NORTH CAROLINA COURT OF APPEALS REPORTS

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GENERAL STATUTES CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

CONSTITUTION OF UNITED STATES CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF APPELLATE PROCEDURE CITED

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SHAWN PATRICK KNIGHT, EMPLOYEE, PLAINTIFF v. WAL-MART STORES, INC., EMPLOYER; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, CARRIER; DEFENDANTS

No. COA01-108

(Filed 5 March 2002)

1. Workers' Compensation— disability—findings—sufficient

The findings of the Industrial Commission in a workers' compensation case supported the conclusion that plaintiff is disabled; medical testimony that a plaintiff suffers from severe pain from a physical injury, combined with the plaintiff's own credible testimony that his pain is so severe that he is unable to work, may be sufficient to support a conclusion of total disability.

2. Workers' Compensation— disability—evidence considered

The record in a workers' compensation case does not indicate that the Industrial Commission failed to consider evidence that plaintiff was not disabled where it is likely that the Commission recognized that the evidence cited by defendants does not necessarily conflict with the conclusion that plaintiff is unable to work due to pain.

3. Workers' Compensation— maximum medical improvement—significance

Any error by the Industrial Commission in a workers' compensation case concerning maximum medical improvement (MMI) was immaterial where plaintiff had established a total loss of wage earning capacity pursuant to N.C.G.S. § 97-29, did not

seek benefits pursuant to N.C.G.S. § 97-31, and did not seek to establish that his total loss of wage earning capacity is permanent. The primary significance of MMI is to delineate when the healing period ends and the statutory period begins in cases involving an employee who may be entitled to benefits for a physical impairment listed in N.C.G.S. § 97-31 and does not represent the point in time at which a loss of wage-earning capacity under N.C.G.S. § 97-29 or N.C.G.S. § 97-30 automatically converts from temporary to permanent.

4. Workers' Compensation— withdrawal from pain medications—detoxification program

An Industrial Commission finding in a workers' compensation action regarding plaintiff's withdrawal from pain medications and entry into a detoxification program was supported by competent evidence where plaintiff testified that his doctor prescribed heavy narcotic pain medicines over a 6-month period, that the doctor decided against a refill because plaintiff was taking too much, that plaintiff abruptly discontinued the medicines and experienced withdrawal symptoms, and that he entered a detoxification program as a result.

5. Workers' Compensation— costs—mediated settlement conference

The Industrial Commission did not err in a workers' compensation action by ordering defendants to pay costs, including those of a mediated settlement conference.

Judge BRYANT dissenting in part.

Appeal by defendants from an Opinion and Award entered 14 July 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 November 2001.

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

Young Moore and Henderson, P.A., by Joe S. Austin, Jr. and Zachary C. Bolen, for defendant-appellants.

HUNTER, Judge.

Wal-Mart Stores, Inc. ("Wal-Mart") and the Insurance Company of the State of Pennsylvania (together "defendants") appeal from an

opinion and award entered by the North Carolina Industrial Commission ("the Commission") awarding Shawn Patrick Knight ("plaintiff") disability benefits. We affirm.

The evidence presented at the hearing tended to establish the following facts. Plaintiff has a history of back injuries, beginning with an injury at work in August of 1990 which caused him to experience pain running down his left leg and which resulted in surgery in 1991 to repair a ruptured disk. In 1993, plaintiff experienced a minor injury to his back. Plaintiff testified that his back bothered him occasionally between 1993 and the accident in 1998.

In 1998, plaintiff was employed by Wal-Mart stocking freight at night, and his job required him, among other tasks, to lift goods and place them on shelves. On 15 March 1998, plaintiff's supervisor directed plaintiff to remove some computers from the top riser. Plaintiff climbed to the top of an eight-foot stepladder, picked up a computer, and started climbing down. When he reached the second-to-last rung, the computer started to fall. He attempted to step down to the last rung, but he missed the rung and fell to the floor. Plaintiff felt something "pop" or "jerk" in his back as he fell, and he landed on his hip. Plaintiff tried to walk around but felt pain running down his left leg. He reported the accident to his supervisor and his supervisor filled out an accident report. After plaintiff indicated that he might need medical attention, a co-employee drove him to the hospital. At the hospital, plaintiff was diagnosed with broad-based disk protrusion. Plaintiff received some painkillers and then returned to work later that night.

Plaintiff returned to work on a few occasions during the next week, including 21 March (for six hours), 22 March (for eight hours), and 24 March (for eight hours). During this time he continued to feel pain in his lower back and running down his left thigh. Following 24 March 1998, plaintiff stopped working due to "pain" and "discomfort."

Dr. Joseph King, an orthopaedic surgeon, first saw plaintiff on 9 April 1998. Dr. King opined that plaintiff "had continued pain in that left leg radiating all the way down the leg and that was quite consistent throughout the course of his treatment." Dr. King opined that the accident at Wal-Mart could have aggravated or accelerated plaintiff's pre-existing back problems. On 30 April, Dr. King saw plaintiff again and noted that he continued to suffer significant pain. Dr. King prescribed a pain medication for plaintiff at that time.

Plaintiff returned to work on 21 May 1998, during which time he sat on a stool in the electronics department and did nothing. Plaintiff testified that this was not a job that any employees normally perform at Wal-Mart. Tracy Stillwell, the store manager, provided testimony corroborating these facts. After a while, plaintiff began to experience significant discomfort and pain in his lower back and leg from sitting, and as a result of this pain plaintiff left work after a few hours. After 21 May, Wal-Mart offered plaintiff a light duty position shelving some "returns" at night, and plaintiff tried this work two or three times but was unable to remain at work due to pain.

Dr. King performed a laminectomy on plaintiff on 22 July 1998. Plaintiff chose to have the surgery, despite the risks, because he "didn't see any alternative to relieving the pain." However, plaintiff testified that he did not experience any relief from the surgery.

Plaintiff again worked on 7 September (four hours), 3 November (eight hours), and 4 November (five hours). In January of 1999, Wal-Mart offered plaintiff light duty work as a sweeper, or greeter, or stock return person. Plaintiff told Wal-Mart that he did not feel he was able to return to work due to his pain. Plaintiff testified that he tried to sweep at home and was only able to sweep for fifteen to thirty minutes. On other occasions plaintiff attempted to work as a return clerk, but was unable to work due to pain in his lower back and left leg.

Dr. King saw plaintiff again on 4 January 1999, at which time plaintiff was still suffering from pain. At that time, Dr. King concluded that plaintiff had improved as much as he was likely to improve. In addition, Dr. King found that plaintiff's left ankle reflex was not present (which, he explained, means that the nerve is not functioning properly). Dr. King stated that this finding suggests "objective nerve damage," meaning "[s]omething that [plaintiff] has no control over." He testified that because plaintiff's reflexes were normal in July of 1998, the finding further suggests that "there may have been some different pressure on that nerve," and that such pressure upon a nerve is connected to pain. Dr. King testified that plaintiff's complaints of burning and pain down into his thigh area, and numbness in his left foot, are consistent with Dr. King's findings.

On 4 January 1999, and on various other occasions during Dr. King's treatment of plaintiff, he gave plaintiff "return-to-work" slips containing various restrictions on how much weight plaintiff should lift. Dr. King testified that the purpose of giving plaintiff return-to-work slips was to help plaintiff return to gainful employment in order

to see whether the pain would prevent him from working. He also explained that, in his opinion, the return-to-work slips and the restrictions were unrelated to whether plaintiff's pain would prevent him from working.

Dr. King further testified that there is no objective medical reason that plaintiff cannot return to work with certain lifting restrictions, and that plaintiff's complaints of pain are more severe than one would normally expect given plaintiff's physical status. However, Dr. King also testified that the type of injury plaintiff has can be very painful, that sitting can cause the pain to become much worse, and that, in his opinion, plaintiff's complaints of significant pain are genuine.

Dr. King also testified that plaintiff has reached a point of maximum medical improvement ("MMI"), and that, although identifying the date at which plaintiff reached MMI is difficult (because plaintiff has never shown *any* improvement since the injury), he would suggest 4 January 1999 as the date at which he became convinced that plaintiff would not further improve. In addition, Dr. King assigned a disability rating of fifteen percent to plaintiff's back.

At the time of the hearing on 26 January 1999, plaintiff was experiencing numbness in his left foot, as well as pain in his lower back and his left leg. Plaintiff was not taking any pain medication because Dr. King had refused to refill his prescription. Plaintiff testified that although Wal-Mart has paid for plaintiff's medical bills, prescription bills, and for his visits to Carolina Bone and Joint, Wal-Mart has never offered plaintiff any vocational rehabilitation services. Further, plaintiff testified that he has not pursued vocational rehabilitation because he does not believe he is fit to return to work.

In its Opinion and Award, the Commission first noted that "[a]t the hearing before the Full Commission, the parties orally stipulated that compensation awarded herein would terminate as of 11 May 1999, and that compensation after that date shall be determined by agreement of the parties or by Order of the Industrial Commission." The Commission then set forth findings of fact consistent with the facts set forth above, including the following pertinent findings of fact:

> 11. Dr. King stated that plaintiff's pain complaints were consistent with his injury and that he has no doubt that plaintiff has been truthful about his pain. Dr. King further opined that plaintiff's fall off of the ladder on 16 March 1998, could have aggra-

vated or accelerated any existing back pain or back injury that plaintiff may have had on 16 March 1998.

. . .

14. . . . Having weighed the testimony of both parties, the Deputy Commissioner gave more weight to the testimony of plaintiff, and the Full Commission adopts that determination.

The Commission also entered the following pertinent conclusions of law:

1. Plaintiff sustained a compensable injury by accident to his back arising out of and in the course of his employment with defendant-employer and as a direct result of a specific traumatic incident of the work assigned on 16 March 1998, which aggravated, exacerbated and/or accelerated an underlying pre-existing back condition.

. . .

3. Plaintiff is entitled to workers' compensation benefits in the amount of $149.10 per week beginning 16 March 1998, and continuing until 11 May 1999. . . .

We note that, although it is not expressly stated in the Opinion and Award, it is clear from the context that the Commission's award of compensation was made pursuant to the conclusion that plaintiff has suffered a total loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 (1999).

On appeal, defendants have set forth seventeen assignments of error in the record. Six of these assignments of error are not set out in defendants' brief and are, therefore, deemed abandoned. *See* N.C.R. App. P. 28(b)(5). Defendants have condensed the remaining eleven assignments of error into five arguments for our review.

I.

[1] By their first argument, defendants contend that the Commission's findings of fact do not support its conclusion that plaintiff is disabled. Defendants essentially contend that, although there is competent evidence that plaintiff suffers from a painful physical infirmity, plaintiff has failed to provide evidence establishing a diminished capacity to earn wages. Therefore, defendants argue, although the findings may be supported by the evidence,

they are insufficient to support the legal conclusion of a disability. We disagree.

The Industrial Commission's conclusions of law are fully reviewable by the appellate courts. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). " 'In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent.' " *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)). "Under the Workers' Compensation Act, disability is defined by a diminished capacity to earn wages, not by physical infirmity." *Id.* at 764, 487 S.E.2d at 750 (citing N.C. Gen. Stat. § 97-2(9) (1991)). Thus, the employee has the burden "to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citing *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684).

> The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he 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) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. (citations omitted). Under the facts in the present case, it is clear that plaintiff has not attempted to establish disability by means of the second, third, or fourth methods outlined by this Court in *Russell*. Thus, plaintiff had the burden of producing "medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment." *Id.* We believe plaintiff has produced such evidence, and that the Commission's findings of fact, based upon this evidence, support the conclusion of disability.

"In determining if plaintiff has met this burden [of establishing a loss of wage-earning capacity], the Commission must consider not only the plaintiff's physical limitations, but also his testimony as to

his pain in determining the extent of incapacity to work and earn wages such pain might cause." *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512, 540 S.E.2d 790, 793 (2000), *cert. denied*, 353 N.C. 398, 548 S.E.2d 159 (2001). Moreover, medical evidence that a plaintiff suffers from genuine pain as a result of a physical injury, combined with the plaintiff's own credible testimony that his pain is so severe that he is unable to work, may be sufficient to support a conclusion of total disability by the Commission. *See Webb*, 141 N.C. App. 507, 540 S.E.2d 790; *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 517 S.E.2d 914 (1999); *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 423 S.E.2d 532 (1992).[1]

Here, Dr. King testified that plaintiff continues to suffer from genuine pain due to his back injury. In addition, plaintiff testified that the pain in his lower back and left leg is so severe that, not only is he unable to work in any employment, he is often unable to undertake even simple chores, such as sweeping, for more than thirty minutes. Such testimony constitutes "competent evidence as to [plaintiff's] ability to work." *Niple v. Seawell Realty & Insurance Co.*, 88 N.C. App. 136, 139, 362 S.E.2d 572, 574 (1987), *disc. review denied*, 321 N.C. 744, 365 S.E.2d 903 (1988). The Commission determined that plaintiff's testimony was credible and accorded this testimony significant weight. *See Matthews*, 108 N.C. App. at 264, 423 S.E.2d at 535 (holding that Commission is sole judge of credibility of witnesses and weight to be given their testimony, and its determination of these issues is conclusive on appeal). The Commission entered findings consistent with this evidence, and these findings, in turn, support the legal conclusion that plaintiff is disabled. Thus, we reject defendants' first argument.

II.

[2] By their second argument, defendants contend that the Commission failed to give adequate consideration to certain competent evidence tending to show that plaintiff is not disabled. Specifically, defendants argue that the Commission failed to consider evidence that plaintiff had not taken any steps to find employment since the date of injury, and also that plaintiff had, on certain occasions, declined Wal-Mart's offers to allow plaintiff to work as a safety-

1. We note that this case involves an initial determination of disability pursuant to N.C. Gen. Stat. § 97-29, and should therefore be distinguished from our opinion in *Shingleton v. Kobacker Group*, 148 N.C. App. 667, 559 S.E.2d 277 (2002), which involves a plaintiff seeking to establish "a change in condition" pursuant to N.C. Gen. Stat. § 97-47 (1999).

monitor or a greeter. However, because plaintiff established disability by means of the first method outlined in *Russell* (showing that he is incapable of earning wages in any employment), and not by means of the second method (showing that he is capable of some work but has been unable to obtain employment), this evidence was not relevant to the Commission's ultimate determination.

Defendants also contend that the Commission failed to consider that Dr. King gave plaintiff "return-to-work" slips on various occasions. However, a close reading of Dr. King's testimony reveals that his reason for giving plaintiff return-to-work slips was to encourage plaintiff to attempt to return to work in order to see whether the pain would prevent him from working, and that, in Dr. King's opinion, his giving plaintiff return-to-work slips did not represent any medical opinion as to whether plaintiff would be able to work in spite of his pain. Finally, defendants contend that the Commission should have considered Dr. King's testimony that there was no medical reason why plaintiff could not return to work within the limitations of the lifting restrictions. Again, a close reading of Dr. King's testimony reveals Dr. King's opinion that, while plaintiff's objective medical condition may not have directly prevented him from working within certain restrictions, plaintiff's subjective pain resulting from his back injury may have prevented him from working in any capacity. Furthermore, Dr. King opined, and the Commission found, that plaintiff's complaints of severe pain are genuine.

The record does not indicate that the Commission failed to consider the evidence cited by defendants. Rather, it is more likely that the Commission simply recognized that the evidence cited by defendants does not necessarily conflict with the conclusion that plaintiff is incapable of work due to pain. For this reason, we reject defendants' second argument.

III.

[3] By their third argument, defendants contend that the Commission erred in finding that plaintiff had not reached the end of his healing period (also referred to as the point of "maximum medical improvement" or "MMI") by 4 January 1999. The Commission's finding states:

> 12. Dr. King determined that by 4 January 1999, he had exhausted all efforts for treatment of plaintiff's . . . back condition which he deemed appropriate, but plaintiff had not "gotten any

> better anywhere along the way." On that basis, Dr. King stated that one could pick any date subsequent to 16 March 1998 as the date plaintiff's condition had reached a plateau in regard to recovery. For this reason, no weight is given to Dr. King's opinion on when plaintiff reached maximum medical improvement. *Plaintiff had not reached the end of his healing period on 4 January 1999.* However, Dr. King stated that it was possible that plaintiff may not be able to return to regular duty. Dr. King further noted that plaintiff's previous restrictions to alternate sitting and standing and to lift no more than five pounds remained appropriate.

(Emphasis added.) Defendants contend that this allegedly erroneous finding is significant because, had the Commission found that plaintiff *had* reached MMI by 4 January 1999, "it could not have concluded that plaintiff was entitled to disability benefits after January 4, 1999." We disagree because we believe the concept of MMI is not relevant under these circumstances.

