the Commission erred in awarding workers' compensation benefits to plaintiff because plaintiff was an illegal alien. We disagree.

Defendants argue the statutory construction of N.C. Gen. Stat. § 97-2(2) does not allow for illegal aliens to be classified as "employees." Defendants further argue plaintiff does not have an earning capacity. However, N.C. Gen. Stat. § 97-2(2) (1999) defines "employee" as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed[.]" The precise issues defendants raise were determined by our Court in *Rivera v. Trapp*, 135 N.C. App. 296, 519 S.E.2d 777 (1999). *Rivera* presents a similar factual situation to the case before us. In *Rivera*, the plaintiff was employed as a roofer despite his not possessing a green card or a social security number. The plaintiff was seriously injured following a three-story fall from a forklift. Our Court held that N.C.G.S. § 97-2(2)

> defines employee to include "every person engaged in an employment . . . including aliens." The statute makes clear that the General Assembly sought to include individuals like the plaintiff under the protections of the Workers' Compensation Act. Further, plaintiff presented sufficient evidence to show that prior to the injury he did in fact have earning capacity as a roofer.

Rivera, 135 N.C. App. at 303, 519 S.E.2d at 781.

N.C.G.S. § 97-2(2) does not preclude plaintiff from receiving workers' compensation benefits based solely on his status as an illegal alien. " 'The philosophy which supports the [Workers'] Compensation Act is that the wear and tear of the workman, as well as the machinery, shall be charged to the industry.' " *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 143-44, 266 S.E.2d 760, 762 (1980) (quoting *Cates v. Construction Co.*, 267 N.C. 560, 563, 148 S.E.2d 604, 607 (1966)). "The primary purpose of legislation of this kind is to compel industry to take care of its own wreckage." *Barber v. Minges*, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943). These principles are still relevant today and in the particular situation before us. We agree with the deputy commissioner's finding in this case that we "must also be aware that defendant-employer received the benefits of plaintiff's

labor up to the time of his injury, and it would be repugnant to now deny plaintiff a benefit of the same agreement."

Furthermore, as *Rivera* holds, an illegal alien can, despite his or her status, demonstrate an earning capacity in this state. *Rivera*, 135 N.C. App. at 303, 519 S.E.2d at 781. In the case before us, plaintiff has shown he had the capacity to earn wages as a brick mason prior to his accident. Plaintiff was employed by defendant Belk Masonry Company, Inc. prior to his accident, and he was receiving wages for his work; plaintiff therefore demonstrated an earning capacity.

[2] Defendants next contend that if the North Carolina Workers' Compensation statute is inclusive of illegal aliens and bestows upon illegal aliens an earning capacity, the statute is in conflict with federal immigration laws and is therefore preempted by them. Defendants contend the Federal Immigration Reform Control Act of 1986 (IRCA) preempts illegal aliens from receiving benefits under the North Carolina Workers' Compensation Act. Because federal law prohibits illegal aliens from obtaining employment, defendants contend illegal aliens can never be defined as "employees" under federal or state labor statutes.

Federal law preempts state law in three circumstances: "*First*, where Congress has explicitly provided that state law is preempted. *Second*, in the absence of express language, where Congress has intended the federal government should exclusively occupy a particular field. . . . *Third*, [s]tate law is preempted to the extent it actually conflicts with federal law." *Collins v. CSX Transportation*, 114 N.C. App. 14, 18, 441 S.E.2d 150, 152, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 388 (1994) (citations omitted) (emphasis in original).

Defendants have chosen to focus on the third situation and argue there exists a conflict between IRCA and the North Carolina Workers' Compensation Act. We disagree. The U.S. House of Representatives report following the enactment of IRCA expressly explained that

> [i]t is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by

> existing law. In particular, the employer sanctions provisions are not inten[d]ed to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act.

H.R. REP. No. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. Other state court jurisdictions have held IRCA does not preempt or redefine the term "employee" for purposes of workers' compensation. In *Reinforced Earth Co. v. W.C.A.B.*, 749 A.2d 1036, 1038 (Pa. Commw. 2000), the court held

> there is nothing in the IRCA which indicates that an individual, hired by an employer in violation of its provisions, is not an "employee" under federal or state law. As such, the IRCA does not, in and of itself, preclude an illegal alien from being considered an "employee" for purposes of the Act.

See also Dowling v. Slotnik, 712 A.2d 396 (Conn. 1998), *cert. denied*, 525 U.S. 1017, 142 L. Ed. 2d 451 (1998); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221 (N.J. 1996) (holding claimant's need for medical treatment and right thereto did not derive from his immigration status but from the service he performed while working for employer).

Based on congressional intent and following the reasoning of other state court jurisdictions, we hold that federal law prohibiting the hiring of illegal aliens does not prevent illegal aliens from being included in the North Carolina Workers' Compensation definition of "employee," nor does federal law prevent illegal aliens, based solely on immigration status, from receiving workers' compensation benefits. We overrule this assignment of error.

II.

[3] Defendants next argue the Commission erred in awarding plaintiff benefits for attendant care. Defendants contend no competent evidence exists to support the findings of fact that in turn would support the Commission's conclusion that plaintiff is entitled to attendant care services at a rate of eight dollars an hour for sixteen hours a day. We disagree.

Whether a plaintiff does or does not receive attendant care benefits is a conclusion of law which must be supported by findings of fact. On an appeal from an opinion and award from the Commission,

the standard of review for this Court "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000).

Defendants argue the Commission's finding that "[p]laintiff is in need of attendant care and defendants have not provided it" is not supported by competent evidence. "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999). Furthermore, the " 'findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)).

The Commission found the following facts in its opinion and award:

> 9. Mr. Jose Ruiz indicated that plaintiff cannot take care of himself. Mr. Ruiz has to cook, clean, wash, shop, and pay bills, among other things, for plaintiff. He turns on plaintiff's shower and has to assist plaintiff into the shower. Plaintiff can bathe himself while he sits on a stool. Mr. Ruiz indicated that plaintiff cannot cook because he will leave the stove on or forget about the food on the stove. Plaintiff needs assistance walking because he is not stable on his feet and may fall at any time.
>
> 10. Mr. Jose Ruiz indicated that he is not able to hold a full time job because it is unsafe to leave plaintiff at home for a long period and he therefore works four or five hours per day, five days a week, and otherwise he is always with plaintiff.
>
> . . .
>
> 16. Paula Medina, a registered nurse with a Master's Degree in health administration who also is a certified life planner, drafted a life care plan for plaintiff at the request of Patrick Clifford. As a part of this plan, she indicated that plaintiff would need attendant care for the remainder of his life. Jose Ruiz has been providing care to plaintiff but will be unable to continue if he is not paid.

Defendants argue the testimony of plaintiff's brother and Paula Medina is incompetent, and they offer conflicting evidence to rebut this testimony. Specifically, defendants offer the testimony of plaintiff's treating physician that plaintiff has improved steadily, plaintiff can remain at home unattended, and vocational rehabilitation would be appropriate for plaintiff. Defendants contend this testimony is the only credible testimony concerning plaintiff's health. However, the Commission

> "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." Thus, the Commission may assign more weight and credibility to certain testimony than other. Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal.

Dolbow v. Holland Industrial, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). After a careful review of the record before us, we find there is competent evidence to support the findings of fact made by the Commission, and these findings support the Commission's conclusions of law.

[4] Defendants also contend plaintiff is not entitled to attendant care benefits because plaintiff did not seek approval of the care before it was performed. N.C. Gen. Stat. § 97-90(a) (1999) states the charges of

> health care providers for medical compensation under this Article shall be subject to the approval of the Commission; but no physician or hospital or other medical facilities shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Commission in connection with the case.

However, N.C.G.S. § 97-90(a) does not require *pre-approval* of fees charged by health care providers, except for physicians, hospitals, or other medical facilities. Plaintiff's brother does not fit into the exceptions for N.C.G.S. § 97-90(a). This interpretation is consistent with our case law, which has allowed compensation to health care providers similar to plaintiff's brother, without the Commission's pre-approval. *See Godwin v. Swift & Co.*, 270 N.C. 690, 155 S.E.2d 157 (1967) *and London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 525 S.E.2d 203 (2000). We dismiss this assignment of error.

III.

[5] Defendants next argue the Commission erred in finding that plaintiff is permanently and totally disabled. Defendants contend the Commission erred in finding as fact that as "a result of the October 7, 1997 injury by accident, given plaintiff's vocational skills and physical limitations, plaintiff has been, and remains, incapable of earning wages with defendant-employer or in any other employment since October 8, 1997." Defendants further contend there is evidence in the record which establishes plaintiff is capable of returning to work, and the evidence the Commission relied on is unreliable. However, this Court cannot weigh the evidence in the record. "It is the Commission's role to resolve conflicts in the evidence." *Knight v. Cannon Mills Co.*, 82 N.C. App. 453, 463, 347 S.E.2d 832, 839, *disc. review denied*, 318 N.C. 507, 349 S.E.2d 861 (1986). This Court is limited to reviewing the record for any competent evidence which would support the Commission's findings of fact. *See Pittman*, 132 N.C. App. at 156, 510 S.E.2d at 709.

In the case before us, Mr. Clifford, the vocational rehabilitation expert, testified that plaintiff could not perform even sedentary work due to plaintiff's educational deficits and his physical limitations, including plaintiff's limited use of his left arm and his inability to walk short distances without help. Furthermore, Mr. Clifford testified plaintiff's impaired concentration, attention, memory, and reasoning make it difficult for him to do work. Defendants' argument is based solely on their opinion that Mr. Clifford's testimony is unreliable. However, we find this evidence to be competent and supporting of the Commission's findings of fact. These findings support the Commission's conclusions of law and award for permanent and total disability. We dismiss this assignment of error.

We affirm the award of the Commission.

Affirmed.

Judges TIMMONS-GOODSON and JOHN concur.

STATE OF NORTH CAROLINA v. RESHAUD AMONDO BROWN

No. COA00-1527

(Filed 19 February 2002)

1. Evidence— cross-examination—credibility—truthfulness

Even assuming arguendo that the trial court erred in a robbery with a dangerous weapon case by sustaining the State's objections to the questions asked by defendant during his cross-examination of one of the eyewitnesses to the robbery concerning the eyewitness's lying to a detective about a separate robbery for the purposes of establishing the eyewitness's character for truthfulness, defendant has failed to show that any error in excluding the testimony in question prejudiced defendant when there was eyewitness testimony by three other individuals that defendant committed this robbery and the evidence that defendant committed the robbery was overwhelming. N.C.G.S. § 8C-1, Rule 608(b).

2. Witnesses— assistant district attorney—concessions provided to coparticipants in exchange for testimony about crime

Even assuming arguendo that the trial court erred in a robbery with a dangerous weapon case by permitting an assistant district attorney to testify at trial concerning the concessions that two eyewitnesses had received in exchange for agreeing to testify about the robbery, defendant has not met his burden of showing that there is a reasonable possibility that a different result would have been reached at trial absent this error.

Appeal by defendant from judgment entered 28 June 2000 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 29 November 2001.

Attorney General Roy A. Cooper, III, by Assistant Attorney General M. A. Kelly Chambers, for the State.

Mark E. Hayes for defendant-appellant.

HUNTER, Judge.

Reshaud Amondo Brown ("defendant") appeals from a judgment entered against him on the charge of robbery with a dangerous

weapon. On appeal, defendant argues that the trial court erred in sustaining the State's objections to questions asked by defendant during his cross-examination of one of the eyewitnesses to the robbery. Defendant also argues that the trial court erred in permitting an assistant district attorney to testify at trial. We find no prejudicial error in defendant's trial.

The evidence at trial tended to show that on 29 September 1999, defendant was driving a car containing four other individuals, including Ibn Hasan ("Hasan") and Michael Jarrell ("Jarrell"). Defendant followed a car with a "Pizza Hut" delivery sign into an apartment complex. Jarrell left the car intending to rob the Pizza Hut delivery employee, Everett Alston ("Alston"), but stopped and returned to the car when he realized he knew Alston. Defendant then proceeded to exit the car and rob Alston using a gun and wearing a ski mask and gloves. All five individuals were arrested and charged with robbery with a dangerous weapon. Jarrell agreed to testify as to the events of the robbery in exchange for not being tried as an adult, and the other three individuals who had been in the car, including Hasan, each agreed to testify as to the events of the robbery in exchange for having the charges against them dropped. At defendant's trial, Jarrell, Hasan, and the other two eyewitnesses each testified that defendant committed the robbery. Alston testified as to the approximate size and weight of the person who had robbed him. Also, Frank Chut ("Chut"), an assistant district attorney, testified as to the concessions that Jarrell and Hasan had received in exchange for agreeing to testify about the robbery.

We first note that defendant contends on appeal that the two evidentiary rulings by the trial court, to which defendant has assigned error, violated various constitutional rights of defendant. However, defendant's objections and arguments at trial were not based upon constitutional grounds, and the trial court's rulings on defendant's objections were, likewise, not made on constitutional grounds. It is well-established that constitutional issues not raised or passed upon at trial will not be considered for the first time on appeal. *See, e.g., State v. Anthony*, 354 N.C. 372, 389, 555 S.E.2d 557, 571 (2001). Therefore, we decline to review the constitutional components of defendant's arguments, and we limit our review to a consideration of the grounds upon which the objections, and the trial court's rulings, were actually based.

[1] Defendant first argues that the trial court erred in sustaining the State's objections to certain questions asked by defendant during his

cross-examination of Hasan. A review of the record indicates that, on direct examination, Hasan testified that defendant committed the robbery of Alston, and he further testified that he has no reason to lie about who committed the robbery. On cross-examination, defendant asked Hasan whether he had lied to a particular detective about a separate robbery incident involving a business called "the Sonic." Before the State was able to object to this question, Hasan stated, "[o]h, yeah. I remember lying to him." The State then objected on the grounds of relevancy.

The trial court removed the jury and conducted a hearing, during which defendant specifically argued that he wished to question Hasan regarding lies he told to a detective about "the Sonic robbery" for the purpose of impeaching Hasan's credibility. The trial court sustained the State's objection, stating:

> The Sonic robbery is wholly collateral to the present case and is not intermingled or inextricably intertwined in this case.
>
> The investigative details of the so-called Sonic robbery being wholly collateral to the case at bar are not relevant to the present prosecution.
>
> Even if there be some marginal relevance on the issue of impeachment, the probative value of such evidence is substantially outweighed by the very distinct and present danger of confusion of the issues by the jury and by the danger of misleading the jury and should be thus excluded under Rule 403.

On appeal, defendant argues that he should have been permitted to question Hasan about the details of the Sonic robbery itself because such questioning would have revealed a reason for Hasan to be biased against defendant. As with defendant's constitutional arguments, defendant did not, in fact, argue the issue of bias to the court at trial. Thus, we address only the issue of whether defendant should have been permitted to question Hasan regarding his lying to a detective about a separate robbery for purposes of establishing Hasan's character for truthfulness.

Rule 608(b) of the North Carolina Rules of Evidence provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if pro-

> bative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C. Gen. Stat. § 8C-1, Rule 608(b) (1999). In order to be admissible under this Rule, evidence of specific instances of conduct offered for impeachment purposes must satisfy four basic prerequisites: (1) the purpose of producing the evidence must be to impeach or enhance the witness' credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness; (2) the conduct in question must be both probative of truthfulness or untruthfulness, and not too remote in time; (3) the conduct in question must be conduct that did not result in a conviction; and (4) the inquiry into the conduct must take place during cross-examination. *State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986).

> If the proffered evidence meets these four enumerated prerequisites, before admitting the evidence the trial judge must determine, in his discretion, pursuant to Rule 403, that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury, and that the questioning will not harass or unduly embarrass the witness.

Id. at 634, 340 S.E.2d at 90. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (1999).

Here, defendant sought to inquire as to whether an eyewitness to the robbery had, on a prior occasion, lied to police officers about his involvement in a separate robbery. Evidence of such conduct would, of course, tend to establish a witness' character for untruthfulness. The trial court nevertheless excluded the evidence under Rule 403. It is not clear how testimony by Hasan as to whether he lied to police officers about a separate robbery could have resulted in confusion of the issues or misleading the jury.

However, even assuming *arguendo* that the trial court erred in excluding the testimony, we conclude that defendant has not met his

burden of showing that there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial. *See* N.C. Gen. Stat. § 15A-1443(a) (1999). Even if defendant had been permitted to question Hasan regarding his lying to the police about the Sonic robbery, and even if defendant had been successful in establishing Hasan's character for untruthfulness, the State's evidence against defendant, including eyewitness testimony by three other individuals that defendant committed the robbery of Alston, was overwhelming. Thus, defendant has failed to show that any error in excluding the testimony in question prejudiced defendant.

[2] Defendant's second and final assignment of error involves the testimony of Chut, an assistant district attorney, who was permitted to testify for the State over defendant's objection. During a hearing to address defendant's objection, the State argued that it sought Chut's testimony in order to clarify the details of the inducements that were offered to two of the eyewitnesses, Hasan and Jarrell, in order to secure their testimony regarding the robbery. Defendant argues that Chut should not have been permitted to testify because his testimony would violate Rule 3.7 of the North Carolina Revised Rules of Professional Conduct, and because his testimony would prejudice the jury against defendant by unfairly bolstering the credibility of the testimony of the eyewitnesses in the eyes of the jury.