An employee seeking indemnity benefits pursuant to the Workers' Compensation Act has, at the outset, two very general options.[2] First, an employee may seek indemnity benefits by showing that the employee has suffered a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-30 (1999). *See* N.C. Gen. Stat. § 97-2(9) (1999) ("disability" is defined as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment"). A loss of wage-earning capacity may either be total, in which case the employee is entitled to benefits pursuant to N.C. Gen. Stat. § 97-29, or partial, in which case the employee is entitled to benefits pursuant to N.C. Gen. Stat. § 97-30. *See Gupton v. Builders Transport*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987). If the loss of wage-earning capacity is total, the employee is entitled to receive benefits for as long as the total loss of wage-earning capacity lasts with no limitation as to duration. *See* N.C. Gen. Stat. § 97-29; *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 434, 444 S.E.2d 191, 195 (1994). If the loss of wage-earning capacity is partial, the employee is entitled to receive benefits for as long as the partial loss of wage-earning capacity lasts, up to a maximum of 300 weeks. *See* N.C. Gen. Stat. § 97-30. In either case, the focus is upon the employee's loss of wage-earning capacity.

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2. These two options are, of course, not exhaustive, since there are a few additional categories of other specific benefits available to particular claimants; examples include claims for death benefits, claims due to asbestosis and silicosis, and claims for hearing loss.

Furthermore, once an employee initially establishes a loss of wage-earning capacity, a presumption of "ongoing" or "continuing" disability arises, and the burden shifts to the employer to show that the employee is capable of earning wages. *See Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 329, 477 S.E.2d 197, 202 (1996); *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990). Finally, as to claims involving a loss of wage-earning capacity, it is important to recognize that, although the Act does not define the terms "temporary" or "permanent," *see Gamble v. Borden, Inc.*, 45 N.C. App. 506, 508, 263 S.E.2d 280, 281 (1980), an incapacity to earn wages (whether total under N.C. Gen. Stat. § 97-29 or partial under N.C. Gen. Stat. § 97-30) is often further categorized as either "temporary" or "permanent." *See, e.g., Watts v. Brewer*, 243 N.C. 422, 423, 90 S.E.2d 764, 766 (1956).

The second option available to an employee seeking indemnity benefits is to show that the employee has a specific physical impairment that falls under the schedule set forth in N.C. Gen. Stat. § 97-31 (1999), regardless of whether the employee has, in fact, suffered a loss of wage-earning capacity.[3] In order to receive scheduled benefits pursuant to N.C. Gen. Stat. § 97-31, an employee with a physical impairment that falls under the schedule need not establish a loss of wage-earning capacity because disability is presumed from the fact of the injury itself. *See, e.g., Watts v. Brewer*, 243 N.C. 422, 424, 90 S.E.2d 764, 767 (1956) (holding that the phrase "shall be deemed to continue" in N.C. Gen. Stat. § 97-31 means that an employee with an injury listed under N.C. Gen. Stat. § 97-31 is presumed to be disabled regardless of any actual loss of wage-earning capacity).

N.C. Gen. Stat. § 97-31 establishes a specific framework for claims falling under that section. It provides that compensation for a scheduled physical impairment is available during two specific periods of time: (1) during "the healing period" of the injury; and (2) for an additional, statutorily-prescribed period of time (referred to herein as "the statutory period"), which begins when the healing period ends and runs for the specific number of weeks set forth in the statute for each type of impairment. However, it is important to

3. We note that in cases where an employee has a specific physical impairment that falls under N.C. Gen. Stat. § 97-31, and is also able to show a loss of wage-earning capacity (whether partial or total), the employee may elect to seek benefits under whichever statutory section will provide the more favorable remedy. *See Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986); *Gupton*, 320 N.C. 38, 357 S.E.2d 674.

recognize that, to the extent that N.C. Gen. Stat. § 97-31 allows for compensation for "disability during the healing period," it does not actually create an additional statutory basis for recovery beyond that found in N.C. Gen. Stat. § 97-29 and § 97-30. The reason that this language—allowing for compensation for "disability during the healing period"—is included in N.C. Gen. Stat. § 97-31 is simply to clarify that an employee who has suffered a physical impairment listed under N.C. Gen. Stat. § 97-31, and who, in addition, suffers a partial or total loss of wage-earning capacity during "the healing period" for that impairment, may (1) receive compensation pursuant to N.C. Gen. Stat. § 97-29 or § 97-30 during "the healing period" and (2) thereafter receive scheduled benefits provided in N.C. Gen. Stat. § 97-31 for the employee's specific physical impairment (regardless of any loss of wage-earning capacity). *See Watkins v. Motor Lines*, 279 N.C. 132, 136, 181 S.E.2d 588, 591 (1971) (citing *Rice v. Panel Co.*, 199 N.C. 154, 154 S.E. 69, (1930)).

For example, an employee who loses a thumb in a work-related accident, and who is unable to work during a seven-week healing period, and who then returns to work earning the employee's pre-injury wages, is entitled to seek the following compensation. First, prior to reaching the end of "the healing period," the employee may seek compensation for a loss of wage-earning capacity under N.C. Gen. Stat. § 97-29 or § 97-30. Second, once "the healing period" ends, the employee may seek compensation for the employee's specific physical impairment pursuant to N.C. Gen. Stat. § 97-31(1) for a duration of seventy-five weeks. *See Watts*, 243 N.C. 422, 90 S.E.2d 764; N.C. Gen. Stat. § 97-31(1).

Understanding this framework established by N.C. Gen. Stat. § 97-31 (contemplating a "healing period" followed by a statutory period of time corresponding to the specific physical injury) is crucial to understanding the primary legal significance of MMI. Because N.C. Gen. Stat. § 97-31 allows an employee to receive scheduled benefits for a specific physical impairment only once "the healing period" ends, the question naturally arises: how is it determined when the healing period ends? This Court has answered the question by holding that the healing period in N.C. Gen. Stat. § 97-31 ends at the point when the injury has stabilized, referred to as the point of "maximum medical improvement" (or "maximum improvement" or "maximum recovery"). *See, e.g., Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288, 229 S.E.2d 325, 328-29 (1976), *disc. review denied*, 292 N.C. 467, 234 S.E.2d 2 (1977); *see also Carpenter v. Industrial Piping Co.*,

73 N.C. App. 309, 311, 326 S.E.2d 328, 330 (1985). Thus, before an employee may receive scheduled benefits pursuant to N.C. Gen. Stat. § 97-31, it must be established that the employee has reached the point of MMI with regard to the employee's specific physical impairment and, therefore, that the healing period has ended and the employee's physical impairment has become permanent. Once this is established, an employee may receive benefits for the specific physical impairment for the statutory period set forth in N.C. Gen. Stat. § 97-31 that corresponds to that impairment.

It is also important to bear in mind that neither N.C. Gen. Stat. § 97-29 nor N.C. Gen. Stat. § 97-30 contemplates a framework similar to that established by N.C. Gen. Stat. § 97-31 (involving a "healing period" followed by a statutory period). Under N.C. Gen. Stat. § 97-29 or § 97-30, the analysis is much more simple: as noted above, an employee may receive compensation once the employee has established a total or partial loss of wage-earning capacity, and the employee may receive such compensation for as long as the loss of wage-earning capacity continues, for a maximum of 300 weeks in cases of partial loss of wage-earning capacity.

There is a great deal of confusion regarding what significance, if any, the concept of MMI has within the context of a loss of wage-earning capacity pursuant to either N.C. Gen. Stat. § 97-29 or § 97-30, and this confusion has produced two lines of case law exemplified recently in two opinions simultaneously issued by this Court. *See Anderson v. Gulistan Carpet, Inc.*, 144 N.C. App. 661, 670-71, 550 S.E.2d 237, 243-44 (2001) (holding that an employee may not receive temporary total disability benefits after the employee has reached MMI); *Russos v. Wheaton Indus.*, 145 N.C. App. 164, 167-68, 551 S.E.2d 456, 459 (2001) (holding that the Industrial Commission did not err in awarding the plaintiff ongoing temporary total disability benefits after she had reached MMI), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 135, *reh'g denied*, 355 N.C. 494, 564 S.E.2d 44 (2002).

Until such time as either our legislature or our Supreme Court directly addresses and resolves the confusion in this area, it is incumbent upon this Court to attempt to clarify the law. Thus, we have carefully and thoroughly reviewed the Workers' Compensation Act and the case law, including our Supreme Court's recent denial of a petition for discretionary review in *Russos*.[4] We have concluded that the

4. We have also considered the import of our Supreme Court's *per curiam* opinion in *Neal v. Carolina Mgmt.*, 350 N.C. 63, 510 S.E.2d 375 (1999), reversing this Court's majority opinion and adopting the dissenting opinion in *Neal v. Carolina Management*,

primary significance of the concept of MMI is to delineate a crucial point in time *only within the context of a claim for scheduled benefits under N.C. Gen. Stat. § 97-31*, and that the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30.

It should first be noted that compensation received during "the healing period" under N.C. Gen. Stat. § 97-31 is sometimes referred to as compensation for "temporary disability," and compensation received during the statutory period under N.C. Gen. Stat. § 97-31 is sometimes referred to as compensation for "permanent disability." *See, e.g., Crawley*, 31 N.C. App. at 288, 229 S.E.2d at 328. Thus, in *Carpenter*, where the plaintiff sought benefits based upon a specific physical impairment listed under N.C. Gen. Stat. § 97-31, this Court stated: "Plaintiff seeks to recover under G.S. 97-31. That section provides for compensation of temporary disability during the healing period of the injury and for permanent disability at the end of the healing period, when maximum recovery has been achieved." *Carpenter*, 73 N.C. App. at 311, 326 S.E.2d at 329.

Although these statements in *Carpenter* were clearly made within the specific context of an employee seeking to recover pursuant to N.C. Gen. Stat. § 97-31, this Court in *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996), appears to have interpreted *Carpenter* as holding that *all* "temporary" disability benefits (even those awarded under N.C. Gen. Stat. § 97-29 or § 97-30) may only be received during "the healing period" (or prior to reaching MMI), and that after reaching MMI, an employee may only receive permanent benefits:

> Temporary total disability is payable only "during the healing period." The "healing period" ends when an employee reaches "maximum medical improvement." Only when an employee has reached "maximum medical improvement" does the question of her entitlement to permanent disability arise.

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130 N.C. App. 228, 502 S.E.2d 424 (1998). We interpret the dissenting opinion, and therefore the Supreme Court's *per curiam* opinion, as standing for the narrow proposition that "maximum medical improvement, by definition, means that the employee's healing period has ended." *Id.* at 235, 502 S.E.2d at 429.

> *Once an employee has reached her "maximum medical improvement," she may establish permanent incapacity pursuant to either section 97-29, -30, or -31.*
>
> . . . .
>
> In this case, the Commission determined, and plaintiff does not dispute, that plaintiff reached maximum medical improvement on 4 January 1993. *Thus, it was improper to award the plaintiff temporary total disability after this date.*

Id. at 204-05, 206, 472 S.E.2d at 385, 386 (citations omitted) (emphasis added). In other words, the Court appears to have applied the framework established by N.C. Gen. Stat. § 97-31 (wherein MMI marks the end of "the healing period") to benefits received under N.C. Gen. Stat. § 97-29 and § 97-30. Based upon this construction of the law, the Court in *Franklin* held that the only options available to the plaintiff after reaching MMI were benefits for (1) *permanent* total disability under N.C. Gen. Stat. § 97-29, (2) *permanent* partial disability under N.C. Gen. Stat. § 97-30, or (3) scheduled benefits under N.C. Gen. Stat. § 97-31. *Id.* at 206-07, 472 S.E.2d at 387.

Franklin appears to hold that MMI serves to delineate the point in time when "temporary disability" ends and "permanent disability" begins, *even within the context of a loss of wage-earning capacity established pursuant to N.C. Gen. Stat. § 97-29 or § 97-30.* In fact, it has become increasingly common for parties to argue precisely such a proposition to this Court, expressly relying upon *Franklin.* However, to the extent that *Franklin* states that an employee may not receive temporary total disability benefits under N.C. Gen. Stat. § 97-29 after the employee reaches MMI, such holding is inconsistent with *Carpenter* and the Workers' Compensation Act, and also conflicts with prior case law. *See, e.g., Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 475, 374 S.E.2d 483, 485 (1988) ("[w]e hold that the Industrial Commission erred in finding that because plaintiff reached maximum medical improvement she was not entitled to additional temporary total disability payments").

Perhaps more significantly, *Franklin* seems to imply (and, in fact, defendants here argue) that, in general, once an employer establishes that an employee has reached MMI, (1) any presumption of ongoing temporary disability established pursuant to N.C. Gen. Stat. § 97-29 or § 97-30 is thereby rebutted, (2) the burden of proof shifts back to the employee, and (3) the employee may only receive disability benefits

if the employee establishes the existence of a "permanent" disability. *See, e.g., Anderson*, 144 N.C. App. at 670, 550 S.E.2d at 243-44 (where this Court, in a case involving a total loss of wage-earning capacity, interpreted *Franklin* in precisely this way).

In fact, as established by case law both prior to *Franklin* and since *Franklin*, the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits (or upon an employee's presumption of ongoing disability) once the employee has established a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30. *See Watson*, 92 N.C. App. at 476, 374 S.E.2d at 485 ("[t]he maximum medical improvement finding is *solely* the prerequisite to determination of the amount of any permanent disability for purposes of G.S. 97-31" (emphasis added)); *Russos*, 145 N.C. App. at 167-68, 551 S.E.2d at 459 (holding that finding of MMI does not rebut presumption of ongoing disability, and that cases holding to the contrary, such as *Franklin*, are not supported by case law). An employee who establishes a total or partial loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30 is entitled to continue to receive benefits for as long as the loss of wage-earning capacity continues (up to a maximum of 300 weeks for partial disability), regardless of whether the employee's *physical injury* has reached a point of maximum medical improvement or not. The primary significance of the concept of MMI (or "maximum improvement" or "maximum recovery") is to delineate when "the healing period" ends and the statutory period begins in cases involving an employee who may be entitled to benefits for a physical impairment listed in N.C. Gen. Stat. § 97-31. In other words, MMI represents the first point in time at which the employee may elect, *if the employee so chooses*, to receive scheduled benefits for a specific physical impairment under N.C. Gen. Stat. § 97-31 (without regard to any loss of wage-earning capacity). MMI does not represent the point in time at which a loss of wage-earning capacity under N.C. Gen. Stat. § 97-29 or § 97-30 automatically converts from "temporary" to "permanent."[5]

5. The confusion in this area is not surprising given that compensation received during "the healing period" under § 97-31 is sometimes referred to as compensation for "temporary disability," and compensation received during the statutory period under § 97-31 is sometimes referred to as compensation for "permanent disability." *See, e.g., Carpenter*, 73 N.C. App. at 311, 326 S.E.2d at 329. Such terminology tends to obscure the crucial distinction between the healing period/statutory period framework under N.C. Gen. Stat. § 97-31 (where MMI signifies a point in time when an employee's *physical impairment* becomes permanent) and the temporary/permanent framework under § 97-29 and § 97-30 (where the permanency of an employee's *wage-earning*

In the present case, even assuming *arguendo* that defendants are correct that Dr. King's testimony clearly established that plaintiff had reached MMI prior to the hearing, and that, therefore, the evidence does not support the Commission's finding that plaintiff had not reached MMI as of the hearing, we find such error to be immaterial at this time. *See Vaughn v. Dept. of Human Resources*, 37 N.C. App. 86, 90, 245 S.E.2d 892, 894 (1978) (to warrant reversal, an error made by the Industrial Commission must be material and prejudicial), *affirmed*, 296 N.C. 683, 252 S.E.2d 792 (1979). Plaintiff has established a total loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29. He has not sought scheduled benefits pursuant to N.C. Gen. Stat. § 97-31, nor has he sought to establish that his total loss of wage-earning capacity is permanent.[6] He is, therefore, entitled to an "ongoing award of disability benefits" equal to two-thirds of his average weekly wages for as long as he remains totally disabled. *Lackey v. R. L. Stowe Mills*, 106 N.C. App. 658, 663, 418 S.E.2d 517, 520, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 150 (1992). At this point in time, it matters not whether plaintiff has reached MMI.[7] Because any error as to whether plaintiff has reached maximum medical improvement is immaterial at this time, we need not address whether the Commission erred in finding that plaintiff had not reached MMI.

IV.

[4] In its Opinion and Award, the Commission entered the following finding of fact, pertinent to defendants' fourth argument:

> 9. After the remedial surgery, plaintiff's psychological condition became unstable and he attempted to withdraw from his pain medications too quickly causing him to become physically and psychologically ill. Consequently, plaintiff entered a detoxification unit for three days.

By their fourth argument, defendants contend that they should not bear the cost of plaintiff's detoxification program because the finding

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capacity is necessarily determined by more than merely an assessment of the status of the employee's physical impairment).

6. We do not address the role that MMI might play where an employee receiving benefits under § 97-29 or § 97-30 seeks to establish that the employee's loss of wage-earning capacity is *permanent*.