A trial court's decision to permit a witness to testify is not reviewable on appeal in the absence of an abuse of discretion, *see State v. Britt*, 291 N.C. 528, 534, 231 S.E.2d 644, 649 (1977), and we are not persuaded that the trial court abused its discretion in admitting Chut's testimony. However, even assuming *arguendo* that the trial court's determination to allow Chut to testify constituted error, defendant has not met his burden of showing that there is a reasonable possibility that, had such error not been committed, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a). Chut testified as to the details of the concessions provided to Jarrell and Hasan by the district attorney's office in return for their agreeing to testify truthfully about the robbery of Alston. Following the State's direct examination, defendant cross-examined Chut and elicited from Chut an express acknowledgement that he was not present at the time of the robbery and that he does not have any first-hand knowledge as to what actually occurred at the time of the robbery. Thus, any possibility that Chut's testimony might serve to bolster the testimony of the eyewitnesses was successfully thwarted by defendant.

Considering also the overwhelming evidence against defendant, we are not persuaded that Chut's testimony prejudiced defendant.

For the foregoing reasons, we find no prejudicial error in defendant's trial.

No error.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA v. ERNEST G. HARGETT

No. COA01-265

(Filed 19 February 2002)

1. **Possession of Stolen Property— recent possession—evidence sufficient**

The facts taken in the light most favorable to the State supported an instruction on the doctrine of recent possession and defendant's motion to dismiss a charge of felonious possession of stolen goods was properly denied where defendant was stopped on an arrest warrant in an unrelated matter; he held a translucent plastic bag in his hand; the officer searched the bag incident to the arrest and the bag contained 27 butane lighters and 11 bottles of cologne; the officer asked defendant what he was doing with these items and defendant replied "making money"; and a store owner reported the theft of items including lighters and cologne and identified the items in the bag seized from defendant as coming from his store. Defendant conceded that there were reasonable grounds for the jury to find that the property possessed by defendant had been stolen.

2. **Possession of Stolen Property— lesser included offense—misdemeanor possession—evidence sufficient for instruction**

The trial court in a prosecution for felonious possession of stolen property erred by failing to instruct on the lesser included offense of misdemeanor possession of stolen property where the State relied on the doctrine of recent possession and defendant contended that he had obtained the property from another and

did not know that it was stolen. This evidence equally supports an inference that defendant did not know or reasonably should not have known that the property was stolen.

3. Indictment and Information— habitual felon—conviction dates changed—not a substantial change

The amendment of conviction dates in an habitual felon indictment did not constitute a substantial change in the indictment.

Judge GREENE concurring.

Appeal by defendant from judgment entered 28 September 2000 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 22 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Sylvia Thibaut, for the State.

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

TYSON, Judge.

I. Facts

On 31 May 2000, at approximately 12:45 a.m., Officer Robert Garrison ("Garrison"), with the New Bern Police Department, stopped Ernest G. Hargett ("defendant") on a warrant for defendant's arrest in an unrelated matter. Defendant held a translucent plastic bag in his hand. Garrison searched the bag incident to the arrest. The bag contained 27 butane lighters and 11 bottles of cologne.

During the stop, Garrison asked defendant what he was doing with the items in the plastic bag. Defendant replied "making money." Garrison had not placed defendant under arrest nor given defendant any *Miranda* warning at the time of questioning. Garrison then placed defendant under arrest.

At approximately 9:00 a.m. on the same morning, Officer Harold Bright ("Bright"), with the New Bern Police Department, responded to a breaking and entering call at the T&J Variety Store. The store owner, Mr. Johnson, informed Bright that some cigarette lighters, cash from the register, cartons of cigarettes, and some bottles of cologne had been stolen from his store. Bright charged defendant and another man with breaking and entering, larceny, and possession of

stolen property in connection with the T&J Variety Store. Mr. Johnson identified the items in the plastic bag seized from defendant as the items taken from his store.

Defendant testified that he had visited the T&J Variety Store but did not steal anything from the store. Defendant further testified that he obtained the lighters and cologne from a lady called "Little Mama" and did not know they were stolen. The trial court granted defendant's motion to dismiss the charge of felonious larceny at the close of the State's evidence. The trial court denied defendant's motion to dismiss all remaining charges at the close of all the evidence. The jury found defendant guilty of felonious possession of stolen goods and not guilty of felonious breaking and entering. Defendant pled guilty to being a habitual felon and was sentenced to a minimum of ninety months and a maximum of 117 months. Defendant appeals. We remand for a new trial.

II. Issues

The issues presented are whether: (1) the trial court erred in denying defendant's motion to dismiss, (2) the trial court erred in failing to charge the jury on the lesser included offense of misdemeanor possession of stolen goods, (3) the trial court erred in allowing the State to "amend" the habitual felon indictment, (4) the trial court committed plain error in not conducting an inquiry or dismissing the entire jury venire after learning that a potential juror was present during the pre-trial motions, (5) the trial court erred in overruling defendant's objection to testimony by Garrison concerning inculpatory statements made by defendant, (6) the trial court erred in denying defendant's motion for a dismissal or mistrial based on the State's failure to disclose potentially exculpatory evidence, (7) the trial court committed plain error in allowing repetitive questioning of defendant about his criminal history and plea bargains, (8) the trial court erred in not allowing defendant to argue to the jury the ramifications of conviction as a habitual felon, and (9) the trial court erred in sentencing defendant.

III. Motion to Dismiss

[1] Defendant argues that the trial court erred in denying his motion to dismiss at the close of the State's evidence and again at the close of all the evidence as to the charge of felonious possession of stolen goods. Defendant contends that there was insufficient evidence that defendant knew or had reasonable grounds to believe that the items

in question he possessed had been stolen pursuant to a breaking and entering.

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). The evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The trial court must determine whether there is substantial evidence of each element of the offense charged. *State v. Irick*, 291 N.C. 480, 491, 231 S.E.2d 833, 841 (1977). Substantial evidence consists of "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). The trial court considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971). The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct. *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982).

For the offense of felonious possession of stolen property, the State was required to prove: (1) possession of personal property, (2) which was stolen pursuant to a breaking and entering, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen pursuant to a breaking and entering, and (4) the possessor acting with a dishonest purpose. N.C. Gen. Stat. § 14-72(c) (1999); *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982).

In order to show that defendant knew or had reasonable grounds to believe the property was stolen pursuant to a breaking and entering, the State relied on the doctrine of recent possession. The doctrine of recent possession raises what has been called a "presumption," but more accurately raises "a permissible inference that the possessor is the thief" and "[t]he inference derived from recent possession 'is to be considered by the jury merely as an evidentiary fact along with other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.' " *State v. Joyner*, 301 N.C. 18, 28, 269 S.E.2d 125, 132-33 (1980) (quoting *State v. Fair*, 291 N.C. 171, 173, 229 S.E.2d 189, 190 (1976)).

For the doctrine to apply, the State must prove: (1) the property was stolen, (2) defendant had possession of the property, subject to his control and disposition to the exclusion of others, and (3) the possession was sufficiently recent after the property was stolen. *State v. Barnes*, 345 N.C. 184, 240, 481 S.E.2d 44, 75 (1997). Defendant concedes in his brief that there was reasonable grounds for a jury to find that the property possessed by defendant had been stolen. We hold that the facts taken in the light most favorable to the State supported an instruction on the doctrine of recent possession and the motion to dismiss was properly denied.

IV. Jury Instruction on Lesser Included Offense

[2] Defendant assigns error to the trial court's denial to instruct the jury on the lesser included offense of misdemeanor possession of stolen goods. Defendant contends that there was insufficient evidence that he knew or reasonably should have known that the goods had been feloniously stolen. We agree.

Misdemeanor possession or non-felonious possession of stolen goods is a lesser included offense of felonious possession of stolen goods. *State v. Brantley*, 129 N.C. App. 725, 731, 501 S.E.2d 676, 680 (1998). "[T]he trial court is not required to submit lesser degrees of a crime to the jury 'when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.'" *State v. McKinnon*, 306 N.C. 288, 300-01, 293 S.E.2d 118, 126 (1982) (quoting *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972)).

The State relied on the doctrine of recent possession to show that defendant knew or had reasonable grounds to believe the property was stolen. However, defendant testified at trial that he obtained the property from a woman known as "Little Mama" and that he did not know the property was stolen. This evidence equally supports an inference that defendant did not know or reasonably should not have known that the property was stolen. "[E]vidence giving rise to a reasonable inference to dispute the State's contention," is sufficient to support an instruction on a lesser offense. *McKinnon*, 306 N.C. at 301, 293 S.E.2d at 127.

We hold that the trial court properly instructed on felonious possession of stolen property, but erred in failing to instruct on the lesser included offense of misdemeanor possession of stolen property. We hold that defendant is entitled to a new trial.

[3] Because we have ordered a new trial, we need not discuss defendant's remaining assignments of error. However, we find it necessary to dispose of defendant's argument that the trial court erred in allowing the State to "amend" the habitual felon indictment. Defendant contends that "amendment" of the conviction dates constitutes a substantial change to the indictment. We disagree. *See State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984) ("amendment" has been defined by our courts as "any change in the indictment which would substantially alter the charge set forth in the indictment); *State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994) (it is the fact that another felony was committed, not its specific date, which is the essential question in the habitual felon indictment). This assignment of error is overruled.

The judgment of the trial court is vacated, and this matter is remanded for a new trial.

New trial.

Judge HUNTER concurs.

Judge GREENE concurs with separate opinion.

GREENE, Judge, concurring.

Although I fully concur with the majority, I write separately to more specifically address defendant's recent possession argument. Defendant contends the recent possession doctrine cannot apply in this felonious larceny case because there is no evidence he knew or should have known "the goods had been feloniously stolen." Although there is no evidence defendant knew or should have known the goods he possessed had been stolen in a breaking and entering of the T&J Variety Store, such showing is not necessary. Once it had been established the store had been broken into and entered and merchandise taken therefrom, defendant's "recent possession of such stolen merchandise raises presumptions of fact that [he] is guilty of the larceny *and* of the breaking and entering." *State v. Allison*, 265 N.C. 512, 516, 144 S.E.2d 578, 580 (1965). Accordingly, the trial court did not err in submitting the felonious larceny charge to the jury.

BEULAH VERNON, PLAINTIFF-APPELLANT v. MICHAEL LOWE AND BRENDA LOWE, DEFENDANT-APPELLEES

No. COA00-1171

(Filed 19 February 2002)

Civil Procedure— motion to dismiss—directed verdict—involuntary dismissal

The trial court did not err by granting defendants' motion to dismiss plaintiff's claim for damages in an action to quiet title to the pertinent tract of land even though plaintiff contends the trial court's order was similar to a directed verdict, meaning the evidence should be viewed in the light most favorable to plaintiff, because: (1) defendants' motion is correctly treated as a motion for involuntary dismissal under N.C.G.S. § 1A-1, Rule 41(b) when there is a trial by the court sitting without a jury; and (2) the function of a judge under Rule 41(b) is to evaluate the evidence without any limitations as to inferences in favor of plaintiff.

Judge TIMMONS-GOODSON dissenting.

Appeal by plaintiff from order entered 31 March 2000 by Judge Peter M. McHugh in Superior Court, Rockingham County. Heard in the Court of Appeals 28 September 2001.

Craig M. Blitzer, for plaintiff-appellant.

No brief filed by defendant-appellees.

McGEE, Judge.

Plaintiff filed an action against defendants to quiet title to a tract of land located in Madison, North Carolina. Plaintiff and defendants claimed ownership of the property through separate quitclaim deeds. Plaintiff also alleged she was entitled to recover from defendants for trespass upon the property, cutting timber thereon, and removing the timber.

In a pretrial conference, plaintiff and defendants stipulated that the following issues were to be determined by the trial court:

(1) Is the plaintiff the owner in fee simple of the real property described in the complaint? (2) Was the entry by the defendant[s] upon the real property described in the complaint trespass as

alleged in the complaint? (3) Have the defendants removed good and valuable timber from the lands of the plaintiff as alleged in the complaint? and, (4) If so, what amount of damages, if any, is the plaintiff entitled to recover of the defendants?

At the close of the evidence, defendants moved to dismiss plaintiff's claim for damages, arguing plaintiff had only offered evidence of the chain of title as to a portion of the land listed in the complaint, described at trial as "Lot 7," but had not presented evidence concerning an adjoining .14 acre tract. After determining plaintiff had in fact only offered evidence pertaining to "Lot 7," and not the .14 acre tract of land adjoining "Lot 7," the trial court dismissed plaintiff's entire claim. Plaintiff appeals.

Plaintiff argues the trial court erred in dismissing her claim to quiet title because the court failed to view the evidence in the light most favorable to plaintiff. Plaintiff contends the trial court's order was similar to a directed verdict and is therefore subject to the standard of review requiring the evidence to be considered in the light most favorable to the non-moving party. Plaintiff argues if she produces "more than a scintilla of evidence," her claim will survive a motion to dismiss. *Poore v. Swan Quarter Farms*, 94 N.C. App. 530, 533, 380 S.E.2d 577, 578 (1989), *disc. review denied*, 326 N.C. 50, 389 S.E.2d 93, 94 (1990).

However, defendants' motion is correctly treated as a motion for involuntary dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) (1999). "Where there is a trial by the court, sitting without a jury, the appropriate motion by which a defendant may test the sufficiency of plaintiff's evidence to show a right to relief is a motion for involuntary dismissal." *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 561-62, 402 S.E.2d 860, 861 (1991). The difference between a motion for a directed verdict and a motion for involuntary dismissal "is more than a mere formality, as a different test is to be applied to determine the sufficiency of the evidence." *Id.* at 562, 402 S.E.2d at 861. In a Rule 41(b) motion, "the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and if so, must pass upon the weight and credibility of the evidence upon which plaintiff must rely in order to recover." *A.M.E. Zion Church v. Union Chapel A.M.E. Zion Church*, 64 N.C. App. 391, 409, 308 S.E.2d 73, 825 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 649 (1984). "Since the court will determine the facts anyway, the function of a judge . . . under G.S. 1A-1, Rule 41(b) is to evaluate the evidence without any limitations as to inferences in favor of the plaintiff."

Holthusen v. Holthusen, 79 N.C. App. 618, 621-22, 339 S.E.2d 823, 825 (1986).

In the case before us, the first issue stipulated by the parties to be determined by the trial court was an action to quiet title to a tract of land. Plaintiff presented evidence that she had obtained title by a quitclaim deed. She then offered expert testimony that the grantors of the quitclaim deed previously possessed a valid chain of title to the property. However, the trial court in this case stated that plaintiff has "failed to prove by the greater weight of the evidence that she is the fee simple owner of the real property[.]" A motion to dismiss under Rule 41(b) "provides a procedure whereby the judge may weigh the evidence, determine the facts, and render judgment on the merits against the plaintiff, even though the plaintiff may have made out a *prima facie* case." *McKnight v. Cagle*, 76 N.C. App. 59, 65, 331 S.E.2d 707, 711, *cert. denied*, 314 N.C. 541, 335 S.E.2d 20 (1985). The trial court's order stated the court did in fact employ this procedure; we therefore dismiss plaintiff's assignment of error and affirm the order of the trial court.

Affirmed.

Judge BIGGS concurs.

Judge TIMMONS-GOODSON dissents with separate opinion.

TIMMONS-GOODSON, Judge, dissenting.

I disagree with the majority that the trial court's order of dismissal is supported by its findings of fact. I therefore respectfully dissent.

"A dismissal under Rule 41(b)should be granted if the plaintiff has shown no right to relief or if the plaintiff has made out a colorable claim but the court nevertheless determines as the trier of fact that the defendant is entitled to judgment on the merits." *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999). If the trial court grants a motion for involuntary dismissal, he must make findings of fact and state his conclusions of law separately as required by the Rule. *Joyner v. Thomas*, 40 N.C. App. 63, 65, 251 S.E.2d 906, 908 (1979). Failure to make the necessary findings of fact constitutes reversible error. *Hill*, 135 N.C. App. at 517, 520 S.E.2d at 800.

> Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided[.] Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts.

Id. at 518, 520 S.E.2d at 800 (quoting, *Helms v. Rea*, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973)).

In the instant case, the trial court made the following findings of fact:

> 2. That the matter was tried by the Court without a jury.
>
> 3. That at the close of all the evidence, the court was of the opinion that the plaintiff had failed to prove by the greater weight of the evidence that she is the fee simple owner of the real property which is the subject of his action and this Court being of the opinion that the plaintiff, having failed to carry the burden of proof on said issue, was not entitled to a favorable answer to any of the subsequent issues and the Court being of the opinion that the action should be dismissed.

This order does not make known the grounds on which the court dismissed plaintiff's claim and additionally does not set forth any conclusions of law to support its findings of fact. While a review of the transcript reveals that the trial court dismissed plaintiff's claim because plaintiff had not shown that "she is the fee simple owner of the real property," this Court is unable to determine the propriety of the order "unaided by findings of fact explaining the reasoning of the trial court." *Hill* at 518, 520 S.E.2d at 800.

Since the trial court failed to make the necessary findings, I would vote to remand for further findings and conclusions of law in support of its order of dismissal.

ELIZABETH ROCHESTER HILL, PLAINTIFF v. CASEY BLAKE McCALL, DEFENDANT

ELIZABETH ROCHESTER HILL, PLAINTIFF v. CASEY BLAKE McCALL, BILLY JACK McCALL, DEFENDANTS

No. COA01-442

(Filed 19 February 2002)

Damages and Remedies; Negligence— aggravation of existing injury—instruction not warranted

The trial court erred in a negligence action by instructing the jury on activation or aggravation of an existing injury where there was evidence of the possibility that plaintiff's herniated disk existed prior to the incident, but no evidence of its actual existence.

Appeal by plaintiff from judgment dated 5 September 2000 and from order dated 5 September 2000 by Judge Zoro J. Guice, Jr. in Jackson County Superior Court. Heard in the Court of Appeals 22 January 2002.

Melrose, Seago & Lay, P.A., by Randal Seago, for plaintiff-appellant.

Frank J. Contrivo, P.A., by Andrew J. Santaniello, for defendant-appellee.

GREENE, Judge.