7. At some later point in time, plaintiff may seek to recover benefits for a specific physical impairment under N.C. Gen. Stat. § 97-31, in which case the question of whether he has reached MMI would be relevant. Also, at some later point in time, plaintiff may seek to establish that his loss of wage-earning capacity is *permanent*, in which case the question of whether he has reached MMI may be relevant.

of fact above is not supported by any *medical* evidence. However, the record reveals that defendants' assignment of error actually contends that this finding of fact is not based upon *any* competent evidence (whether medical or otherwise).

The finding in question is supported by competent evidence. Plaintiff testified: that Dr. King initially prescribed "heavy narcotic pain medication over a period of about six months"; that when plaintiff ran out of the medication, Dr. King decided not to prescribe a refill because he believed plaintiff was taking too much of it; that plaintiff abruptly discontinued taking the pain medication and experienced some withdrawal symptoms; and that, as a result, plaintiff entered a detoxification program in Hamlet, North Carolina. This testimony is competent evidence that supports the Commission's finding of fact, and we reject defendants' fourth argument.

V.

[5] Lastly, defendants argue that the Commission erred in failing to award defendants a credit for having advanced plaintiff's share of the mediator's fee against the compensation due plaintiff. Prior to the hearing in this case, the parties stipulated that defendants had paid the mediator's fee of $375.00 in full, thereby advancing plaintiff's share of $187.50. Rule 7(c) of the Rules for Mediated Settlement and Neutral Evaluation Conferences of the North Carolina Industrial Commission provides that, "[u]nless otherwise . . . ordered by the Commission," all parties must pay equal shares of the mediator's fee. In such situations, the defendant is required to "pay the plaintiff's share, as well as its own, and the defendant shall be reimbursed for the plaintiff's share when the case is concluded from benefits that may be determined to be due to the plaintiff." R. Mediated Settlement Confs. Of N.C. Indus. Comm'n 7(c), 2002 Ann. R. N.C. 794, 795.

Here, at the conclusion of its Opinion and Award, the Commission entered the following order: "Defendants shall pay the costs." Thus, pursuant to the authority vested in the Commission by Rule 7(c), the Commission apparently concluded that the costs of the mediated settlement conference should not be apportioned as set forth in Rule 7(c), and further that plaintiff should not be obligated to share in the payment of such costs. We hold that the Commission did not err in entering this order, and we, therefore, reject defendants' final argument.

For the reasons set forth herein, we affirm.

Affirmed.

Judge McGEE concurs.

Judge BRYANT dissents in part.

BRYANT, Judge, dissenting in part.

I dissent from the portion of the majority opinion relating to whether the concept of MMI is material to Issue # 3. That issue on appeal is whether, once the employee has established loss of wage earning capacity pursuant to N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-30, the employee may continue to receive temporary total disability after having reached maximum medical improvement. In two prior decisions of this Court, we addressed this issue. In *Anderson v. Gulistan Carpet, Inc.*, 144 N.C. App. 661, 550 S.E.2d 237 (2001), a panel of this Court answered that issue, "no"; however, in another opinion filed on the same day as *Anderson*, a different panel in *Russos v. Wheaton Industries*, 145 N.C. App. 164, 551 S.E.2d 456, *disc. review denied*, 355 N.C. 214, 560 S.E.2d 135 (2001) answered, "yes". No appeal was taken by the parties from the *Anderson* decision; and, our Supreme Court declined to grant discretionary review of the *Russos* decision.

Manifestly, a conflict of panels on this Court requires a decision from our Supreme Court. N.C. Gen. Stat. § 7A-30(2). Accordingly, I dissent from the majority decision for the reasons stated in *Anderson* and thereby afford the defendants the opportunity to appeal this issue directly to the Supreme Court to obtain a definitive opinion.

KEENER LUMBER COMPANY, INCORPORATED, PLAINTIFF v. LEON W. PERRY, III AND CONN TRUCKING, INC., DEFENDANTS

No. COA00-1525

(Filed 5 March 2002)

1. Bankruptcy— claim brought by creditor against director of corporation—constructive fraud—unfair and deceptive trade practices—subject matter jurisdiction

The trial court did not err in a constructive fraud and unfair and deceptive trade practices case by denying a motion to dismiss by defendant individual director of a bankrupt corporation

based on an alleged lack of subject matter jurisdiction even though plaintiff creditor filed a proof of claim in the bankruptcy proceeding against the bankrupt corporation, because: (1) a claim brought by a creditor against a director of a corporation alleging that the director has committed constructive fraud by breaching a fiduciary duty owed directly to the creditor is a claim founded on injuries peculiar or personal to the individual creditor and thus is a claim that belongs to the creditor and not the corporation; and (2) the trustee in bankruptcy does not have authority to bring this claim under 11 U.S.C. § 541 since plaintiff's claim does not belong to the bankrupt corporation and is not part of the bankruptcy estate.

2. Fraud—constructive— director of corporation's fiduciary duty to creditors—failure to adequately declare and explain the law

The trial court erred by failing to adequately declare and explain the law to the jury in its instructions on a constructive fraud claim and by failing to submit to the jury issues which properly frame the essential factual questions as required by N.C.G.S. § 1A-1, Rule 51(a) in an action by plaintiff creditor to recover, from defendant individual director of a bankrupt corporation, the debts of the bankrupt corporation owed to plaintiff for the purchase of lumber, because: (1) the trial court instructed the jury that a director of a corporation has a fiduciary duty to all creditors to treat them fairly and equally while the corporation is insolvent, without sufficiently explaining the circumstances under which the law imposes upon directors a fiduciary duty to creditors; (2) the first issue presented to the jury did not adequately frame the question of whether defendant director of the corporation owed plaintiff creditor a fiduciary duty; (3) the jury should have been specifically instructed that directors of a corporation owe a fiduciary duty to creditors of the corporation only where there are circumstances amounting to a winding-up or dissolution of the corporation, that balance sheet insolvency alone is insufficient to trigger the fiduciary duty, and that various factors may be considered in determining whether there existed circumstances amounting to a winding-up or dissolution; (4) although the trial court made an accurate statement of the law regarding general fiduciary duties, the better approach would be to simplify the issue on the jury sheet and supplement the issue with an instruction more carefully tailored to the specific context; and (5)

although the trial court properly explained the issue of damages, it should have supplemented the instructions with additional information.

3. Unfair Trade Practices— business relationship—intent to pay creditor—preferential payments to creditors

The trial court erred by determining as a matter of law that defendant individual director of a corporation's conduct in his business relationship with plaintiff creditor amounted to an unfair and deceptive trade practice under N.C.G.S. § 75-1.1, because: (1) the jury determined that defendant had intended to pay for the lumber purchased from plaintiff; and (2) although the jury determined that defendant made preferential payments to creditors other than plaintiff, plaintiff did not base its unfair and deceptive trade practices claim upon the allegation that defendant made preferential payments to other creditors.

4. Fraud; Racketeer Influenced and Corrupt Organizations— motion to dismiss—sufficiency of evidence

The trial court did not err by dismissing all claims against defendant corporation and by dismissing the fraud claim and racketeer influenced and corrupt organizations (RICO) claim against defendant individual director of the corporation.

5. Corporations— piercing the corporate veil—director of corporation

The trial court did not err by refusing to instruct the jury on the piercing the corporate veil doctrine, because: (1) the complaint does not allege that defendant individual director of a bankrupt corporation should be held liable for the bankrupt corporation's acknowledged debt to plaintiff creditor based upon defendant individual's complete domination of the bankrupt corporation; and (2) the complaint does not allege any torts committed by the bankrupt corporation for which plaintiff might seek to hold defendant individual liable.

Appeal by defendant Leon W. Perry, III from judgment entered 21 July 2000 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 8 November 2001.

Mast, Schulz, Mast, Mills & Stem, P.A., by George B. Mast, Bradley N. Schulz and David F. Mills, for plaintiff-appellee.

Kennedy, Covington, Lobdell & Hickman, L.L.P., by John L. Sarratt and Amie Flowers Carmack, for defendant-appellant Leon W. Perry, III.

HUNTER, Judge.

Defendant Leon W. Perry, III ("Perry") appeals from the trial court's judgment (1) upholding a jury verdict that Perry committed constructive fraud, and (2) determining as a matter of law that Perry's conduct in his business relationship with Keener Lumber Company, Inc. ("plaintiff") amounted to an unfair and deceptive practice. We affirm in part, reverse in part, and remand in part for a new trial on plaintiff's constructive fraud claim.

This case involves three corporations and one individual. The first corporation is plaintiff Keener Lumber Company, a North Carolina corporation that buys timber and sells lumber products. The second corporation is Perry Builders Outlet, Inc. ("Perry Builders"), now in bankruptcy, which was a North Carolina corporation that purchased lumber, chemically treated it, and sold it to retail supply centers. The individual defendant Perry was the chief operating officer ("COO"), president, director, and a twenty percent shareholder of Perry Builders. Perry is also the COO, president, director, and the majority shareholder of a third corporation, Conn Trucking, Inc. ("Conn Trucking"), a North Carolina corporation that hauls lumber products.

The evidence at trial tended to establish the following facts. Perry Builders experienced some financial difficulties in 1995 and 1996, including recurring annual operating losses. In 1996, Perry Builders defaulted on a loan from First Union which terminated its financing. In March of 1997, Perry Builders entered into a new financing arrangement with CIT Group/Business Credit ("CIT"), pursuant to which all money borrowed from CIT was secured by collateral including: Perry Builders' accounts receivable, inventory, equipment, and property. In addition, all loans from CIT were guaranteed by Perry (individually) and Conn Trucking.

In April of 1997, Perry Builders contacted plaintiff and expressed interest in purchasing lumber from plaintiff. Plaintiff began to sell lumber to Perry Builders in May of 1997 and, over a period of several

months, Perry Builders purchased and paid for over $700,000.00 of lumber. In June or July of 1997, Perry Builders fell behind in its payments to plaintiff. By 12 September 1997, Perry Builders had paid for all lumber purchased from plaintiff through 29 August 1997. However, Perry Builders continued to purchase lumber through 26 September 1997, and ultimately failed to pay for all lumber purchased from plaintiff between 30 August 1997 and 26 September 1997, resulting in an outstanding debt of $146,185.23.

On or about 18 August 1997, Perry hired a "workout" company (Anderson, Bauman, Tourtellot, Vos & Company, or "ABTV") to perform an "operational analysis" of Perry Builders and Conn Trucking and to recommend business strategies, including the possible sale of either company or both companies. On 22 September 1997, ABTV set forth its findings in a report issued to Perry Builders. The report included a recommendation that Perry Builders cease operations, that the company be liquidated, and that Conn Trucking be continued.

According to the valuations set forth in the 22 September 1997 ABTV report, Perry Builders had assets worth $1,973,000.00, including equipment, inventory, real estate, and property. The evidence tended to show that Perry decided, at some point in time after receiving the ABTV report, to liquidate the company's assets and to use the money from the sale of the assets to pay the outstanding debts to the company's creditors. The evidence further tended to show that, between August of 1997 and early January of 1998, Perry fully, or nearly fully, paid off certain debts, including the secured loans from CIT, and an unsecured debt to Conn Trucking for services rendered. However, after 12 September 1997, Perry made no payments on the unsecured debt to plaintiff.

Perry Builders was unable to secure a purchaser of the company's assets outside of bankruptcy. Perry Builders filed for bankruptcy on 9 January 1998 and turned the administration of its assets over to the Bankruptcy Trustee, Richard Sparkman. The company's assets were ultimately sold in bankruptcy for only $335,000.00, resulting in a shortfall of funds to pay all of the creditors. Perry Builders acknowledged in its bankruptcy petition that it owed plaintiff $146,185.23. Plaintiff filed a proof of claim in the bankruptcy proceeding for that amount on 22 December 1998.

On 27 August 1998, plaintiff filed this action against defendants Perry and Conn Trucking. Plaintiff initially set forth four causes of

action in its complaint: fraud, constructive fraud, unfair and deceptive practice (pursuant to N.C. Gen. Stat. § 75-1.1 (1999)), and racketeer influenced and corrupt organizations violation (the "RICO" claim). The trial court denied a motion by Perry to dismiss for lack of jurisdiction. The trial court granted summary judgment in favor of defendants on the RICO claim, and, at the close of all the evidence, the trial court granted a directed verdict as to all claims against Conn Trucking, and as to the fraud claim against Perry. Thus, the trial court submitted to the jury (1) the constructive fraud claim against defendant Perry, and (2) questions of fact pertaining to the unfair and deceptive practice claim.

The jury returned a verdict in favor of plaintiff on the constructive fraud claim and awarded plaintiff damages of $146,185.23. In addition, based upon the jury's findings of fact, the trial court determined as a matter of law that Perry's conduct amounted to an unfair and deceptive practice pursuant to N.C. Gen. Stat. § 75-1.1 and, therefore, trebled the damages pursuant to N.C. Gen. Stat. § 75-16 (1999), resulting in a total recovery of $438,555.00 for plaintiff. Perry moved for Judgment Notwithstanding the Verdict (JNOV) and for a new trial, which motions were denied. Perry appeals and plaintiff cross-appeals.

On appeal, the parties have raised a number of complex issues. First, we will address the trial court's denial of Perry's motion to dismiss for lack of jurisdiction. Second, we will address plaintiff's constructive fraud claim. Third, we will address plaintiff's unfair and deceptive practice claim. Finally, we will examine various other issues raised on appeal.

I. Jurisdiction/Standing

[1] We turn first to Perry's argument regarding the trial court's denial of his motion to dismiss, filed 2 November 1998, and made pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6) (1999). Perry argues that the motion to dismiss should have been granted because the trial court lacked subject matter jurisdiction over the claims asserted by plaintiff. We disagree.[1]

Perry first argues that the trial court lacked subject matter jurisdiction because plaintiff filed a proof of claim in the Perry Builders

1. It should be noted that, at the time of the trial, the bankruptcy proceeding was open and pending and no final determination had yet been made as to what payments would be made to the unsecured creditors of Perry Builders, including plaintiff.

bankruptcy proceeding, and thereby submitted the determination of its claim to the jurisdiction of the bankruptcy court. The cases cited by Perry in support of this argument, and the legal propositions set forth in those cases, are patently inapplicable here. *See, e.g., Langenkamp v. Culp*, 498 U.S. 42, 44-45, 112 L. Ed. 2d 343, 347-48 (1990) (holding that, where a creditor files a claim against a bankruptcy estate, and where the trustee in bankruptcy brings a preference claim against that creditor, that preference action against the creditor is triable only by the bankruptcy court in its equitable jurisdiction, and the creditor does not have a right to a jury trial on that preference action), *reh'g denied*, 498 U.S. 1043, 112 L. Ed. 2d 709 (1991). Perry has not cited any authority for the proposition that a creditor who has filed a proof of claim against a bankrupt corporation is thereby prohibited from instituting a separate proceeding against a director of the corporation seeking damages resulting from an alleged breach of fiduciary duty. Thus, we reject this argument.

Perry also argues that the trial court lacked subject matter jurisdiction because plaintiff's claim is property of the Perry Builders bankruptcy estate and must, therefore, be brought by the trustee in bankruptcy.[2] When a corporation enters bankruptcy, any legal claims that could be maintained *by the corporation* against other parties become part of the bankruptcy estate, *see* 11 U.S.C.A. § 541(a) (West 1993), and claims that are part of the bankruptcy estate may only be brought by the trustee in the bankruptcy proceeding, *see, e.g., National American Ins. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999) ("[i]f a cause of action is part of the estate of the bankrupt then the trustee alone has standing to bring that claim"), *cert. denied*, 528 U.S. 1156, 145 L. Ed. 2d 1073 (2000). Because the trustee of the bankruptcy estate has full authority over claims that are part of the bankruptcy estate, a creditor may not pursue such a claim unless there is a judicial determination that the trustee in bankruptcy has abandoned the claim. *See Steyr-Daimler-Puch of America Corp.*

2. Perry also appears to argue that this action is subject to the automatic stay provided by 11 U.S.C.A. § 362(a)(3) (West 1993). We note, first, that § 362(a)(3) only prohibits parties from instituting separate proceedings "to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," and Perry has not established that this action, seeking damages from Perry individually, implicates property of the Perry Builders bankruptcy estate. *See In re Litchfield Co. of South Carolina Ltd. Partnership*, 135 B.R. 797, 803-04 (W.D.N.C. 1992). We also note that the record contains an order entered by the United States Bankruptcy Court (E.D.N.C.) in the Perry Builders bankruptcy proceeding, Case No. 01-03355-5-ATS, granting a motion for relief from the automatic stay to allow the appeal in this case to "proceed to decision."

v. Pappas, 852 F.2d 132, 136 (4th Cir. 1988). Moreover, this Court has held that North Carolina state trial courts lack subject matter jurisdiction to hear claims that belong to a bankruptcy estate. *See Tart v. Prescott's Pharmacies, Inc.*, 118 N.C. App. 516, 521, 456 S.E.2d 121, 125 (1995).