Elizabeth Rochester Hill (Plaintiff) appeals a judgment dated 5 September 2000 ordering Casey Blake McCall (Defendant) pay Plaintiff damages in the amount of $2,000.00 and an order dated 5 September 2000 denying Plaintiff's motion for a new trial.

Plaintiff filed a complaint dated 2 June 1999 alleging negligence against Defendant for an incident occurring on 25 January 1999.[1] Defendant admitted in his answer that he was at fault in causing the incident but specifically denied that his conduct was a proximate cause of Plaintiff's injuries. Accordingly, the only issue that remained for trial was whether Defendant's negligence proximately caused

1. Plaintiff originally filed her complaint against Defendant and Billy Jack McCall. Plaintiff, however, filed a voluntary dismissal without prejudice of the action as to Billy Jack McCall.

Plaintiff's injuries and if so, what amount of damages Plaintiff was entitled to.

A jury trial on Plaintiff's case began on 13 December 1999. At trial, Plaintiff testified that on 25 January 1999, the vehicle she was driving was hit in the rear by a vehicle driven by Defendant. After Plaintiff went home and had slept, she began experiencing neck, back, and shoulder pains. The next day, Plaintiff visited a nurse practitioner and was later seen by Dr. Steven Deweese (Dr. Deweese), who requested x-rays and an MRI be taken. Dr. Deweese subsequently referred Plaintiff to Dr. Keith Melvin Maxwell (Dr. Maxwell). Prior to the incident, Plaintiff had not experienced any problems with either her neck or her back. After treatments and tests by various doctors, Plaintiff's total medical expenses amounted to $21,077.33.

On cross-examination, Plaintiff testified she had never experienced either neck or back pain prior to the incident, although she did have a disorder that affected the blood vessels in her brain, which she referred to as an "ABM of the brain." Prior to 25 January 1999, Plaintiff was involved in one other automobile incident in which she was rear ended, but sustained no injuries.

Dr. Maxwell testified as an expert in orthopedic surgery. Dr. Maxwell treated Plaintiff after the 25 January 1999 incident. Plaintiff told Dr. Maxwell she had been rear ended by Defendant's vehicle, which was traveling approximately thirty-five miles per hour. During her initial visit, Plaintiff complained of both neck and arm pain occurring immediately after the incident and worsening thereafter. After performing diagnostic tests on Plaintiff, Dr. Maxwell concluded Plaintiff had a herniated disk in the left side of her neck. Based on Plaintiff's account, Dr. Maxwell believed the incident proximately caused Plaintiff's herniated disk. Dr. Maxwell testified he found Plaintiff's account of the incident to be credible.

On cross-examination, Dr. Maxwell testified he was basing his conclusions and opinions on the account provided by Plaintiff and the integrity of her account was essential for a proper diagnosis. According to Dr. Maxwell, approximately thirty-four percent of the middle-age adult population could be diagnosed as having a herniated disk. Although an MRI taken on 3 February 1999, about a week after the incident, showed Plaintiff to have a herniated disk, the possibility exists the herniated disk predates the incident and there could be causes other than the incident for Plaintiff's herniated disk.

Dr. Deweese testified as an expert in internal medicine, and he testified concerning his treatment of Plaintiff shortly after the incident. While Dr. Deweese could not state to a medical certainty whether Plaintiff's herniated disk was proximately caused by the incident, he did state that prior to the incident, Plaintiff was virtually pain free. On cross-examination, Dr. Deweese testified that prior to the automobile incident on 25 January 1999, he and Plaintiff did not have a physician/patient relationship, although he was familiar with her.

Plaintiff read into evidence portions of Defendant's deposition testimony taken on 24 November 1999 in which Defendant testified he was traveling approximately twenty-five to thirty miles per hour prior to hitting his brakes and was not going very fast at the time there was contact between the two vehicles. At trial, however, Defendant testified he was traveling approximately ten miles per hour at the point of impact between his vehicle and Plaintiff's vehicle.

At the close of the evidence, the trial court conducted a conference on proposed jury instructions. Plaintiff stated it was not necessary to give an instruction on aggravation or activation of a pre-existing physical condition as there was no evidence of any pre-existing condition. The trial court overruled Plaintiff's objection.

The trial court instructed the jurors that they were "the sole judges of the weight to be given to any evidence" and the "sole judges of the credibility of each witness." After giving instructions to the jury regarding proximate cause, the trial court further instructed the jury that if a

> defendant's negligence aggravates or activates a pre[-]existing physical condition, the defendant is liable only to the extent that his wrongful act proximately and naturally aggravated the plaintiff's condition. The defendant is not liable for damages attributable solely to the original condition.

After deliberating, the jury returned a verdict in favor of Plaintiff finding her damages to be in the amount of $2,000.00.

Plaintiff subsequently moved for a new trial on 22 December 1999. The trial court entered a judgment on the jury's verdict and denied Plaintiff's motion for a new trial on 5 September 2000.

The dispositive issue is whether there was any evidence Plaintiff had a pre-existing herniated disk warranting an instruction on activation or aggravation of a previous injury.

Plaintiff contends the trial court erred in instructing the jury on activation or aggravation of a previous injury as there was insufficient evidence to support that Plaintiff had a pre-existing herniated disk. We agree.

In instructing a jury in a civil case, "the trial court has the duty to explain the law and apply it to the evidence on the substantial issues of the action." *Wooten v. Warren*, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994). The trial court is permitted to instruct a jury on a claim or defense only "if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense." *Id.* To permit an instruction on the activation or aggravation of a pre-existing injury, the evidence, when viewed in the light most favorable to the proponent of the instruction, must support an inference of the aggravation of a pre-existing injury. *Id.* at 358, 451 S.E.2d at 348. A pre-existing injury is one which exists at the time of the wrongful act. *See Potts v. Howser*, 274 N.C. 49, 54, 161 S.E.2d 737, 742-43 (1968); *see also American Heritage College Dictionary* 1078 (3d ed. 1993) (pre-exist means "[t]o exist before; precede").

In this case, the evidence, when viewed in the light most favorable to Defendant, the proponent of the instruction on activation and aggravation of a pre-existing injury, does not support an inference of the aggravation of a pre-existing condition. Dr. Maxwell testified that while it was possible the herniated disk existed prior to the incident, it was his opinion the incident caused the herniated disk. Although possible, there is no evidence whatsoever in the record to this Court that Plaintiff's herniated disk existed prior to the 25 January 1999 incident.[2] Accordingly, as the record to this Court was devoid of evidence relating to a pre-existing condition, the trial court erred in instructing the jury on activation or aggravation of a pre-existing injury. Therefore, this case must be remanded for a new trial on the issue of damages. *See Wooten*, 117 N.C. App. at 359, 451 S.E.2d at 348.

2. In order to present an issue of causation to a jury, the evidence must raise more than " 'a mere conjecture, surmise and speculation as to [causation].' " *Hinson v. Nat. Starch & Chem. Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659-60 (1990) (citation omitted). Rather, there must be "[s]ome degree of probability, however small," to provide the jury with a question of causation. *Id.*

New trial.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. TIMOTHY BERNARD ALLISON

No. COA01-306

(Filed 19 February 2002)

1. Search and Seizure— stop and frisk—reasonable suspicion—tip

A tip to an officer exhibited the "moderate indicia of reliability" needed for the reasonable suspicion necessary to justify an investigatory stop and frisk where the tip came through a face-to-face encounter with an officer rather than by an anonymous telephone call; the informant provided the officer with a reasonable explanation as to how she was aware that criminal activity might take place; and the officer independently corroborated the tip prior to his investigatory stop of defendant.

2. Search and Seizure— stop and frisk—scope—suspicion for continuation

An officer was justified in continuing his frisk of defendant after defendant said that he was not carrying weapons and the initial frisk revealed nothing where the officer had received information that defendant's group had been passing a weapon around, the officer had identified defendant as having been involved in prior gun-related incidents, and the officer had observed defendant holding his pants up as though something was dragging them down.

Appeal by defendant from judgment entered 30 November 2000 by Judge Kimberly S. Taylor in Cleveland County Superior Court. Heard in the Court of Appeals 23 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

Teddy & Meekins, P.L.L.C., by David R. Teddy, for defendant-appellant.

WALKER, Judge.

Defendant appeals the trial court's order denying his motion to suppress evidence which was seized during a search of his person. Following the denial of his motion, defendant entered a conditional plea of guilty to carrying a concealed weapon for which he received a sentence of six to eight months. However, the trial court suspended the sentence and placed defendant on supervised probation for twenty-four months.

The trial court's findings with respect to defendant's motion to suppress may be summarized as follows: On 20 June 1999, Officers Jamie Ledford and Richard Ivey of the Shelby Police Department were investigating a call at a local convenience store when they were approached by two women. One of the women told Officer Ledford that about five minutes earlier she had been in a nearby restaurant where she observed four African American males sitting in the bar area. She related that she overheard them talking about robbing the restaurant and that she had seen the four men passing a black handgun amongst themselves. At Officer Ledford's request, the woman repeated her observations to Officer Ivey. Officer Ivey then obtained a telephone number from the woman, which he wrote on the back of his hand.