Perry contends that the essence of plaintiff's claim is that Perry, as an individual director of Perry Builders, directed Perry Builders to make preferential payments to certain creditors for his own benefit and to the detriment of all other creditors. Perry further contends that this preference claim could be brought by Perry Builders against Perry. Therefore, Perry argues, the claim is property of the Perry Builders bankruptcy estate and the trustee of the bankruptcy estate has full authority over the claim. As a result, Perry concludes, the trial court here lacked subject matter jurisdiction to hear plaintiff's claim. We reject Perry's argument because we believe plaintiff's claim is not one that could be brought by Perry Builders against Perry, and, therefore, is not property of the Perry Builders bankruptcy estate.

Whether plaintiff's claim is property of the bankruptcy estate, and, therefore, under the full authority of the bankruptcy trustee, requires an examination of the nature of the claim under state law. *See Pappas*, 852 F.2d at 135. Under North Carolina law, directors of a corporation generally owe a fiduciary duty *to the corporation*, and where it is alleged that directors have breached this duty, the action is properly maintained *by the corporation* rather than any individual creditor or stockholder. *Underwood v. Stafford*, 270 N.C. 700, 703, 155 S.E.2d 211, 213 (1967). However, where a cause of action is "founded on injuries peculiar or personal to [an individual creditor or stockholder], so that any recovery would not pass to the corporation and indirectly to other creditors," the cause of action belongs to, and is properly maintained by, that particular creditor or stockholder. *See id.* Such is the case here.

Plaintiff seeks damages resulting from Perry's individual conduct allegedly constituting constructive fraud; this constructive fraud claim is based upon the theory that Perry breached a fiduciary duty owed directly to plaintiff under "circumstances amounting to a 'winding-up' or dissolution" of Perry Builders. *See Whitley v. Carolina Clinic, Inc.*, 118 N.C. App. 523, 528, 455 S.E.2d 896, 900, *disc. review denied*, 340 N.C. 363, 458 S.E.2d 197 (1995). We hold that a claim brought by a creditor against a director of a corporation, alleging that the director has committed constructive fraud by breaching his fiduciary duty owed directly to the creditor, is a claim founded on in-

juries peculiar or personal to the individual creditor, and, therefore, is a claim that belongs to the creditor and not the corporation. *See Mills Co. v. Earle*, 233 N.C. 74, 62 S.E.2d 492 (1950) (holding that, where corporation has been placed in receivership, individual creditor may maintain claim alleging fraud by individual officers and directors; and specifically rejecting defendants' argument that such claim belongs to receiver for benefit of all corporate creditors and may not be maintained by creditor until receiver has refused to bring claim). Because plaintiff's claim does not belong to Perry Builders, it is not part of the bankruptcy estate, and the trustee in bankruptcy does not have authority to bring this claim pursuant to 11 U.S.C. § 541.[3] For this reason, we reject Perry's argument that the trial court erred in denying his motion to dismiss on the grounds of subject matter jurisdiction.

II. Constructive Fraud

[2] Rule 51(a) of the North Carolina Rules of Civil Procedure provides that when charging the jury in a civil action, the trial court shall declare and explain the law arising on the evidence. *See* N.C. Gen. Stat. § 1A-1, Rule 51(a) (1999). This rule imposes upon the trial judge a positive duty to explain the law to the jury, and a failure to adequately explain the law to the jury requires a new trial. *See, e.g., Board of Transportation v. Rand*, 299 N.C. 476, 483, 263 S.E.2d 565, 570 (1980). Similarly, the trial court must submit to the jury issues which properly frame the essential factual questions, and a new trial must be awarded where the trial court fails to do so. *See, e.g., HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 326, 204 S.E.2d 188, 191 (1974). Having carefully reviewed the record, we hold that, as to the constructive fraud claim, the trial court failed to adequately declare and explain the law to the jury in its instructions, and failed to submit to the jury issues which properly frame the essential factual questions. Thus, we remand for a new trial on this claim.

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3. We note that, although Perry refers in passing to the trustee's alternate source of power under the Bankruptcy Act—11 U.S.C.A. § 544 (West 1993), which involves rights of creditors—Perry does not specifically argue that the trial court lacked subject matter jurisdiction because the trustee in bankruptcy is authorized to pursue plaintiff's claim in the bankruptcy proceeding *on behalf of all creditors pursuant to § 544*. Therefore, we find it unnecessary to address the issue of whether a trustee in bankruptcy has the power under § 544 to bring a general claim on behalf of all creditors, which issue has apparently been addressed with conflicting results by various Federal Circuit Courts. *See, e.g., Koch Refining v. Farmers Union Cent. Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), *cert. denied*, 485 U.S. 906, 99 L. Ed. 2d 237 (1988); *In re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir.), *cert. denied*, 484 U.S. 848, 98 L. Ed. 2d 102 (1987).

The elements of a constructive fraud claim are proof of circumstances " '(1) which created the relation of trust and confidence [the "fiduciary" relationship], and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.' " *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (citation omitted). Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty.

In its complaint, plaintiff based its constructive fraud claim upon the following allegations: that Perry Builders became insolvent at some point in time toward the end of 1997; that, as a result of such insolvency, defendant Perry, as director of Perry Builders, owed plaintiff, as a creditor of Perry Builders, a fiduciary duty; that Perry breached his fiduciary duty to plaintiff, and that such breach constituted constructive fraud; and that Perry's constructive fraud proximately caused damages to plaintiff.

Thus, it was essential that the jury determine: whether Perry had a fiduciary duty to plaintiff; at what point in time any such fiduciary duty arose; whether Perry breached any such fiduciary duty to plaintiff once it arose; and what amount of damages any such breach of fiduciary duty proximately caused. It was also vital that the trial court explain to the jury under what limited circumstances the law imposes a fiduciary duty upon a director of a corporation for the benefit of creditors of the corporation.

The "Jury Issue Sheet" set forth the following issues for the constructive fraud claim:

1. Did the exchange of lumber between the plaintiff and Perry Builders Outlet, Inc., between August 30, 1997 and September 26, 1997 arise out of a relationship where Leon Perry, III was a fiduciary for Keener Lumber? _____

   If you answer "Yes," go to issue 2. If you answer "No," go to issue 4.

2. Did Leon Perry, III act openly, fairly, and honestly, and take no advantage of Keener? _____

   If you answer "No," go to issue number 3. If you answer "Yes," go to issue 4.

3. What amount of damages, if any, did Keener suffer as a result of the breach of fiduciary duty by Leon Perry, III? _____

Addressing the first issue, the trial court instructed the jury as follows:

> On [the first] issue the burden of proof is on the Plaintiff. This means that the Plaintiff must prove by the greater weight of the evidence that the sale of timber arose out of a relationship where the Defendant was a fiduciary for the Plaintiff. A fiduciary is a person in whom a special confidence or trust is placed by another and who, under the circumstances or their relationship, is required to act in good faith and with due regard to such other person. A director of a corporation has a fiduciary duty to all creditors to treat them fairly and equally while the corporation is insolvent.

Addressing the second issue, the trial court instructed the jury:

> You are to answer [the second] issue only if you have answered the preceding issue yes in favor of the Plaintiff. It is the law of this state that the Plaintiff is entitled to damage incurred as a result of the purchase of lumber by Perry Builders, Inc., from August 29 through September 26, 1997, unless it was open, fair, and honest, and no advantage was taken of the Plaintiff by the Defendant.
>
> On this issue, the burden of proof is on the Defendant. This means that the Defendant must prove by the greater weight of the evidence two things. First, that the sale of timber was open, fair, and honest, and second, that no advantage was taken of the Plaintiff by the Defendant. . . .

As to the third issue, the trial court instructed the jury as follows:

> The Plaintiff must prove by the greater weight of the evidence the amount of damages sustained as a result of this injury. The Plaintiff's damages are to be reasonably determined from the evidence presented in this case and Plaintiff is not required to prove with mathematical certainty the exact extent of its injury in order to recover damages. . . .

Having carefully reviewed the entire record, we hold that, as to the constructive fraud claim, the Jury Issue Sheet and the trial court's instructions were inadequate for a number of reasons.

A. Existence of the Fiduciary Duty

"As a general rule, directors of a corporation do not owe a fiduciary duty to creditors of the corporation." *Whitley*, 118 N.C. App. at

526, 455 S.E.2d at 899. However, North Carolina law holds that, under certain circumstances, directors of a corporation do owe a fiduciary duty to creditors of the corporation, and that this duty is breached if the directors take advantage of their position for their own benefit at the expense of other creditors. *See id.*

The circumstances required to trigger this fiduciary duty were initially described by North Carolina courts simply as "insolvency" of the corporation. *See Hill v. Lumber Co.*, 113 N.C. 174, 176, 18 S.E. 107, 108 (1893). In the early cases, "insolvency" meant balance sheet insolvency. *See id.* at 179, 18 S.E. at 109 (a corporation is "insolvent" where "it owes more than its capital can pay"). The triggering circumstances were later expanded to include situations where a corporation "is in declining circumstances and verging on insolvency," *Wall v. Rothrock*, 171 N.C. 388, 391, 88 S.E. 633, 635 (1916), or where a corporation has become "insolvent or nearly so," has made a conveyance of its entire property "with a view of going out of business," and where such facts establish circumstances that amount "practically to a dissolution," *Bassett v. Cooperage Co.*, 188 N.C. 511, 512, 125 S.E. 14, 14 (1924).

Recently, this Court had an opportunity to further discuss the circumstances required to trigger the existence of a director's fiduciary duty to creditors. In *Whitley*, 118 N.C. App. 523, 455 S.E.2d 896, the plaintiffs/creditors claimed that the individual defendants/directors owed plaintiffs a fiduciary duty during a specific period of time because the corporation's audited balance sheets for the relevant time period reflected liabilities in excess of assets (balance sheet insolvency), as well as negative stockholders' equity.

Relying primarily on *Bassett*, this Court stated that "more than 'balance sheet insolvency' is required in order to impose on directors a fiduciary duty to creditors." *Id.* at 527, 455 S.E.2d at 899. We noted that the Supreme Court in *Bassett* had found that a fiduciary duty existed in that case due to the fact that the corporation in question had been "practically insolvent," and that there had been a sale of the corporation's entire property ". . . '*with a view of going out of business*' . . ." which ". . . '*amounted practically to a dissolution*' . . . ." *Id.* (quoting *Bassett*, 118 N.C. at 512, 125 S.E. at 14). This Court in *Whitley* also noted that, according to one authority, insider preference liability may be limited to situations involving the *liquidation* of a corporation. *Id.* at 527, 455 S.E.2d at 900 (citing Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.8, at 247-48 (4th ed. 1990)). We further noted that, according to a second

authority, " 'a corporation is *not insolvent*, as a general rule, merely because it is embarrassed and cannot pay its debts as they become due, or because its assets, if sold, would not bring enough to pay all its liabilities, *if it is still prosecuting its business in good faith, with a reasonable prospect and expectation of continuing to do so.*' " *Id.* at 527-28, 455 S.E.2d at 900 (quoting 15A William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 7472, at 273-74 (perm. ed. rev. vol. 1990)).

Applying all of these principles, we held in *Whitley* that a corporate director has a fiduciary duty to creditors only "under circumstances amounting to a 'winding-up' or dissolution of the corporation." *Id.* at 528, 455 S.E.2d at 900. We then applied this holding to the facts of the case. We noted that during the relevant time period: (1) the corporation was balance sheet insolvent, but was solvent on a cash flow basis in that it was always able to pay its financial obligations when they were due; and (2) there was no evidence that the corporation was making plans to cease doing business or that it was conducting its business in bad faith. *Id.* at 529, 455 S.E.2d at 900. On these grounds we held that no fiduciary duty had been triggered.

Whitley clearly establishes that directors of a corporation owe a fiduciary duty to creditors of the corporation only where there exist "circumstances amounting to a 'winding-up' or dissolution of the corporation." *Id.* at 528, 455 S.E.2d at 900. *Whitley* also indicates that various factors may be considered in determining whether there existed circumstances amounting to a winding-up or dissolution, including but not limited to: (1) whether the corporation was insolvent, or nearly insolvent, on a balance sheet basis; (2) whether the corporation was cash flow insolvent; (3) whether the corporation was making plans to cease doing business; (4) whether the corporation was liquidating its assets with a view of going out of business; and (5) whether the corporation was still prosecuting its business in good faith, with a reasonable prospect and expectation of continuing to do so. Finally, *Whitley* clearly holds that "[b]alance sheet insolvency, absent [circumstances amounting to a 'winding-up' or dissolution of the corporation] is insufficient to [trigger] a fiduciary duty to creditors of a corporation." *Id.*

Considering this complex analysis regarding what circumstances are sufficient to trigger a director's fiduciary duty to creditors, we believe the trial court's jury instructions here were inadequate. The trial court simply instructed the jury that "[a] director of a corporation has a fiduciary duty to all creditors to treat them fairly and

equally while the corporation is insolvent." This instruction does not sufficiently explain the circumstances under which the law imposes upon directors a fiduciary duty to creditors.

We also believe that the first issue presented to the jury did not properly frame the question of whether Perry owed plaintiff a fiduciary duty. The first issue on the jury sheet and the court's instructions seem to imply that the jury need only determine whether Perry owed plaintiff a fiduciary duty between 30 August 1997 and 26 September 1997 (the period of time when Perry Builders purchased lumber for which it ultimately failed to pay). However, this construction of the fiduciary duty issue is more narrow than is warranted by either plaintiff's allegations in its complaint, or the law. Plaintiff's complaint alleges that Perry breached a fiduciary duty to plaintiff (1) by directing Perry Builders to purchase lumber from plaintiff without informing plaintiff as to the financial status of the company, and also (2) by making preferential payments to creditors other than plaintiff while Perry had a fiduciary duty to treat all creditors equally. Thus, the issue should not be limited to whether there was a fiduciary duty only during the time when the lumber was purchased, especially since an affirmative answer to such a question would fail to specify precisely when the duty arose. The issue is simply whether a fiduciary duty to creditors arose *at any point in time*, and, if so, when.[4]

We believe that, as to the existence of a fiduciary duty, the Jury Issue Sheet should have set forth two issues (in place of the first issue actually presented to the jury in this case):

(1) Did Perry owe a fiduciary duty to Keener at any point in time?

(2) If yes, at what point in time did this fiduciary duty arise?

Furthermore, the jury should have been specifically instructed that: directors of a corporation owe a fiduciary duty to creditors of the corporation only where there exist "circumstances amounting to a 'winding-up' or dissolution of the corporation," *id.* at 528, 455 S.E.2d at 900; that balance sheet insolvency alone, absent such circumstances, is

4. The parties' and the trial court's inclination to focus only on this period of time is understandable: *Whitley* states that "for a corporate director to breach a fiduciary duty to a creditor, *the transaction at issue* must occur under circumstances amounting to a 'winding-up' or dissolution of the corporation." *Whitley*, 118 N.C. App. at 528, 455 S.E.2d at 900. However, in this case, the "transactions" which may have constituted a breach of fiduciary duty include both the lumber purchases as well as the preferential payments by Perry to creditors other than plaintiff, which transactions did not necessarily occur only during this limited period of time.

insufficient to trigger the fiduciary duty; and that various factors may be considered in determining whether there existed circumstances amounting to a winding-up or dissolution, including, but not limited to, the five factors set forth above.

B. Breach of the Fiduciary Duty

On the issue of whether there was a breach of fiduciary duty, the Jury Issue Sheet asked the jury whether Perry acted "openly, fairly, and honestly," and whether he took "no advantage of" plaintiff. Although this is an accurate statement of the law regarding general fiduciary duties, we believe that the better approach would be to simplify the issue on the Jury Issue Sheet and to supplement the issue with an instruction more carefully tailored to the specific context. Thus, the next issue for the jury should simply read:

(3) If Perry had a fiduciary duty to Keener, did he, at any time after the fiduciary duty arose, breach this fiduciary duty?

The accompanying jury instructions should explain that, once a director's fiduciary duty to creditors arises, a director is generally prohibited from taking advantage of his intimate knowledge of the corporate affairs and his position of trust for his own benefit and to the detriment of the creditors to whom he owes the duty. *Steel Co. v. Hardware Co.*, 175 N.C. 450, 451-52, 95 S.E. 896, 897 (1918); *Whitley*, 118 N.C. App. at 526, 455 S.E.2d at 899. The jury should also be instructed that, once the fiduciary duty arises, a director must treat all creditors of the same class equally by making any payments to such creditors on a pro rata basis. *See Bassett*, 188 N.C. at 512, 125 S.E.2d at 14. We further suggest that the jury be instructed that, under the particular facts of this case, if a fiduciary duty arose at some point in time, the acts that *may* have amounted to a breach of this fiduciary duty include, but are not necessarily limited to: (1) continuing to purchase lumber from plaintiff without disclosing the status of Perry Builders; and (2) failing to pay all creditors of the same class on a pro rata basis.