Based on this information, the officers contacted their supervisor who advised them that he and another officer would meet them outside the restaurant. When they all arrived, Officer Ivey entered the restaurant and observed four African American males sitting in the bar area. He identified defendant as having been involved in previous gun-related incidents. He then approached the men and asked them to step out into the restaurant's foyer. Officer Ivey testified that when defendant stood, he was "holding his pants up as though he had something dragging his pants down."

In the foyer, Officer Ivey began conducting a pat-down frisk of defendant and asked him whether he was carrying any weapons. After defendant responded "no," Officer Ivey continued frisking him and seized a nine millimeter handgun from his front waistband. Defendant was then arrested and charged with carrying a concealed weapon. Sometime thereafter, Officer Ivey called the telephone number he had written on the back of his hand but did not get an answer.

In his sole assignment of error, defendant contends the trial court erred in denying his motion to suppress the nine millimeter handgun

seized from his person. Specifically, he offers two alternative arguments: (1) that Officer Ivey did not have a reasonable articulable suspicion so as to justify an investigatory stop of defendant, and (2) assuming the existence of a reasonable articulable suspicion, the pat-down frisk exceeded its permissible scope.

[1] Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether it's findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Here, defendant does not dispute that the trial court's findings are sufficiently supported by competent evidence. Rather, he contends the findings do not support the trial court's conclusion that Officer Ivey had a reasonable suspicion of criminal activity thereby justifying a stop and frisk of defendant.

Defendant relies primarily on *Florida v. J.L.*, 529 U.S. 266, 146 L. Ed. 2d 254 (2000), in which the United States Supreme Court held that an anonymous telephone call reporting that a person is carrying a gun is insufficient to justify a police officer's investigatory stop and frisk of that person. In *J.L.*, an anonymous caller reported to police that a young African American male, dressed in a plaid shirt, was standing at a particular bus stop and was carrying a handgun. Two officers were sent to the bus stop where they observed three African American males, one of whom was wearing a plaid shirt. An officer frisked this man and seized a handgun from his pocket. The Court, relying on its Fourth Amendment precedent, found the anonymous tip alone lacked a "moderate indicia of reliability" to provide the officer with the reasonable suspicion necessary to justify an investigatory stop. *Id.* at 271, 146 L. Ed. 2d at 260; *see also Alabama v. White*, 496 U.S. 325, 110 L. Ed. 2d 301 (1990); *and Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). However, the Court also recognized that had the circumstances surrounding the tip been such that its assertion of criminal activity was more reliable or if the tip had been suitably corroborated by the police, an investigatory stop would have been justified. *Id.* at 272, 146 L. Ed. 2d at 260-61.

Our Supreme Court has recently applied *J.L.'s* holding to an anonymous tip which led to an investigatory stop of an automobile. *See State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000). In *Hughes*, a telephone caller reported to Jacksonville police that a man would be arriving there by bus that day with cocaine and marijuana in his

possession. The caller provided a detailed description of the man, indicated that he occasionally carried an overnight bag, and stated that at times he took a taxi from the bus station to North Topsail Beach. Based on this information, officers staked out the bus station. After some time, they observed a man matching the description and carrying an overnight bag step into a taxi. They followed the taxi but stopped it before they could definitively determine whether it was headed towards North Topsail Beach. Upon searching the defendant, the officers found marijuana and cocaine in his shoes. *Citing J.L.*, the Court held the search to be unlawful as the circumstances surrounding the tip were insufficient to create a reasonable suspicion and the police had failed to independently corroborate the tip. *Id. at* 201-03, 209-10, 539 S.E.2d at 627-28, 631-32.

After a careful review of the facts in this case, we find Officer Ivey's investigatory stop of defendant is notably distinguishable from the ones which occurred in *J.L.* and *Hughes*. Foremost, the tip in this case came through a "face-to-face" encounter rather than by an anonymous telephone call. Under this scenario, Officer Ivey had an opportunity to observe the demeanor of the female informant in an effort to assess the reliability of her tip. Furthermore, by engaging Officer Ivey directly, the female informant significantly increased the likelihood that she would be held accountable if her tip proved to be false. *See generally State v. Sanchez*, 147 N.C. App. 619, 556 S.E.2d 602 (No. COA00-1075 filed 18 December 2001).

We note as well that, unlike the informants in *J.L.* and *Hughes*, the female informant here provided Officer Ivey with a reasonable explanation as to how she was aware that criminal activity was possibly going to take place. She stated that she had just recently come from the restaurant, had overheard the men discussing plans to rob it, and had observed them passing around a handgun.

Moreover, our review of the record reveals Officer Ivey independently corroborated the tip prior to his investigatory stop of defendant. As he entered the bar area, he recognized defendant and recalled that he had previously been involved in gun-related incidents. Thus, his knowledge of defendant's reputation served to buttress the tip he received. *See J.L.*, 529 U.S. at 270, 146 L. Ed. 2d at 260 ("there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop' ") (*quoting White*, 496 U.S. at 327, 110 L. Ed. 2d at 306); *see also Hughes*, 353 N.C. at 207, 539 S.E.2d at 630;

and *State v. Young*, 148 N.C. App. 462, 467, 559 S.E.2d 814, 818-19 (2002). Accordingly, we conclude the tip furnished to Officer Ivey exhibited the "moderate indicia of reliability" so as to furnish him with the reasonable suspicion necessary to justify an investigatory stop and frisk of defendant.

[2] Defendant also argues that even if the investigatory stop were lawful, Officer Ivey's search exceeded its permissible scope. He contends that once Officer Ivey had begun to frisk him and found nothing, he should have been permitted to leave once he informed the officer that he was not carrying a handgun. We disagree.

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or *dispel the officer's suspicion* in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983) (citations omitted) (emphasis added). Here, Officer Ivey frisked defendant based on the information he had received, which was reinforced by his prior knowledge of defendant. Additionally, he had observed defendant leave the bar area "holding his pants up as though he had something dragging his pants down." Based on these facts, we find that Officer Ivey's suspicion that defendant had a weapon hidden on his person had not been sufficiently dispelled when his initial frisk failed to uncover a weapon. *Accord State v. Watson*, 119 N.C. App. 395, 399, 458 S.E.2d 519, 523 (1995). Therefore, we conclude he was justified in his continued frisk of defendant and the subsequent seizure of the handgun from his waistband. The trial court's order denying defendant's motion to suppress this evidence is affirmed.

Affirmed.

Judges McGEE and BIGGS concur.

THE CIT GROUP/COMMERCIAL SERVICES, INC., PLAINTIFF v. JODY B. VITALE, DEFENDANT

No. COA01-251

(Filed 19 February 2002)

Evidence— hearsay—business records exception

The trial court did not err in a breach of contract action by admitting into evidence an exhibit entitled "Inventory Certification" under the business records exception to the hearsay rule in N.C.G.S. § 8C-1, Rule 803(6) even though the testimony of the custodian of the business record was used rather than the person who prepared the record, because: (1) the in-court testimony of the person who prepared the business record is not required; and (2) the use of a custodian's testimony or other qualified witness to establish a foundation for admission of the record is expressly permitted by the rule.

Appeal by defendant from judgment entered 24 August 2000 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 January 2002.

Shumaker, Loop & Kendrick, L.L.P., by Frederick M. Thurman, Jr., for plaintiff-appellee.

Newitt & Bruny, by Roger H. Bruny, for defendant-appellant.

TYSON, Judge.

I. Facts

Jody B. Vitale ("defendant") personally guaranteed payment of certain debts of Trendline Home Fashions, Inc. ("Trendline"). The CIT Group/Commercial Services, Inc. ("plaintiff") loaned to Trendline the sum of $4,500,000.00, pursuant to a Loan and Security Agreement ("Security Agreement"). The Security Agreement was amended four times. After continuing defaults by Trendline, plaintiff accelerated the obligations, and made demand upon defendant for payment of the limited amount in the Limited Guaranty Agreement ("Guaranty Agreement") executed by defendant on 4 August 1997. The limited amount in the Guaranty Agreement is defined as:

"Limited Amount" shall mean, as at any date of determination thereof, that portion of the Obligations owing by the Borrower

> [Trendline] to the Lender [plaintiff] equal to (i) sixty percent (60%) of the value of the Borrower's Eligible Inventory at such date, minus (ii) forty percent (40%) of the value of the Borrower's Eligible Inventory at such date, in each case calculated on the basis of lower or cost or market with cost calculated on a first-in, first-out basis.

After defendant refused to pay the limited amount, plaintiff filed suit for breach of the Guaranty Agreement on 4 May 1999. Defendant moved for a directed verdict at the close of plaintiff's evidence and again at the close of all the evidence. Both motions were denied by the trial court. The parties stipulated the issues to be submitted to the jury.