We also believe that the jury should be instructed that even after the fiduciary duty arises, directors of a corporation may prefer secured creditors over unsecured creditors. *See Drug Co. v. Drug Co.*, 173 N.C. 502, 508, 92 S.E. 376, 378 (1917) ("it is now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund to be secured and administered for the benefit of the general creditors of the corporation, *subject, of course,*

to the claims of lienors entitled to priority" (emphasis added)); *see also* 15A William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 7434, at 187 (perm. ed. rev. vol. 2000) (for preference to one creditor to be "unlawful" it must result in detriment to other creditors "of the same class who have similar or superior interests in the corporate assets"); 18B Am. Jur. 2d *Corporations* § 2155 (1985) ("[a] preference is a transfer of any of the property of an insolvent corporation which has the effect of enabling a creditor to obtain a greater percentage of his debt than any other creditor of the same class"); *see also, Association of Mill and Elevator Mut. Ins. Co. v. Barzen Intern., Inc.*, 553 N.W.2d 446, 451 (Minn. Ct. App. 1996) (paying down secured line of credit to bank creditor during liquidation is not impermissible preference and does not constitute breach of fiduciary duty to unsecured creditors). Moreover, the jury should be instructed that this proposition is true even where (1) the director himself is the creditor (provided the debt was secured while the corporation was solvent), or (2) where the secured debt from a third-party creditor is guaranteed by the director. *See Hill*, 113 N.C. at 178, 18 S.E. at 108 (noting that director/creditor with lien upon corporate property may receive priority over unsecured creditors); *see also Robson v. Smith*, 777 P.2d 659, 661-62 (Alaska 1989) ("[d]irectors, who in good faith make loans to a solvent corporation and become its secured creditors, can have their secured debt validly paid ahead of unsecured creditors").

C. Damages

Although the final issue submitted to the jury ("[w]hat amount of damages, if any, did Keener suffer as a result of the breach of fiduciary duty by Leon Perry, III") was proper, we believe that the trial court should explain two additional points to the jury in its instructions. First, the trial court should explain that if the jury determines that Perry breached a fiduciary duty by continuing to purchase lumber from plaintiff (after the duty arose) without disclosing the status of Perry Builders, the jury should first determine what damages resulted from this breach before determining damages from any other possible breach. Second, the trial court should explain to the jury what it means to pay all creditors of the same class on a pro rata basis, and how the jury is to go about calculating the damages resulting from a failure to do so.

For example, the jury might determine that a fiduciary duty arose on 22 September 1997, and that Perry breached this duty (1) when he purchased lumber from plaintiff after this date without disclosing

that Perry Builders was planning to liquidate and cease operations, and (2) by failing to pay plaintiff on a pro rata basis after this date. Under these circumstances, the jury might conclude (1) that Perry's breach by making purchases after 22 September 1997 without disclosing certain information resulted in damage equal to the total value of all purchases made after 22 September 1997, and (2) that Perry's breach by making preferential payments to certain creditors after 22 September 1997 resulted in damage equal to the pro rata share of the *remaining debt* owed to plaintiff (the total of all *other* unpaid invoices) that plaintiff would have received if Perry had paid all creditors of the same class equally. Without such explanation, we are concerned that, if the jury determines there was any breach of fiduciary duty, the jury might simply award plaintiff the total amount of all unpaid invoices, rather than determining what specific amount of damages proximately resulted from any particular acts constituting a breach of fiduciary duty. We are confident that the trial court and the parties will be able to fashion an appropriate instruction in this regard.

For these reasons, we remand for a new trial on plaintiff's constructive fraud claim in accordance with the suggested jury instructions and jury issues outlined above.

III. Unfair and Deceptive Practice

[3] Plaintiff's complaint sets forth certain specific factual allegations in support of the unfair and deceptive practice claim pursuant to N.C. Gen. Stat. § 75-1.1. The jury in its verdict clearly determined that plaintiff had not proven these specific factual allegations. Therefore, we reverse the trial court's determination that, as a matter of law, Perry's conduct amounted to an unfair and deceptive practice.

The Jury Issue Sheet contained the following issues pertaining to the unfair and deceptive practice claim:

> 4. (a) Did the defendant Leon Perry, III do any of the following:
>
> 1. Obtain lumber from Keener without the intent to pay for such lumber? _____; or
>
> 2. Make preferential payments to creditors other than Keener as a fiduciary? _____
>
> If you answer "Yes" to any of the above, go to (b). If you do not answer "Yes" to any of the three [sic] above, stop.

(b) Was the defendant Leon Perry, III's conduct in commerce or did it affect commerce? _____

If you answer "Yes" to (b), go to (c). If you answer "No," stop.

(c) Was the defendants' conduct a proximate cause of the plaintiff's injury? _____

If you answer "Yes," go to (d). If you answer "No," stop.

(d) In what amount, if any, has the plaintiff Keener been injured? _____

The jury answered "no" to 4(a)1 (thus determining that Perry *had* intended to pay for the lumber purchased from plaintiff), but answered "yes" to 4(a)2 (thus determining that Perry made preferential payments to creditors other than plaintiff). However, in its complaint, plaintiff did not base its unfair and deceptive practice claim upon the allegation that Perry made preferential payments to other creditors. Only the constructive fraud claim was founded upon allegations of preferential payments. Rather, the unfair and deceptive practice claim was based solely upon the following allegations: that plaintiff agreed to sell lumber to Perry Builders based on Perry's representations that plaintiff would be paid upon delivery or within ten days from delivery; that Perry intended to defraud plaintiff and to use the lumber purchased from plaintiff to pay debts to certain other creditors; and that Perry did not intend to pay plaintiff for this lumber. Thus, we believe that question 4(a)2 should not have been presented to the jury because it does not conform to the allegations in plaintiff's complaint.

Furthermore, because the jury answered "no" to question 4(a)1, the jury's verdict amounts to a determination that plaintiff did not prove the allegations set forth in its complaint in support of the unfair and deceptive practice claim. Therefore, we reverse the trial court's judgment against Perry on the unfair and deceptive practice claim.

IV. Other Assignments of Error

[4] Perry has also assigned error to a number of evidentiary rulings made by the trial court during the trial. Because we remand for a new trial on the constructive fraud claim, we need not address evidentiary rulings made at the first trial, as such issues may not arise again or in exactly the same way during the new trial. Finally, plaintiff has cross-assigned as error the trial court's dismissal of all claims against Conn Trucking, and of plaintiff's fraud and RICO claims against Perry. We

have reviewed these cross-assignments of error and find them to be without merit. Therefore, we affirm the trial court's dismissal of all claims against Conn Trucking and of the fraud and RICO claims.

[5] Plaintiff also cross-assigns error to the trial court's refusal to instruct the jury on the "piercing the corporate veil" doctrine. The "piercing the corporate veil" doctrine is "a drastic remedy" and "should be invoked only in an extreme case where necessary to serve the ends of justice." *Dorton v. Dorton*, 77 N.C. App. 667, 672, 336 S.E.2d 415, 419 (1985). The doctrine allows courts to disregard the corporate form (or "pierce the corporate veil") of a corporation where some alternate entity (whether an individual or another company) exerts complete domination over the corporation's policy, finances and business practices. *See Glenn v. Wagner*, 313 N.C. 450, 455, 329 S.E.2d 326, 330 (1985). Piercing the corporate veil of a corporation allows a plaintiff to impose legal liability for a corporation's obligations, or for torts committed by the corporation, upon some other company or individual that controls and dominates the corporation. *See id.* at 454, 329 S.E.2d at 330. Plaintiff here purportedly sought to pierce the corporate veil of Perry Builders, and to have the trial court instruct the jury on this doctrine. However, we do not believe plaintiff's complaint warranted application of this doctrine.

The complaint does not allege that defendant Perry should simply be held liable for Perry Builders' acknowledged debt to plaintiff based upon Perry's complete domination of Perry Builders. Nor does the complaint allege any torts committed by Perry Builders for which plaintiff might seek to hold defendant Perry liable. Rather, the complaint alleges only causes of action against Perry individually and directly for fraud, constructive fraud, unfair and deceptive practice, and RICO violation. Because there are no causes of action against Perry Builders set forth in the complaint for which plaintiff might seek to hold Perry liable under a "piercing the corporate veil" theory, the trial court properly refused to instruct the jury on this doctrine.

In summary: we affirm the trial court's denial of Perry's motion to dismiss on the grounds of jurisdiction; we affirm the trial court's grant of summary judgment for Perry on the RICO claim; we affirm the trial court's directed verdict for Perry on the fraud claim and all claims against Conn Trucking; we reverse the trial court's determination as a matter of law that Perry's conduct amounted to an unfair and

deceptive practice; we uphold the trial court's refusal to instruct the jury on the "piercing the corporate veil" doctrine; and we remand to the trial court for a new trial on the constructive fraud claim.

Affirmed in part, reversed in part, and remanded in part for a new trial.

Judges McGEE and BRYANT concur.

GARY M. NEUGENT, PLAINTIFF/COUNTERDEFENDANT, AND CINDY P. NEUGENT, COUNTERDEFENDANT v. BEROTH OIL COMPANY, 4 BROTHERS FOOD STORE, LTD., VERNICE V. BEROTH, JR., AND WALTER BEROTH, DEFENDANTS

No. COA01-242

(Filed 5 March 2002)

1. Sales— wholesale motor fuel—sale of goods—governed by UCC

The sale of motor fuel by a jobber, distributor, or oil company to a dealer is a "sale of goods" governed by the UCC.

2. Sales— wholesale motor fuel—oral contract—not shown

Plaintiff failed to meet his burden of showing that an oral contract for motor fuel was entered into at a meeting where, presuming that an offer was made, the evidence shows that it was not accepted and that it lapsed well before the date defendant began supplying plaintiff with motor fuel. N.C.G.S. § 25-2-204.

3. Sales— wholesale motor fuel—breach of contract—unexpected freight charge

In a contract action arising from the transfer of a service station and its motor fuel supply agreement, summary judgment was properly entered for defendants as to plaintiff's breach of contract claims regarding the prices defendant charged during an interim period. Bare allegations of an unexpected freight charge do not state a claim for breach of the implied covenant of good faith under N.C.G.S. § 25-2-305.

4. Sales— wholesale motor fuel—pricing—issues of fact

There were genuine issues of material fact concerning the breach of a contract to supply motor fuel to a service station

where the plain, clear, and unambiguous language of the dealer service agreement established a pricing formula which created an expectation by plaintiff and an obligation by defendant that plaintiff could purchase motor fuel at the same price as every other Amoco dealer supplied by defendant in defendant's "pricing area." The size and location of the pricing area during the relevant period, the number of other independent dealers inside the pricing area that defendant sold to as an Amoco dealer, the price that defendant charged others for motor fuel, and whether stations which defendants owned were located in the pricing area were all issues of fact.

5. Fraud— facilitation—wholesale motor fuel—summary judgment

The trial court erred by granting summary judgment for defendant on plaintiff's civil conspiracy claim. North Carolina recognizes a cause of action for facilitating fraud and plaintiff presented evidence that service stations owned by defendants and located near plaintiff's station sold motor fuel to the public at a price lower than that at which defendant sold fuel to plaintiff.

6. Statutes of Limitation and Repose— wholesale motor fuel—fraud—conspiracy—unfair trade practices—breach of contract

In an action arising from the sale of a service station and a motor fuel sales agreement, defendants' statute of limitations claim did not preclude plaintiff's contract claims that accrued on or after 1 December 1995 where plaintiff filed his complaint on 25 June 1999, well within the required four-year period. The dates that fraud and conspiracy claims and unfair and deceptive trade practice claims began to run could not be determined from the record and presented genuine issues of material fact.

7. Corporations-corporate veil— summary judgment erroneous

Defendants were not protected by the corporate veil from claims of fraud, unfair and deceptive trade practice, and conspiracy arising from the transfer of a service station and a motor fuel pricing agreement.

8. Contracts— ratification—motor fuel pricing formula

Plaintiff did not ratify defendant's pricing of wholesale motor fuel where plaintiff did not bring suit until 3 years after he learned of an unexpected freight charge and only when plaintiff was in

default, but awareness of the freight charge is inconclusive. Plaintiff did not have full knowledge of all material facts concerning the elements of the formula.

Appeal by plaintiff/counterclaim-defendants from summary judgment entered 23 October 2000 by Judge Russell G. Walker, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 5 December 2001.

Michelle D. Reingold, for plaintiff/counterclaim-defendants-appellants.

Hendrick Law Firm, by T. Paul Hendrick and Matthew H. Bryant, for defendants-appellees.

TYSON, Judge.

Gary M. Neugent ("plaintiff") appeals from the trial court's order granting Beroth Oil Company, 4 Brothers Food Store, Ltd., Vernice V. Beroth, Jr., and Walter Beroth (collectively "defendants") summary judgment on plaintiff's claims, and plaintiff and Cindy P. Neugent, counterclaim-defendant, appeal from the trial court's order granting Beroth Oil Company summary judgment on its counterclaim. We affirm in part, and reverse and remand in part.

I. Facts

Prior to 1986, Amoco Oil Company ("Amoco") constructed a motor fuel station at 831 South Main Street in Kernersville on land it leased from Mr. Peddycord. In 1986, Amoco leased the improvements to plaintiff (the "Amoco lease"). Plaintiff purchased motor fuel directly from Amoco through an Amoco dealer supply agreement ("Amoco DSA"). The Amoco DSA and lease were renewed 1 November 1993 for three additional years. The Amoco DSA established the motor fuel's price at "Amoco's dealer buying price." Amoco's dealer buying price ("DBP") is a formula price term, which allows Amoco to adjust prices in response to the commercial dynamics in the market place. The Amoco DSA also provided that "[i]f this Agreement is assigned by **Amoco** to an **Amoco** jobber, the prices to be paid by **Dealer** for motor fuel and other products hereunder shall be as established by said jobber." (Emphasis in original). "Jobber" is a term of art in the motor fuel industry used to describe an intermediate distributor who sells motor fuel to other dealers rather than directly to consumers.

Beroth Oil Company, Inc. ("Beroth") operates as an Amoco motor fuel jobber in Forsyth and other North Carolina counties. Sometime between August of 1994 and February of 1995, Beroth purchased the land from Mr. Peddycord and took assignment of the land lease with Amoco. Beroth is a North Carolina corporation organized 13 June 1986. Vernice and Walter Beroth, and two other brothers, are shareholders and officers.

Vernice and Walter Beroth are also shareholders and officers of another North Carolina corporation organized 9 January 1985 named 4 Brothers Food Store, Ltd. ("4 Brothers"). All twenty-seven 4 Brothers stores sell Amoco motor fuel. Some of the 4 Brothers stores are located in Kernersville where the Amoco station plaintiff operated was located.

During 1994, Amoco decided to sell its retail motor fuel stations in North Carolina. Plaintiff testified in deposition that "[e]arly in 1994, Amoco decided to pull out of its locations in North Carolina." Amoco's dealer leases provided that if Amoco ever decided to sell its stations, its lessees would have the first opportunity to purchase. Amoco notified its lessees that they could exercise their "rights of first refusal" and purchase Amoco's stations. Plaintiff stated that "they [would] have to give me first—right of refusal, and I [would] have 30 days to exercise it . . . ." Amoco also provided its jobbers the opportunity to bid on and purchase the stations, if the lessees did not exercise their rights and purchase.

In October of 1994, Vernice and Walter Beroth and plaintiff met to discuss whether plaintiff would be interested in purchasing Amoco motor fuel from Beroth rather than directly from Amoco. What was actually said at the meeting is disputed, but all parties agree that Beroth's pricing of Amoco motor fuel was discussed. Walter and/or Vernice Beroth mentioned the price of "6¢ over Beroth's cost." The two parties interpreted the word "cost" differently. Plaintiff understood that "cost" meant the price Beroth purchased motor fuel from Amoco, known as the "rack price," and Vernice and Walter Beroth understood that "cost" meant the rack price plus tax and freight charges.

After the 1994 meeting, plaintiff decided not to become a Beroth dealer and decided to exercise his "right of first refusal" contained in his Amoco lease and to purchase the station from Amoco. By December of 1994, plaintiff was unable to complete the purchase of

the station from Amoco. Plaintiff testified that his "financing fell through."

After plaintiff failed to purchase the station, Beroth, as one of Amoco's jobbers, bid on and purchased the station, assumed the Amoco lease and the Amoco DSA sometime in December of 1994. The Amoco lease and the Amoco DSA were due to expire 31 October 1996.

On or about 18 January 1995, Beroth began supplying Amoco motor fuel to plaintiff. The motor fuel was sold to plaintiff under an electronic meter marketing plan. Beroth delivered motor fuel to the station's underground storage tanks, which Beroth owned and maintained, on consignment. Beroth retained title to the motor fuel in the storage tanks until it was sold to the consumer through metered fuel pumps. At that time, Beroth established the price it charged to plaintiff. Beroth billed plaintiff on Monday, Wednesday and Friday. Beroth normally delivered motor fuel twice a week.

Plaintiff remained a Beroth dealer, selling Amoco motor fuel until 27 May 1999. From about 18 January 1995 until 30 November 1995, Beroth and plaintiff operated under the plaintiff's Amoco lease and Amoco DSA that Beroth acquired when it purchased the station from Amoco. Plaintiff understood that he would "operate on Amoco's lease until Beroth . . . came up with a lease . . . ."

In the fall of 1995, plaintiff received a draft of a proposed lease and dealer supply agreement from Beroth's attorney. Plaintiff and his counsel reviewed the agreements, and plaintiff signed a new lease ("Beroth lease"), a new dealer supply agreement ("Beroth DSA"), and an unlimited absolute guaranty effective 1 December 1995. Cindy P. Neugent signed the guaranty only on 23 February 1996.

On or about 4 July 1996, plaintiff claims to have discovered that Beroth had been billing him for a freight charge of 1.427 cents per gallon delivered in addition to the rack price plus six cents per gallon. Plaintiff never notified Beroth of his dissatisfaction with the price and continued to accept, sell, and pay for Amoco motor fuel sold by Beroth.

On 31 December 1998, the Beroth lease and the Beroth DSA expired, and plaintiff failed to renew. On 1 January 1999, plaintiff became a hold-over tenant. Plaintiff paid Beroth rent for January and February, but failed to pay rent for March, April, or May 1999. Plaintiff also failed to pay Beroth for motor fuel he purchased from 10 through 17 May 1999.

Beroth notified plaintiff in writing of his default on 11 March 1999, and plaintiff vacated the property on 27 May 1999. Beroth applied plaintiff's deposit of $13,000.00 and a $541.00 credit for returned stock toward past due amounts. Plaintiff and Cindy P. Neugent, counterclaim-defendant, claim that plaintiff deposited approximately $17,000.00, and this remains a disputed issue of fact. A letter from Beroth's counsel to plaintiff dated 22 June 1999 demanded remaining past due rent and payment for motor fuel in the amount of $16,768.95. Plaintiff responded by filing suit on 25 June 1999 alleging (1) breach of contract, (2) civil conspiracy, (3) fraud, (4) punitive damages, and (5) unfair and deceptive trade practices.

Defendants answered denying all allegations and affirmatively pled the defenses of (1) Statute of Frauds, (2) Statute of Limitations, (3) assumption of the risk, (4) frivolous action, (5) frivolous punitive damage claim, (6) unclean hands, (7) waiver, (8) failure to mitigate, (9) plaintiff's breach, and (10) the Petroleum Marketing Practices Act, 15 U.S.C.S. § 2802 et seq. on 16 August 1999. Only Beroth Oil Company counterclaimed for past due rent and motor fuel payments and named Cindy P. Neugent as a counterclaim-defendant.

On 27 September 1999, defendants amended their answer to add the additional affirmative defenses of (11) G.S. § 25-2-607, (12) corporate veil, (13) estoppel, (14) failure of consideration, (15) rejection of offer, (16) ratification, and (17) G.S. § 25-2-202. On 26 October 1999, plaintiff and counterclaim-defendant replied to Beroth's counterclaim and affirmatively pled the defenses of (1) duress, (2) failure of consideration, (3) fraud, (4) illegality, and (5) payment. Defendants moved for summary judgment.

The trial court entered judgment for defendants on all of plaintiff's claims and granted judgment for Beroth on its counterclaim in the amount of $15,826.89 for past due rent and motor fuel, attorney's fees of $2,374.03, prejudgment interest of $1,852.90, and costs of $3,892.63 on 23 October 1999. Plaintiff and counterclaim-defendant appeal. Defendants did not cross-appeal.

II. Issues

Plaintiff assigns as error the trial court's (A) granting of summary judgment for defendants on plaintiff's claims where disputed issues of material fact exist regarding: (1) breach of contract, (2) fraud, (3) unfair and deceptive trade practices, and (4) civil conspiracy; and (B) granting of summary judgment for Beroth on its counterclaim

because of plaintiff and counterclaim-defendant's meritorious affirmative defenses of (1) duress, (2) failure of consideration, (3) fraud, (4) illegality, and (5) payment.

III. Breach of Contract

Plaintiff contends that defendants represented and agreed that the price of motor fuel sold to plaintiff would be 6 cents per gallon "above Beroth's cost," and that Beroth "breached this contract by charging Mr. Neugent an additional 1.4 cents per gallon, above Beroth's cost, as a delivery charge."

Plaintiff argues that Walter and/or Vernice Beroth breached an oral contract made at the October 1994 meeting, and also claims that "Beroth breached its . . . . Dealer Supply Agreement signed by the parties . . . ." We address each claim separately.

A. Motor Fuel as a Sale of Goods

[1] We recognize that these transactions are governed by the Uniform Commercial Code ("UCC"). Article 2 of the UCC, set out in Chapter 25 of the North Carolina General Statutes, governs the sale of goods. " 'Goods' means all things . . . which are movable at the time of identification to the contract for sale . . . ." N.C. Gen. Stat. § 25-2-105(1) (1965). North Carolina Courts have not addressed the issue of whether the sale of motor fuel between a jobber, distributor, or oil company and a dealer constitutes the sale of goods. Other jurisdictions have concluded that the UCC controls these transactions. *Allapattah Servs., Inc. v. Exxon Corp.* 61 F. Supp 2d 1308 (S.D. Fla. 1999) (sale of gasoline by an oil company to its dealers is a sale of goods covered by Article 2 of the UCC); *CPI Oil & Ref., Inc. v. Metro Energy Co.*, 557 F. Supp 958, 964 (N.D. Ala. 1983); *Oakey Gasoline and Oil Co., Inc. v. OKC Ref., Inc.*, 364 F. Supp 1137, 1141 (D. Minn. 1973); *Laudisio v. Amoco Oil Co.*, 108 Misc. 2d 245 (NYS. 1981); *Steiner v. Mobile Oil Corp.*, 569 P.2d 751 (Cal. 1977) (gasoline sold by a supplier to a service station constitutes goods under the UCC). We hold that the sale of motor fuel between a jobber, distributor, or oil company to a dealer is the "sale of goods" governed by the UCC.

B. Alleged Oral Contract

[2] Plaintiff claims that defendants committed "a material breach of the contract formed in October, 1994" by charging him a 1.427 cents

per gallon delivery charge. We disagree. Viewed in the light most favorable to the plaintiff, the evidence failed to establish that an oral contract was entered into during the October 1994 meeting.

Article 2 of the UCC provides that:

> (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by *both* parties which recognizes the existence of a contract.
>
> (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
>
> (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

N.C. Gen. Stat. § 25-2-204 (1965) (emphasis supplied); *see also Custom Molders, Inc. v. Roper Corp.*, 101 N.C. App. 606, 613, 401 S.E.2d 96, *100, disc. review on additional issues denied*, 328 N.C. 731, 404 S.E.2d 867, *aff'd*, 330 N.C. 191, 410 S.E.2d 55 (1991) ("under [the UCC] a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct that indicates the existence of such a contract") (citing *Carolina Builders Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 324 S.E.2d 626, *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985)). "The Uniform Commercial Code applies more liberal rules governing the formation of contracts than the rules applied under traditional common law." *Fordham v. Eason*, 351 N.C. 151, 156, 521 S.E.2d 701, 705 (1999).

When plaintiff's evidence showed only tentative negotiations, it is insufficient to show the existence of a contract for the sale of goods. *Oakley v. Little*, 49 N.C. App. 650, 272 S.E.2d 370 (1980). "A contract binding defendant was not made until defendant did some act indicating its intent to be bound, *i.e.*, recognized the existence of the contract." *Unitrac, S.A. v. Southern Funding Corp.*, 75 N.C. App. 142, 146, 330 S.E.2d 44, 46 (1985) (citing G.S. § 25-2-204). "[P]laintiff bore the burden of proving all of the essential elements of a valid contract . . . ." *Delp v. Delp*, 53 N.C. App. 72, 76, 280 S.E.2d 27, 30 (1981); *see also King v. Bass*, 273 N.C. 353, 354, 160 S.E.2d 97, 98 (1968) (burden on plaintiff to offer evidence in support of all essential and material elements of claim) (citation omitted).

At bar, plaintiff has failed to meet his burden by showing that an oral contract was entered into during the October 1994 meeting. Plaintiff claims that Walter or Vernice Beroth offered to sell motor fuel to plaintiff at that meeting. Walter and Vernice Beroth claim that no offer was made, simply a discussion of motor fuel prices.

Reviewing the record in the light most favorable to plaintiff, he failed to produce any evidence that he accepted the alleged "offer," other than showing that Beroth: (1) purchased the underlying property from Mr. Peddycord, (2) purchased the station from Amoco, (3) assumed the Amoco lease and Amoco DSA, and (4) began supplying plaintiff motor fuel on or about 18 January 1995. Presuming an "offer" was made, the evidence indicates it was not accepted and lapsed well before 18 January 1995.

Although not definitive, plaintiff's deposition testimony and his conduct after the October meeting indicates no acceptance of Beroth's alleged "offer." Plaintiff stated that "I don't recollect making a comment back to them. I don't remember making a comment back to them. I was just getting—gathering information," and concluded that "I was basically seeking information to try to clarify how much things would change in dealing from Amoco Oil Company direct versus being with Beroth Oil Company."

Also, plaintiff exercised his right of first refusal to the Amoco lease and attempted to purchase the station directly from Amoco after the October 1994 meeting. "I had a meeting with Walter and Thornton [sic] Beroth that—and maybe November or early December [1994], and that's after I had signed that first right of refusal . . . . I told them . . . it was my intentions to, you know, purchase the lease from Amoco." Plaintiff offers no evidence that he intended to be bound, or that he considered any of defendants bound to any alleged oral contract as a result of the October 1994 meeting.

Additionally, UCC § 2-201 requires that "a contract for the sale of goods for the price of five hundred dollars ($500.00) or more is not enforceable . . . unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . ." N.C. Gen. Stat. § 25-2-201 (1965). The record indicates that after Beroth began selling motor fuel to plaintiff, pursuant to the Amoco and Beroth DSA's, the price of motor fuel deliveries were substantially more than $500.00. We hold that no contract was formed between the parties as a result of the October 1994 meeting.

C. Beroth Begins Selling Amoco Motor Fuel to Plaintiff

[3] On or about 18 January 1995, Beroth began selling motor fuel to plaintiff. From that date until 30 November 1995, the parties operated pursuant to plaintiff's Amoco lease and Amoco DSA that Beroth assumed when it purchased the station from Amoco. The Amoco DSA set the price for motor fuel at "**Amoco's** dealer buying price . . . in effect in **Amoco's** pricing area in which the above-identified motor fuel sales facility is located at the time when title to said products passes from **Amoco** to **Dealer**." (Emphasis in original). Walter Beroth testified that he did not know "Amoco's dealer buying price." Plaintiff testified that he did not know "the markup in the dealer buying price that Amoco charged . . . ." The Amoco DSA further provided that "[i]f this Agreement is assigned by **Amoco** to an **Amoco** jobber, the prices to be paid by **Dealer** for motor fuel and other products hereunder shall be as established by said jobber." (Emphasis in original). We conclude that Beroth, as jobber-assignee of the Amoco DSA, was not obligated to charge the same price to plaintiff that Amoco had charged for motor fuel according to the clear and unambiguous terms of the Amoco DSA. It is also clear from the record that Beroth and plaintiff did not enter into a new written agreement until 1 December 1995.

Plaintiff understood that he would "operate on Amoco's lease until Beroth . . . came up with a lease," and that he would be bound by its terms. Plaintiff does not argue that no contract existed, only that defendants breached the Beroth DSA that became effective 1 December 1995. Plaintiff does not specifically address the interim period from or about 18 January 1995 to 30 November 1995, when the parties operated under the Amoco DSA, in his brief.

"UCC § 2-305 provides for the determination of the price when the parties intended to make a contract although no price was stated . . . ." 2A Ronald A. Anderson, *Anderson on the Uniform Commercial Code* § 2-305.5, p 431 (3d ed. 1997).

> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

. . . .

N.C. Gen. Stat. § 25-2-305 (1965) (emphasis supplied).

Here, the Amoco DSA established the price of motor fuel at whatever Beroth, as assignee-jobber, decided to charge. Beroth's discretion was not unlimited: "A price to be fixed by the seller . . . means a price for him to fix in good faith." N.C. Gen. Stat. § 25-2-305(2). " 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." N.C. Gen. Stat. § 25-2-103(1)(b) (2001). Beroth and plaintiff were both merchants as defined in the UCC. *See* N.C. Gen. Stat. § 25-2-104 (1965).

Plaintiff does not allege that Beroth did not set the price in good faith during this interim period between about 18 January 1995 and 30 November 1995. We hold that bare allegations of an unexpected 1.427 cents per gallon freight charge, without more, does not state a claim for breach of the implied covenant of good faith during the period of time between about 18 January 1995 to 30 November 1995. We affirm the trial court's grant of summary judgment for defendants as to all of plaintiff's contract claims through 30 November 1995.

D. Beroth DSA

[4] Plaintiff claims that defendants breached the Beroth DSA, or alternatively, there is a disputed issue of fact as to whether defendants breached. Plaintiff's main contention is that "Beroth was charging . . . 4 Brothers an amount substantially less than that charged plaintiff." We are unable to determine from the record whether defendants breached the Beroth DSA because genuine issues of material fact exist.

Beroth and plaintiff, each represented by counsel, executed the Beroth lease and DSA effective 1 December 1995. The parties established the price for motor fuel using language that is virtually identical to the language contained in the Amoco DSA. The Beroth DSA stated:

4. **Prices.** The price for motor fuels purchased by **Dealer** from **Beroth** hereunder, shall be **Beroth's** dealer buying price for each respective grade of said products in effect in **Beroth's** pricing area in which the Premises is located at the time when title to said products passes from **Beroth** to **Dealer**.

(Emphasis in original).

As stated above, UCC § 2-305(2) authorizes a seller or buyer to fix the price to be charged. "This is not expressly declared in the Code but is necessarily implied in UCC § 2-305(2) which defines the duty of a party in fixing the price." Anderson, *supra*, § 2-305:44, at 449.

Good faith ordinarily is met if a formula or standard is set. Official Comment 3 of the UCC § 2-305(2) provides that a "price in effect" is by definition a price set in good faith: "in the *normal case* a 'posted price' or a future seller's or buyer's 'given price,' '*price in effect*,' 'market price,' or the like satisfies the good faith requirement." N.C. Gen. Stat. § 25-2-305, Official Comment, para. 3, sent. 3 (emphasis supplied). "This provision apparently reflects a belief that § 2-305(2) should not require suppliers in industries where 'price in effect'-type contracts are often used to establish that the price ultimately charged was a reasonable one." *Wayman v. Amoco Oil Co.*, 923 F. Supp 1322, 1346 (D. Kan. 1996). "[T]he chief concern of the UCC Drafting Committee in adopting § 2-305(2) was to prevent *discriminatory* pricing—i.e., to prevent suppliers from charging two buyers with identical pricing provisions in their respective contracts different prices for arbitrary or discriminatory reasons." *Id.* at 1347 (emphasis in the original). We hold that once a buyer or a seller sets a formula or standard to determine the price in the contract pursuant to UCC 2-305(2), both parties must abide by that formula or standard until mutually amended or changed.

Defendants argue that "Neugent contracted to buy at an open price term—not a fixed price formula." We disagree. "When the parties have agreed on a formula for determining the price, there is no 'open price' term . . . ." Anderson, *supra*, § 2-305:32, at 443 (citing *S.C. Gray, Inc. v. Ford Motor Co.*, 286 N.W.2d 34 (Mich. Ct. App. 1979)). Under the Beroth DSA pricing structure, the price charged by Beroth may change from day to day, but the pricing formula or structure contractually cannot change without amending the agreement. The plain, clear, and unambiguous language of the Beroth DSA establishes a pricing formula which created an expectation by plaintiff and an obligation by Beroth that plaintiff could purchase motor fuel at the same

price as every other Amoco dealer that Beroth supplied Amoco motor fuel to in "Beroth's pricing area."

Alternatively defendants contend that even if they breached a contract, plaintiff's contract claim is barred because defendants affirmatively pled UCC § 2-607, and plaintiffs failed to give defendants required notice after they knew of the breach. N.C. Gen. Stat. § 25-2-607 (1965).

After careful review, we conclude that defendants have failed to show that UCC § 2-607 applies to transactions other than the failure of the "goods or the tender of delivery . . . to conform to the contract." N.C. Gen. Stat. § 25-2-601 (1965). Also, the date of the breach(es), if any, is a disputed issue of fact. We are unable to determine when plaintiff should have discovered that a breach, if any, occurred, triggering the notice requirements of G.S. § 25-2-607.

We hold that the Beroth DSA set the price for motor fuel at "Beroth's dealer buying price . . . in effect in Beroth's pricing area" and utilized a fixed price formula that obligated Beroth to sell to plaintiff at the same dealer buying price that Beroth sold motor fuel to other dealers in "Beroth's pricing area."