After judgment was entered in favor of plaintiff, defendant moved for judgment notwithstanding the verdict, or in the alternative, for a new trial. The trial court denied defendant's motion. Defendant appeals. We hold there was no error at trial.

II. Issues

The only question raised on appeal is whether the trial court erred in admitting into evidence an exhibit entitled "Inventory Certification" pursuant to the business records exception to the hearsay rule found in N.C.G.S. § 8C-1, Rule 803(6).

Defendant also assigned error to the denial of his motions for a directed verdict and judgment notwithstanding the verdict, or in the alternative, a new trial. Defendant fails to argue these assignments of error in his brief. They are deemed abandoned pursuant to N.C. R. App. P. 28(b)(5) (1999).

Defendant argues that plaintiff failed to lay a proper foundation for admission of the Inventory Certification within the business records exception to the hearsay rule. Rule 803(6) allows records to be admitted into evidence if: (1) it is a record of acts, events, or conditions, (2) it is made at or near the time [of the act, event, condition], (3) it is made by a person with knowledge, (4) it is kept in the regular course of business, (5) it is the regular practice of that business to make such a record, and (6) such is shown by the testimony of the custodian or other qualified witness. N.C. Gen. Stat. § 8C-1, Rule 803(6) (1999).

Defendant does not challenge the trustworthiness of the document. The trial court noted in its findings of fact that the parties

stipulated to the authenticity of the document. Defendant's contention is an attempt to demand what Rule 803(6) expressly does not require: the in-court testimony of the person who prepared the business record.

Rule 803(6) expressly permits the use of a custodian's testimony to establish a foundation for admission of the record. *State v. Woods*, 126 N.C. App. 581, 590, 486 S.E.2d 255, 260 (1997). The rule does not require that this foundation be established by an employee of Trendline. *Id.* Under Rule 803(6) the record is admissible, once the proper foundation for admission is established "by the testimony of the custodian or other qualified witness." *Id.*; *see also* N.C. Gen. Stat. § 8C-1, Rule 803.

Defendant testified that Trendline was required to furnish plaintiff with inventory reports on a weekly or monthly basis. Defendant further testified that he delegated the duty of preparing and forwarding the inventory reports to Mark Slagg. Gordon Jones testified on *voir dire* that he worked for plaintiff and was in charge of Trendline's account. Mr. Jones further testified that: (1) he regularly received monthly inventory certifications from Trendline, (2) each certification was signed by Mark Slagg, and (3) the inventory certifications were required as part of Trendline's Security Agreement.

The trial court found that the Inventory Certification, dated December 3, 1997, was prepared in the regular course of business by Trendline for the specific purpose of satisfying its obligation under the Security Agreement, that the document was obtained by plaintiff in the regular course of its business and made a part of its operating documents relative to this case, that it was relevant, that authenticity had been stipulated too, and that the probative value outweighs any undue prejudice.

We agree that the Inventory Certification was admissible under Rule 803(6). In *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985), our Supreme Court held that "business records made in the ordinary course of business at or near the time of the transaction involved are admissible as an exception to the hearsay rule if they are authenticated by a witness who is familiar with them and the system under which they are made." The authenticity of such records may be established by circumstantial evidence and there is no requirement that the records be authenticated by the person who made them. *Id.* "[I]f the records themselves show that they were made at or near the

time of the transaction in question, the authenticating witness need not testify from personal knowledge that they were made at that time." *Id.* The determination of whether or not evidence should be excluded pursuant to Rule 403 is a matter within the discretion of the trial court. *Reis v. Hoots*, 131 N.C. App. 721, 727-28, 509 S.E.2d 198, 203 (1998).

III. Conclusion

We hold that plaintiff laid a proper foundation for admission of the Inventory Certification through the testimony of Gordon Jones, the custodian of the record. We also hold that the Inventory Certification met all requirements to be admitted into evidence under the business records exception to the hearsay rule.

No error.

Judges GREENE and HUNTER concur.

STATE OF NORTH CAROLINA, ON BEHALF OF TINA ROCHELLE BRIGHT, PLAINTIFF V. BRIAN JAMES FLASKRUD, DEFENDANT

No. COA01-305

(Filed 19 February 2002)

Paternity— acknowledgment—subsequent motion for DNA testing—Rule 60 motion required

The trial court erred by granting a motion to compel DNA testing to determine paternity where the father executed an acknowledgment of paternity, subsequently filed a Rule 60(b) motion attacking the acknowledgment and moved for DNA testing, and the court granted the motion for testing without ruling on the Rule 60(b) motion. Granting the Rule 60(b) motion would set aside the acknowledgment of paternity and reopen the issue, but without that ruling the prior orders remain in effect and defendant is barred by res judicata.

Appeal by the State from an order entered 15 December 2000 by Judge Joseph Williams in Richmond County District Court. Heard in the Court of Appeals 9 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Melanie Wade Goodwin for defendant-appellee.

WALKER, Judge.

On 25 September 1995, Brian James Flaskrud (the child) was born out of wedlock to Tina Rochelle Bright. Ms. Bright had been in an ongoing sexual relationship with the defendant prior to the birth of the child. At the time of the birth, she informed the defendant that he was the father.

On 6 November 1995, Ms. Bright executed a Mother's Affirmation of Paternity (AOC Form CV-605) certifying that she was the natural mother of the child and that defendant was the natural father. On 27 November 1995, defendant executed a Father's Acknowledgment of Paternity (AOC Form CV-604) certifying that he was the natural father of the child. On 19 December 1995, the district court entered an order of paternity which listed defendant as the natural father. On that same date, a Voluntary Support Agreement and Order was entered by the trial court in which the defendant agreed to contribute to the support of the child and provide health insurance for him. Thereafter, defendant provided health insurance and regularly sent payments to Ms. Bright for support of the child.

In July of 1996, defendant was informed that Ms. Bright was telling others that he was not the father. According to the defendant, he came to this State and confronted Ms. Bright, who admitted that defendant was not the father of the child. Ms. Bright and the defendant then met with Barbara Mathews, a representative of the Richmond County IV-D Child Support Enforcement Agency, who informed them that the Agency could not get the acknowledgment of paternity and consent support order set aside. Defendant asserts that he erroneously believed, based on that conversation, that he could not get these orders set aside. Thereafter, defendant did not provide any support or health insurance coverage for the child.

After Ms. Bright initiated actions to require defendant to support the child, defendant filed a motion, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) (1999), asking the trial court to set aside the order of paternity and the voluntary consent to support order. He also moved the court for an order compelling DNA testing to determine

paternity. The State, on behalf of Ms. Bright, then filed a motion to modify the existing consent support order to require the defendant to pay child support in the future.

After a hearing, the trial court made findings and conclusions before ordering the parties and the child to submit to DNA testing to determine paternity. The trial court declined to rule on the Rule 60(b) motion and on Ms. Bright's motion for future child support.

In this appeal, Ms. Bright challenges the granting of the motion compelling DNA testing contending that paternity was established in 1995. This Court has held that it is proper for a party to attack an acknowledgment of paternity or an order of paternity by a Rule 60(b) motion. *Leach v. Alford*, 63 N.C. App. 118, 304 S.E.2d 265 (1983). The granting of a Rule 60(b) motion would set aside the acknowledgment of paternity and order of support and would reopen the issue of paternity. However, without such a Rule 60(b) motion ruling, these orders remain in effect.

N.C. Gen. Stat. § 8-50.1(b1) requires the trial court to grant a motion for blood tests in "any civil action in which the question of parentage arises." However, where *res judicata* prevents a defendant from challenging paternity, there is no action "in which the question of parentage arises" and it is error to compel blood testing. *Williams v. Holland*, 39 N.C. App. 141, 143, 249 S.E.2d 821, 823 (1978). A party is barred under the doctrine of *res judicata* from contesting paternity when there is an acknowledgment of paternity or an order of paternity in effect and binding on him. *Ambrose v. Ambrose*, 140 N.C. App. 545, 536 S.E.2d 855 (2000); *State ex rel. Hill v. Manning*, 110 N.C. App. 770, 431 S.E.2d 207 (1993); *Dorton v. Dorton*, 69 N.C. App. 764, 318 S.E.2d 344, *review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984); *Williams*, *supra*.

In the present case, the trial court allowed defendant's motion for DNA testing without addressing his Rule 60(b) motion. As this Court held in *Leach*, "defendant is entitled to his day in court" to show whether any grounds exist under Rule 60(b) to set aside the acknowledgment of paternity and voluntary child support order by which he might otherwise be estopped from re-litigating the issue of paternity. *Leach*, 63 N.C. App. at 125, 304 S.E.2d at 269. However, until the trial court addresses the defendant's Rule 60(b) motion, it is error for the trial court to grant his motion to compel DNA testing.

Reversed and remanded.

Judges McGEE and BIGGS concur.