Whether or not Beroth charged plaintiff "Beroth's dealer buying price . . . in effect in Beroth's pricing area" from 1 December 1995 to 27 May 1999 is a dispositive issue regarding plaintiff's breach of contract claim. Defendants argue that plaintiff has "no evidence that he [plaintiff] is being charged differently than other dealers." This assertion is unsupported by the record.

Beroth or 4 Brothers owns and operates at least twenty-seven stations in Forsyth and surrounding counties. Walter Beroth admitted in his deposition testimony that "[w]e don't charge ourselves for the product . . . . [4 Brothers] is not really charged over what Beroth is charged for the product." "In other words, there's not a set markup on that product when it's dropped at the store for the store internally." From this and other parts of Walter Beroth's testimony and the record, it is undisputed that Beroth sells motor fuel to the 4 Brother stations at Beroth's "rack price" plus freight only. Beroth charged 4 Brothers a different price than it charged plaintiff for motor fuel.

Walter Beroth contends in his deposition testimony that 4 Brothers is not an Amoco dealer. The record before us does not support his contention. 4 Brothers is a separate corporation.

Approximately twenty-seven 4 Brothers stores sold Amoco motor fuel, supplied by Beroth, to the public. In plaintiff's first request for admissions, defendants admitted that "4 Brothers . . . and Beroth . . . are separate and distinct corporations." Some 4 Brothers stations were located less than three miles from plaintiff's station. Although the record is clear that Beroth charged 4 Brothers less than it charged plaintiff, the record does not show the extent of "Beroth's pricing area," and consequently we are unable to determine if Beroth breached the Beroth DSA.

Vernice Beroth was unable to identify "Beroth's pricing area" conclusively. When asked "[w]hat's the geographic area that Beroth . . . controls the pricing for Amoco petroleum products to various dealers," Vernice responded "[w]ell, it—it could be Forsyth County or it could be like a Walkerton or a Kernersville or something like that." "Generally it's Forsyth County. But I—like I say, it could be—one side of town could be one price and the other side another." Plaintiff's counsel specifically asked Vernice Beroth "[a]s of December 1st, 1995, what was Beroth's pricing area as outlined in [Beroth's DSA]." He responded "I don't know. I don't know. I couldn't tell you. I just don't recall that." As some evidence of Beroth's pricing area, defendants admitted that "from 1994 to May 1999, Beroth . . . was the only Amoco distributor from whom the plaintiff could purchase Amoco petroleum products" in plaintiff's request for admissions.

Also it is unclear from the record how Beroth determined the price it charged for motor fuel sold to plaintiff. When asked, Walter Beroth stated that "In that—in those—in that—instances of those locations, we—we based the price on our liability." Establishing plaintiff's price for motor fuel based on Beroth's "liability" is different than "Beroth's dealer buying price . . . in effect in Beroth's pricing area," as required by the Beroth DSA. In any event, the record is inconclusive as to how Beroth determined the price it charged plaintiff.

Beroth, as a jobber, also sold motor fuel to five or six other independent Amoco dealers. We are unable to determine the number of other independent dealers to whom Beroth sold motor fuel from 1 December 1995 to 27 May 1999, the price Beroth charged those other dealers for motor fuels, and if those dealers were located in the same "Beroth's pricing area" as plaintiff.

On the record before us, we cannot ascertain whether Beroth sold motor fuels to plaintiff from 1 December 1995 until 27 May 1999

for "Beroth's dealer buying price . . . in effect in Beroth's pricing area." We hold that: (1) the size and location of "Beroth's pricing area" from 1 December 1995 until 27 May 1999; (2) the number of other independent dealers inside "Beroth's pricing area" that Beroth sold to, as an Amoco jobber, (3) the price that Beroth charged independent dealers and 4 Brothers stations for motor fuel, and (4) whether any 4 Brothers stations were located in "Beroth's pricing area" from 1 December 1995 until 27 May 1999, are all genuine issues of material fact which precludes summary judgment on plaintiff's breach of contract claim for the period between 1 December 1995 through 27 May 1999.

Each billing on or after 1 December 1995 could constitute a new and separate breach if Beroth sold motor fuel to plaintiff at a price other than "Beroth's dealer buying price . . . in effect in Beroth's pricing area." *See e.g.* 23 Samuel Williston, *A Treatise on the Law of Contracts* § 63.1 (Richard A. Lord ed., 4th ed. 2002) ("As a contract consists of a binding promise or set of promises, a breach of contract is a failure, without legal excuse, to perform any promise that forms the whole or part of a contract"); *see also* N.C. Gen. Stat. § 25-2-612 (1965).

Although genuine issues of material fact exist with respect to plaintiff's breach of contract claim of the Beroth DSA for the sale of motor fuel, plaintiff and counterclaim-defendant presented no evidence, and have not argued here, that they are not liable for rent payments for March, April, and May 1999 as alleged in Beroth's counterclaim. We affirm the trial court's grant of summary judgment for Beroth's counterclaim for past due rent for those months.

We also affirm plaintiff and counterclaim-defendant's liability for payment of motor fuel that Beroth sold to plaintiff from 10 through 17 May 1999. We remand for determination of the amount owed, using the price formula set forth in the Beroth DSA in accordance with this opinion.

The award of attorney fees, costs and interest to Beroth on its counterclaim is also remanded for a determination of the proper allocation of these fees, costs, and interest between Beroth's rental claims and motor fuel claims.

IV. Civil Conspiracy

[5] Plaintiff contends that North Carolina law "permits one defrauded to recover from anyone who facilitated the fraud by agree-

ing for it to be accomplished," and that it was error for the trial court to grant summary judgment to defendants. We agree.

This State recognizes a cause of action for the facilitation of fraud. "While there is no recognized action for civil conspiracy in North Carolina, *Fox v. Wilson*, 85 N.C. App. 292, 354 S.E.2d 737 (1987), and this claim is couched in the language of conspiracy, our law nevertheless permits one defrauded to recover from anyone who facilitated the fraud by agreeing for it to be accomplished." *Nye v. Oates*, 96 N.C. App. 343, 346-47, 385 S.E.2d 529, 531 (1989). "When a cause of action lies for injury resulting from a conspiracy, 'all of the conspirators are liable, jointly and severally, for the act of any one of them done in furtherance of the agreement.' " *State ex rel. Long v. Petree Stockton, L.L.P.* 129 N.C. App. 432, 447, 499 S.E.2d 790, 799 (1998) (quoting *Fox*, 85 N.C. App. at 301, 354 S.E.2d at 743).

The elements of facilitating fraud are: (1) that the defendants agreed to defraud plaintiff; (2) that defendants committed an overt tortious act in furtherance of the agreement; and (3) that plaintiff suffered damages from that act. *Oates*, 96 N.C. App. at 347, 385 S.E.2d at 531-32 (citing *Coleman v. Shirlen*, 53 N.C. App. 573, 281 S.E.2d 431 (1981)).

Through the testimony of Walter Beroth, plaintiff presented evidence that on several occasions 4 Brothers stations located near plaintiff's station sold motor fuel to the public at a price per gallon less than Beroth sold motor fuel to plaintiff. Walter Beroth and Vernice Beroth also testified that Beroth now owned several of the other formerly independent dealer's stations that Beroth had previously sold motor fuel to as a jobber. These stations now operate as 4 Brothers stations.

Although not dispositive as to plaintiff's civil conspiracy claim, when viewed in the light most favorable to the plaintiff and according him every reasonable inference, defendants are not entitled to judgment as a matter of law. The trial court erred granting summary judgment for defendants on plaintiff's conspiracy claim.

IV. Defendants' Affirmative Defenses

Defendants have affirmatively pled 17 defenses that they claim support the trial court's grant of summary judgment, although not all are argued. We do not address those not argued. N.C. R. App. P. 28(b)(5) (1999).

A. Statute of Limitations

[6] The Statute of Limitations defense affirmatively pled to plaintiff's breach of contract claim is not a complete bar to plaintiff's recovery. The applicable statute of limitations for plaintiff's contract claim is four years from the date of any potential breach which may or may not have occurred on and after 1 December 1995 until 27 May 1999. *See* N.C. Gen. Stat. § 25-2-725(2) (1967) (a cause of action accrues when the breach occurs, even if the aggrieved party is unaware of the breach); N.C. Gen. Stat. § 25-2-725(1) (1967) (four year statute of limitation for breach of contract for the sale of goods). We conclude defendants' Statute of Limitations defense does not preclude plaintiff's contract claims that accrued on or after 1 December 1995. Plaintiff filed his complaint on 25 June 1999, well within the required four year period.

Plaintiff's fraud and conspiracy claims are governed by a three year statute of limitations. N.C. Gen. Stat. § 1-52(9) (1997). The statute commences from discovery of the fraud or from when it should have been discovered exercising ordinary care. *Sinclair v. Teal*, 156 N.C. 458, 72 S.E. 487 (1911). Plaintiff's unfair and deceptive trade practices claim is governed by a four year statute of limitation. N.C. Gen. Stat. § 75-16.2 (1979). The statute commences when the violations occur. *Hinson v. United Fin. Servs., Inc.*, 123 N.C. App. 469, 475, 473 S.E.2d 382, 387 (1996) (citing *United States v. Ward*, 618 F. Supp 884, 902 (E.D.N.C. 1985)).

Defendants argue that plaintiff "had Beroth's pricing to him as of January 18, 1995, and knew or should have known the facts constituting the alleged fraud . . . and unfair trade actions . . . as of January 1995 . . . . He had the ability to verify Beroth's pricing . . . ." We disagree.

Plaintiff could have verified the price "formula" at that time. Plaintiff had no way to determine whether defendants engaged in unfair and deceptive trade practices from 25 June 1995 until 30 November 1995. Also plaintiff had no way of knowing whether defendants' actions constituted fraud, unfair and deceptive trade practice, and/or conspiracy on and after 1 December 1995. Given the limited record before us, genuine issues of fact preclude us from determining the dates that the three and four year statute of limitations respectively began to run on these claims.

B. Corporate Veil

[7] Defendants affirmatively pled corporate veil and argue here that the trial court properly dismissed plaintiff's claims against 4 Brothers, and Walter and Vernice Beroth. Defendants contend that plaintiff offered no evidence that Walter and Vernice Beroth were acting in their individual capacities, and that plaintiff offered no evidence that 4 Brothers were liable under any of his claims. Again we disagree.

The judgment does not contain findings of fact or conclusions of law regarding whether 4 Brothers, or Walter and Vernice Beroth are proper defendants. Reviewing the evidence in the light most favorable to plaintiff, we conclude that genuine issues of fact exist as to whether 4 Brothers, Walter Beroth and/or Vernice Beroth defrauded, unfairly and deceptively practiced trade, and conspired against plaintiff. The trial court erred granting summary judgment for defendants on these claims.

C. Ratification, Waiver, Estoppel

[8] Defendants next contend that plaintiff "ratified the Beroth's contract and pricing" arguing that plaintiff did not bring suit until 3 years after he learned of the freight charge and only when plaintiff was in default. Defendants conclude that plaintiff "cannot assert claims for unfair trade practices, breach of contract, fraud, or civil conspiracy against any of defendants."

It is true that "[a] cause of action premised on fraud or misrepresentation may be waived by affirmative acts taken by a plaintiff that amount to a ratification of the transaction." David A. Logan and Wayne A. Logan, *North Carolina Torts* § 25.10, at 545 (1996) (citing *Hawkins v. Carter*, 196 N.C. 538, 146 S.E.2d 231 (1929)); *see also Link v. Link*, 278 N.C. 181, 197, 179 S.E.2d 697, 706 (1971) (citations omitted). "It is equally clear, however, that an act of the victim of any of these wrongs will not constitute a ratification of the transaction thereby induced unless, at the time of such act, the victim had full knowledge of the facts and was then capable of acting freely." *Link*, 278 N.C. at 197, 179 S.E.2d at 706-07 (citations omitted).

Plaintiff admitted that he became aware of the "freight charge" on 4 July 1996. That fact alone is inconclusive evidence that plaintiff was aware that defendants may have sold motor fuel to plaintiff at a price other than "Beroth's dealer buying price. . . in effect in Beroth's pricing area." Beroth, as seller, set the "dealer buying price" and the "pricing area." Viewing the evidence in the light most favorable to

plaintiff, plaintiff did not have full knowledge of all material facts concerning "Beroth's dealer buying price" and "Beroth's pricing area" sufficient for the trial court to conclude, as a matter of law, that plaintiff acted freely and ratified defendants wrongdoing, if any.

V. Plaintiff's Affirmative Defenses

Plaintiff contends that his affirmative defenses of duress, failure of consideration, fraud, illegality, and payment should have prevented the trial court from granting Beroth summary judgment on its counterclaim.

We affirmed the trial court granting Beroth summary judgment on its counterclaim on the issues of past due rent and plaintiff and counterclaim-defendant's liability for payment of motor fuel purchased but unpaid only. The amount plaintiff owes Beroth must await the determination of whether a breach of contract occurred and application of the proper price. Plaintiff and counterclaim-defendant failed to argue these affirmative defenses to that portion of the judgment. These affirmative defenses do not bar Beroth's recovery.

VII. Conclusion

After a thorough review of the limited record and arguments of the parties, we conclude that genuine issues of material fact preclude summary judgment for defendants on plaintiff's claims, except for plaintiff's contract claims prior to 1 December 1995. We also conclude that Beroth is entitled to partial summary judgment on its counterclaim.

We affirm that portion of the trial court's grant of summary judgment (A) for defendants on plaintiff's (1) breach of an alleged oral contract, and (2) breach of contract claim during the period from 18 January 1995 until 30 November 1995, the period during which the parties operated under the Amoco lease and Amoco DSA; (B) for Beroth's counterclaim for past due rent and for plaintiff and counterclaim-defendant's liability for payment of motor fuel purchased from 10 May to 17 May 1999. The amount owed for motor fuel should be determined by application of the appropriate contract price after a determination of whether or not defendants breached the Beroth DSA.

We affirm the trial court's award, but not amount, of attorney fees, costs, and interest to Beroth on its counterclaim for past due rent and plaintiff and counterclaim-defendant's liability for motor fuel

payments. We remand for the trial court's proper determination and allocation of those fees, costs, and interest.

We reverse and remand for trial on plaintiff's claims for (1) breach of contract between 1 December 1995 through 27 May 1999, and the amount that plaintiff and counterclaim-defendant owe Beroth for unpaid motor fuel purchases, (2) civil conspiracy, (2) fraud, (3) unfair and deceptive trade practices, and (4) punitive damages.

Affirmed in part, reversed and remanded in part.

Judges TIMMONS-GOODSON and HUDSON concur.

STATE OF NORTH CAROLINA v. WILLIAM JASPER GOODMAN, JR.

No. COA00-1417

(Filed 5 March 2002)

1. **Homicide— second-degree murder—driving while intoxicated—malice—sufficiency of evidence**

The trial court did not err by failing to dismiss the charge of second-degree murder arising out of defendant's driving while intoxicated based on the sufficiency of the evidence concerning malice, because: (1) the State introduced evidence of defendant's extensive driving-related convictions, including prior convictions for driving while impaired; and (2) the evidence also showed that defendant ran a red light while traveling approximately forty to forty-five miles per hour with his head and arm hanging out of the window.

2. **Homicide— second-degree murder—driving while intoxicated—failure to submit misdemeanor death by vehicle**

The trial court did not err in a second-degree murder case arising out of defendant's driving while intoxicated by failing to submit to the jury the possible verdict of misdemeanor death by vehicle under N.C.G.S. § 20-141.4(a2), because misdemeanor death by vehicle is a lesser included offense of involuntary manslaughter, and since the jury rejected involuntary manslaughter in favor of second-degree murder, it would also have rejected the lesser offense of misdemeanor death by vehicle.

3. Evidence— prior crimes or bad acts—assault upon a law enforcement officer—failure to give limiting instruction

Although the trial court erred in a second-degree murder case arising out of defendant's driving while intoxicated by failing to charge the jury with a limiting instruction regarding defendant's 1980 conviction for assault upon a law enforcement officer, the omission does not entitle defendant to a new trial because: (1) the trial court's instructions to the jury throughout the trial and during the charge made clear that it was the evidence of defendant's prior driving convictions which were being offered to prove malice; (2) the trial court was clear in instructing the jury that the purpose of the evidence of the 16 June 1980 conviction was to determine whether defendant was guilty of possessing a firearm as a felon; and (3) any limiting instruction would not have affected the admissibility or the inflammatory nature of the evidence.

4. Evidence— victim's good character—no plain error

The trial court did not commit plain error in a second-degree murder case arising out of defendant's driving while intoxicated by admitting testimony from the victim's son concerning the victim's good character, because: (1) although such character evidence is generally inadmissible, the evidence was harmless in light of the evidence of defendant's alcohol-related convictions within the past few years; and (2) defendant has failed to show that any error was so fundamental as to amount to a miscarriage of justice or would have resulted in a different verdict.