GERALDINE H. STEADMAN, PLAINTIFF v. THOMAS ALAN STEADMAN, DEFENDANT

No. COA01-376

(Filed 19 February 2002)

Appeal and Error— appealability—interlocutory order—partial summary judgment—spousal support agreement

Defendant husband's appeal from the trial court's grant of partial summary judgment in favor of plaintiff wife regarding arrearages owed to plaintiff under the terms of the parties' spousal support agreement is dismissed as an appeal from an interlocutory order and defendant is taxed under N.C. R. App. P. 34(a)(2) with the entire costs because this appeal is defendant's second premature appeal to the Court of Appeals.

Appeal by defendant from order entered 15 December 2000 by Judge H. Paul McCoy, Jr., in Halifax County District Court. Heard in the Court of Appeals 31 January 2002.

William T. Skinner, IV, for plaintiff-appellee.

Moseley, Elliott, Sholar, and Dickens, L.L.P., by William F. Dickens, Jr., for defendant-appellant.

SMITH, Judge.

Defendant appeals from an order of the district court granting partial summary judgment in favor of plaintiff. In the order, the trial court determined that plaintiff was entitled to a money judgment against defendant for arrearages owed to her under the terms of a spousal support agreement. The court then stated:

> The balance of the issues for the Court to determine on summary judgment concerning the amount of the money judgment to be established in favor of the plaintiff and the amount of attorney

> fees to be allowed to plaintiff's attorney is continued for hearing at the February 6, 2001 Session of Halifax County Civil District Court.

Prior to the trial court's determination of the amount of money due plaintiff, defendant filed notice of appeal to this Court.

Defendant has appealed from an interlocutory order. An order 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) (citation omitted). Although interlocutory orders are generally not immediately appealable, a litigant may appeal from an interlocutory order which affects a substantial right. *Hart v. F.N. Thompson Constr. 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). A substantial right has been defined as "one which 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). It is well settled that a judgment which determines liability but which leaves unresolved the amount of damages is interlocutory and cannot affect a substantial right:

> [i]f . . . [such a] partial . . . judgment is in error defendant can preserve its right to complain of the error on appeal from the final judgment by a duly entered exception. Even if defendant is correct on its legal position, the most it will suffer from being denied an immediate appeal is a trial on the issue of damages.

Johnston v. Royal Indemnity Co., 107 N.C. App. 624, 625, 421 S.E.2d 170, 171 (1992) (citation omitted). Defendant's appeal in the present case is interlocutory, does not affect a substantial right, and the appeal is therefore dismissed. We remand this case for a determination of the amount of money due plaintiff as a result of defendant's non-payment of spousal support and such other proceedings as may be appropriate.

In addition, we note that this interlocutory appeal is the second premature appeal to this Court by this defendant in the instant case. Accordingly, this Court is constrained to conclude that the appeal was taken for an improper purpose so as to cause unnecessary delay and needless increase in the cost of this litigation. N.C.R. App. P. 34(a)(2). Pursuant to Rule 34, the Court imposes the following

sanction: the appellant is taxed with the entire costs, to be doubled, with appellant paying one cost and appellant's counsel paying one cost.

Appeal dismissed and costs taxed to appellant and appellant's counsel.

Judges TIMMONS-GOODSON and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 FEBRUARY 2002

COVINGTON v. McCREERY No. 01-371	Wake (99CVD2155)	Affirmed
IN RE PAWLEY No. 01-315	Buncombe (99J141)	Reversed
KANUPP v. KANUPP No. 00-1271	Caldwell (96CVD1509)	Remanded
MYERS v. MYERS No. 00-1092	Johnston (00CVD108)	Reversed in part, vacated and remanded in part
STATE v. BOWENS No. 01-360	Durham (00CRS10439) (00CRS55488)	No error
STATE v. COMPTON No. 00-1283	Rockingham (99CRS12746)	No prejudicial error
STATE v. HARRIS No. 01-240	Wake (98CRS60662) (98CRS87026)	No error
STATE v. IVEY No. 01-65	Mecklenburg (99CRS105861) (99CRS105863) (99CRS105870) (99CRS105872)	No error
STATE v. RICHARDSON No. 01-147	Union (99CRS17290) (00CRS3018) (00CRS3020)	No error
STATE v. WARREN No. 01-219	Hyde (00CRS0188)	Reversed and remanded
STATE v. WESTMORELAND No. 00-1288	Davidson (98CRS3741) (98CRS3742) (98CRS3743) (98CRS3744)	No error
STATE v. WILSON No. 01-101	Forsyth (99CRS13097) (99CRS13098) (99CRS13099) (99CRS13100)	No error

STEG v. STEG No. 00-1299	Catawba (96CVD2864)	Affirmed in part and reversed in part
STEG v. STEG No. 00-1333	Catawba (96CVD2864)	Affirmed
SUN LIFE ASSURANCE CO. v. PACK'N POST AT PRESTON, INC. No. 01-193	Wake (00CVD157)	Affirmed
WALTERS v. COLE No. 01-70	Harnett (00CVS327)	Affirmed in part, reversed and remanded in part

APPENDIXES

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

In the Supreme Court of North Carolina
Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

Rules of Rules of Appellate Procedure 30(e)(2) and 30(e)(4) are hereby amended as described below:

Rule 30(e)(2) is modified to state:

"The text of a decision without published opinion shall be posted on the Administrative Office of the Court's North Carolina Court System Internet web site and reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the North Carolina Court of Appeals Reports."

Rule of Appellate Procedure 30 is amended further to add a new subsection (e)(4) which states:

"Counsel of record and *pro se* parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1), and serving a copy of the motion upon all other counsel and *pro se* parties of record. The motion shall be filed and served within 10 days of the filing of the opinion. Any objection to the requested publication, by the counsel or *pro se* parties of record, must be filed within 5 days after service of the motion requesting publication. The panel which heard the case shall determine whether to allow or deny such motion."

These amendments to the Rules shall be effective 1 January, 2002.

Adopted by the Court in Conference this the 18th day of October, 2001. The Appellate Division Reporter shall publish these Rules in the Advance Sheets of the Supreme Court and the Court of Appeals and on the Administrative Office of the Court's North Carolina Court System Internet web site, at the earliest practicable date.

s/Butterfield, J.
Butterfield, J.
For the Court

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WORD AND PHRASE INDEX

HEADNOTE INDEX

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CRIMINAL LAW

Aggravated assault—disjunctive instructions—erroneous—The trial court erroneously gave disjunctive instructions in a prosecution for assault with a deadly weapon inflicting serious injury where the court told the jury to return a verdict of guilty if it found that defendant beat the victim with his hands and feet and/or a chain, and that defendant's hands and feet and/or the chain were deadly weapons. **State v. Lotharp, 435.**

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Jury instructions—failure to give limiting instruction about exhibit—The trial court did not err in a prosecution for two murders by failing to give the jury a limiting instruction at the time the written statement by the one victim's father was taken into the jury room. **State v. Demos, 343.**

Plea agreement—rejection by judge—There was no error where the trial court rejected a plea agreement by which defendant would have pled guilty to felonious child abuse in exchange for dismissing a first-degree sexual offense charge and a limit on his sentence. A plea agreement must have judicial approval before it is effective, and a decision by a judge disapproving a plea agreement is not subject to appeal. N.C.G.S. § 15A-1023(b). **State v. Santiago, 62.**

EVIDENCE—Continued

doctor was no better qualified than the jury to determine whether the rectal tear was the result of abuse. The doctor's testimony was related to a diagnosis based upon her medical examination of the victim and the doctor was an expert in pediatrics and the identification of child abuse who had examined thousands of children. **State v. Santiago, 62.**

Expert testimony—credibility of victim—The trial court in a first-degree statutory sexual offense and taking indecent liberties with a minor case did not improperly permit a licensed professional counselor and a doctor to testify as to the credibility of the minor victim where both witnesses testified only as to the general characteristics of children who suffer from sexual abuse. **State v. Isenberg, 29.**

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Hearsay—catch-all exception—statement from nontestifying witness—duplicative—There was no prejudice in an assault prosecution where the court refused defendant's motion to introduce a prior statement of a witness who refused to testify under the catch-all exception of N.C.G.S. § 8C-1, Rule 804(b) where defendant did not explain how the statement would have contributed to his defense, other than adding to the six descriptions of the events from those who testified. **State v. Poland, 588.**

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EVIDENCE—Continued

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TERMINATION OF PARENTAL RIGHTS—Continued

court believed that a presumption that termination was in the best interests of the child arose after a finding of grounds for termination. There is no presumption or burden of proof after a finding of grounds for termination; the determination of best interests is more in the nature of an inquisition, with the trial court having the obligation to secure whatever evidence it deems necessary for the decision. **In re Mitchell, 483.**

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wrote each word of a holographic will which included the phrases "bank close" and "to and wife Valerie" written with a different pen. Although an expert testified that the disputed phrases were not in the testator's handwriting, several other witnesses testified that the testator added one of the phrases, the testator died eight years after writing the main body of the will and had suffered a stroke in the meantime, and the expert had not examined any other exemplars of the testator's handwriting. **In re Will of Allen, 526.**

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WORKERS' COMPENSATION

WORKERS' COMPENSATION—Continued

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WORD AND PHRASE INDEX

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