5. Evidence— prior crimes or bad acts—driving record—driving convictions

Although the trial court erred in a second-degree murder case arising out of defendant's driving while intoxicated by admitting defendant's entire driving record which detailed his prior driving convictions under N.C.G.S. § 8C-1, Rule 404(b) when some of his convictions were too remote in time to be probative, the trial court did not commit plain error because: (1) prior driving convictions are a proper means of establishing the malice element of second-degree murder; (2) defendant had numerous convictions, including four convictions for driving while intoxicated or impaired which occurred within the appropriate time frame of within sixteen years of the date of the offense at issue; (3) the remoteness of defendant's three convictions for driving while intoxicated, occurring only one and two years outside the per-

missible period of sixteen years, goes to the weight of the evidence rather than its admissibility; (4) defendant's non-alcohol related convictions including failing to yield the right of way, illegal passing, reckless driving, and speeding are not too dissimilar to be probative of a pattern of recklessness and inherently dangerous conduct which substantiate defendant's malice in the present case; and (5) defendant cannot establish that a different result would have occurred absent any error.

6. Sentencing— second-degree murder—failure to prove prior convictions

Defendant is entitled to a new sentencing hearing in a second-degree murder case arising out of defendant's driving while intoxicated based on the State's failure to prove defendant's prior convictions as required by N.C.G.S. § 15A-1340.14(f), because: (1) the State did not offer into evidence any document which tended to prove that defendant had been convicted of the prior crimes; and (2) the trial court sentenced defendant based upon the information provided by the State's unverified prior record level worksheet.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 31 March 2000 by Judge James C. Davis in Gaston County Superior Court. Heard in the Court of Appeals 8 January 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Philip A. Lehman, for the State.

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

HUNTER, Judge.

William Jasper Goodman, Jr. ("defendant") appeals his conviction and sentence for the second degree murder of Lewis Watford. We hold defendant's trial was free from prejudicial error; however, we remand for resentencing.

The evidence presented at trial tended to establish that on 11 February 1999 at approximately 11:30 a.m., seventy-three year-old Lewis Watford was driving a Mercury Grand Marquis on U.S. 321 in Gastonia. Watford's vehicle was stopped at a red light in the left

northbound lane of U.S. 321 at the intersection of Hudson Boulevard. When the light turned green, Watford proceeded into the intersection to make a left turn when his vehicle was struck on the passenger side by defendant's truck. Defendant had run a light as he proceeded west on Hudson Boulevard. Witness Tracy Moose testified she saw defendant's head and arm hanging out the driver's side window of his truck as he ran the red light. Defendant was traveling at approximately forty to forty-five miles per hour when he struck Watford's passenger-side door. A blood test performed on defendant at the hospital revealed his blood alcohol content was .138. Watford died four days later as a result of injuries sustained in the accident.

Defendant was indicted on 1 March 1999 for second degree murder, driving while impaired, and failure to stop at a red light. He was also indicted for possession of marijuana and carrying a concealed weapon, both of which were recovered from defendant's truck after the accident. On 1 November 1999, defendant was indicted for possession of a firearm by a convicted felon, based upon the discovery of the firearm in defendant's vehicle and his 1980 conviction for assault upon a law enforcement officer. Defendant pled guilty to possession of marijuana and driving while impaired on 28 March 2000.

Defendant's second degree murder charge and possession of a firearm by a felon charge were both tried to a jury. During trial, the State introduced defendant's driving record which contained numerous convictions for traffic violations, including several prior convictions for driving while impaired. Defendant did not testify. On 31 March 2000, defendant was convicted of second degree murder. He was acquitted of possession of a firearm by a convicted felon. The trial court arrested judgment on the charge of driving while impaired, and consolidated defendant's convictions for possession of marijuana and second degree murder. Based upon his prior record level, the trial court sentenced defendant to a minimum of 251 and a maximum of 311 months' imprisonment. He appeals.

Defendant brings forth six arguments on appeal, contending the trial court erred in (1) failing to dismiss the charge of second degree murder for insufficient evidence of malice; (2) failing to submit the possible verdict of misdemeanor death by vehicle to the jury; (3) failing to charge the jury with a limiting instruction regarding the 1980 conviction for assault upon a law enforcement officer; (4) admitting testimony that Watford was a good person; (5) admitting defendant's driving record; and (6) sentencing defendant based upon incompetent

evidence of defendant's prior convictions. For reasons stated herein, we find no prejudicial error in the guilt phase of defendant's trial, but remand for resentencing.

I.

[1] Defendant first argues the trial court erred in failing to dismiss the charge of second degree murder on the basis there was insufficient evidence to establish defendant acted with malice. Defendant failed to properly renew his motion to dismiss at the close of all evidence as required by Rule 10(b)(3) of the Rules of Appellate Procedure. Although he urges us to review this assignment of error for plain error, our Supreme Court "has only elected to review unpreserved issues for plain error that involve instructional errors or the admissibility of evidence." *State v. Carpenter*, 147 N.C. App. 386, 556 S.E.2d 316, 323 (2001) (citing *State v. Steen*, 352 N.C. 227, 536 S.E.2d 1 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001); *State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1996)). However, in our discretion, we may suspend application of Rule 10(b)(3) in this case. *See* N.C.R. App. P. 2. We elect to do so here, and will review defendant's argument.

In order to convict a defendant of second degree murder, the State must establish that defendant committed an unlawful killing of a human being with malice, but need not establish premeditation or deliberation. *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991). It is well-established that the malice element of second degree murder in cases such as this may be proved through the introduction of prior driving convictions.

In *State v. Miller*, 142 N.C. App. 435, 543 S.E.2d 201 (2001), this Court recently reiterated this principle, holding that the defendant's prior driving convictions dating as far back as sixteen years could be used to establish the defendant acted with malice when he hit the decedent while driving under the influence of alcohol. *Id.* at 439, 543 S.E.2d at 204; *see also State v. Jones*, 353 N.C. 159, 173, 538 S.E.2d 917, 928 (2000) (prior charge of driving while intoxicated sufficient to establish malice element of second degree murder; such evidence demonstrates "defendant was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life"); *State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 307 (2000) (introduction of prior driving convictions to establish malice element of second degree murder not in violation of N.C. Gen. Stat.

§ 8C-1, Rule 404(b) (1999); such convictions are for the permissible purpose of establishing defendant's " 'totally depraved mind' " and " 'recklessness of the consequences' ").

Moreover, this Court in *Miller* rejected defendant's argument that his convictions, dating as far back as sixteen years prior to the accident at issue, were too remote in time to be admissible. In so holding, we noted that the Supreme Court in *Rich* had held a prior conviction dating back nine years to be admissible; that this Court in *State v. McAllister*, 138 N.C. App. 252, 530 S.E.2d 859, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000), had held a seven year-old conviction for driving while intoxicated admissible to establish malice; and that in *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), we held prior convictions over ten years old to be admissible to establish malice. *Miller*, 142 N.C. App. at 440, 543 S.E.2d at 205.

Applying these principles to the present case, we hold the State introduced ample evidence of defendant's malice to defeat a motion to dismiss. The State introduced evidence of defendant's extensive driving-related convictions, including most recently, convictions in January 1997 for failing to yield the right of way; October 1995 for illegal passing; April 1990 for driving while impaired; October 1990 for refusing to submit to a chemical test; September 1988 for speeding; May 1982 for driving while intoxicated; March 1982 for driving while intoxicated; and August 1981 for driving while intoxicated. The evidence further showed that defendant ran the red light while traveling approximately forty to forty-five miles per hour with his head and arm hanging out of the window. The trial court did not err in submitting the charge of second degree murder to the jury.

II.

[2] Defendant next argues he is entitled to a new trial because the trial court erred in failing to submit to the jury a possible verdict of misdemeanor death by motor vehicle, N.C. Gen. Stat. § 20-141.4(a2) (1999). The trial court submitted to the jury three possible verdicts: second degree murder; involuntary manslaughter; and not guilty. Assuming, *arguendo*, that such failure was error, defendant is unable to establish the requisite prejudice that would entitle him to a new trial. *See State v. Riddick*, 340 N.C. 338, 343, 457 S.E.2d 728, 732 (1995) (error in failing to submit requested instruction to jury is harmless where defendant cannot show prejudice as a result).

In *State v. Moss*, 139 N.C. App. 106, 114, 532 S.E.2d 588, 594, *disc. review denied*, 353 N.C. 275, 546 S.E.2d 387 (2000), this Court held that where the jury was instructed on possible verdicts of second degree murder and involuntary manslaughter, any error in failing to submit a defense of accident was harmless. We observed that because the jury had found all of the elements of second degree murder, it precluded the possibility that the same jury would have found the defendant guilty of anything less than involuntary manslaughter, which it rejected. *Id.*; *see also State v. Johnston*, 344 N.C. 596, 602-03, 476 S.E.2d 289, 292 (1996) (where jury convicted defendant of first degree murder out of three possible verdicts of first degree murder, second degree murder, or not guilty, any error in failing to instruct on voluntary manslaughter could not have prejudiced defendant).

Similarly, in *State v. Wagner*, 343 N.C. 250, 259, 470 S.E.2d 33, 38 (1996), in which the defendant was convicted of first degree murder, our Supreme Court determined the defendant could not have been prejudiced by the trial court's failure to instruct on voluntary manslaughter. The Court reasoned that " '[s]ince the jury rejected second-degree murder, it would also have rejected the lesser offense of voluntary manslaughter.' " *Id.* (quoting *State v. Lyons*, 340 N.C. 646, 664, 459 S.E.2d 770, 779 (1995)).

Here, misdemeanor death by vehicle is a lesser included offense of involuntary manslaughter. *State v. Moore*, 107 N.C. App. 388, 398, 420 S.E.2d 691, 698, *cert. denied*, 332 N.C. 670, 424 S.E.2d 414 (1992), *overruled on other grounds*, *State v. Hayes*, 350 N.C. 79, 511 S.E.2d 302 (1999). Therefore, since the jury rejected involuntary manslaughter in favor of second degree murder, it would also have rejected the lesser offense of misdemeanor death by vehicle. This assignment of error is overruled.

III.

[3] By his third argument, defendant contends he is entitled to a new trial because the trial court failed to include a limiting instruction in the jury charge regarding evidence of defendant's 16 June 1980 conviction for assault on a law enforcement officer. Evidence of the assault charge was introduced to prove the underlying felony in defendant's charge for possession of a firearm by a convicted felon, which charge was consolidated for trial with the murder charge. At the charge conference, defendant requested that the trial court provide a limiting instruction that the assault charge should have no effect on the verdict in the murder charge. The trial court agreed to

so instruct the jury; however, the trial court neglected to give the limiting instruction during the charge.

Although we agree with defendant that the trial court should have provided the limiting instruction, we do not agree that such omission entitles defendant to a new trial. In order to show prejudice necessary for a new trial, a defendant alleging error 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." N.C. Gen. Stat. § 15A-1443(a) (1999). Defendant argues he was prejudiced because without the instruction, the jury could have used the assault conviction to find the malice element of second degree murder, and also because evidence of the 1980 conviction was "extremely inflammatory." We disagree.

The trial court's instructions to the jury throughout the trial and during the charge made clear that it was the evidence of defendant's prior *driving* convictions which were being offered to prove malice. During the trial, the court instructed the jury that defendant's driving record was being admitted "to establish a pattern of reckless and inherently dangerous conduct to substantiate malice." Again, during the charge, the trial court twice instructed the jury that defendant's "prior *traffic* violations" were to be used in assessing whether the State had met its burden of establishing malice. Although defendant excerpts a single statement made by the trial court in which it instructed the jury that they "may consider [defendant's] prior record" to establish malice, the statement came directly after the trial court made clear the record it was referring to was defendant's traffic record.

The trial court's charge to the jury " '. . . "must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it . . . ." ' " *State v. Hooks*, 353 N.C. 629, 634, 548 S.E.2d 501, 505 (2001) (citations omitted). The charge must ". . . 'be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. . . . [T]he fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.' " *Id.* (citations omitted).

Moreover, in subsequently instructing the jury on the charge of possession of a firearm by a convicted felon, the court clearly stated that the jury must find that defendant was convicted of a felony in Gaston County Superior Court on 16 June 1980. Thus, the trial court

was clear in instructing the jury that the purpose of the evidence of the 16 June 1980 conviction was to determine whether defendant was guilty of possessing a firearm as a felon.

We also disagree with defendant that evidence of the 1980 assault conviction was overly inflammatory. The only evidence of the assault charge presented was in the form of testimony of Mandy Cloninger, Deputy Clerk of Superior Court, whose testimony simply verified the documents showing that defendant pled guilty to assault on a law enforcement officer in 1980 as a result of pointing a gun. Any limiting instruction would not have affected the admissibility or the inflammatory nature of the evidence. Given the overwhelming evidence of defendant's prior traffic violations, he has failed to show a reasonable possibility that absence of the limiting instruction on his 1980 assault conviction likely caused the jury to convict him of second degree murder. This assignment of error is overruled.

IV.

[4] Defendant next argues he is entitled to a new trial because the trial court allowed Eddie Watford, Lewis Watford's son, to testify to his father's good character. Defendant failed to object at trial to the admission of this evidence, but he argues the error rises to the level of 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).

Eddie Watford testified that his father owned Blue Gas Company, and that he always had time for his customers. Eddie testified:

> [Lewis Watford] had time for everybody. He would go out of his way for customers. . . . He would loan people that had hard times—he would loan them money. He just—you know, he was easy going. He didn't have any problem with anybody and he was, you know, coming to work doing what he was supposed to be doing, what he wanted to do. He didn't have to work. He wanted to do it.

Although defendant is correct that such character evidence is generally not admissible under these circumstances, " '[t]he admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.' " *State v. Quick*,

329 N.C. 1, 26, 405 S.E.2d 179, 194 (1991) (citation omitted). In *Quick*, our Supreme Court held that the defendant could not show prejudice from testimony related to the victim's good character. *Id.* The Court concluded that although "the evidence against defendant was not overwhelming, we are convinced that exclusion of the witness's statement that the victim was a good man who helped people in the community would not likely have changed the result in this case." *Id.*

In the present case, we believe the evidence against defendant was, in fact, overwhelming, in light of evidence of defendant's several alcohol-related driving convictions within the past few years. As was our Supreme Court in *Quick*, we too are convinced that exclusion of Eddie Watford's testimony would not likely have changed the result in this case. Defendant has failed to show that any error was 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.' " *Parker*, at 427, 516 S.E.2d at 118 (citation omitted). Accordingly, this argument is rejected.

V.

[5] In his fifth argument, defendant maintains he is entitled to a new trial because the trial court erroneously admitted his driving record, which detailed his prior driving convictions. Specifically, defendant argues such evidence violates N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999), which provides:

> 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. Gen. Stat. § 8C-1, Rule 404(b).

Initially, we note that although defendant excepted to the trial court's denial of his motion *in limine* regarding his driving record, defendant did not object to the introduction of his driving record at trial. Rulings on motions *in limine* "are preliminary in nature and subject to change at trial, . . . and 'thus an objection to an order granting or denying the motion "is insufficient to preserve for appeal the question of the admissibility of the evidence." ' " *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (citations omitted).

Defendant contends, however, that he reasonably relied upon the assurances of the trial court that pre-trial objections would remain in effect at trial. After ruling on another of defendant's motions *in limine*, the trial court assured defendant that his objection as to that issue would remain effective, and that he would not need to re-object at trial. When the trial court subsequently denied defendant's motion regarding his driving record, defendant objected, but did not do so again at trial.

In *State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48, *disc. review denied*, 352 N.C. 594, 544 S.E.2d 792 (2000), the defendant sought a standing objection to evidence discussed during motions *in limine*. The trial court in that case granted the defendant's request that the objections remain effective for trial. *Id.* We held that regardless of the trial court's ruling that the objections would remain effective at trial, "[b]ased on the established law of this State, because defendant failed to object to the admission of the evidence at the time it was offered, he has failed to preserve [the] issue for . . . review." *Id.* Nonetheless, at defendant's urging, we will review this argument for plain error.

Our Supreme Court has held:

> Rule 404(b) state[s] 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); *see also McAllister*, 138 N.C. App. at 257, 530 S.E.2d at 863 (evidence is only excluded under Rule 404(b) if its sole probative value is to show defendant's propensity to commit the crime). " 'The admissibility of evidence under this rule is guided by two further constraints—similarity and temporal proximity.' " *State v. Barnett*, 141 N.C. App. 378, 389-90, 540 S.E.2d 423, 431 (2000) (citation omitted), *affirmed*, 354 N.C. 350, 554 S.E.2d 644 (2001).

"The demonstration of malice is a proper purpose for admission of evidence of other crimes, wrongs, or acts by the defendant." *McAllister*, 138 N.C. App. at 258, 530 S.E.2d at 863. As discussed in detail in section I of this opinion, prior driving convictions are a proper means of establishing the malice element of second degree

murder, and such admission does not violate Rule 404(b). *See Rich*, 351 N.C. at 400, 527 S.E.2d at 307.

We agree with defendant that some of the convictions contained in his driving record, dating back to 1962, are too remote in time to be probative of defendant's malice in the crime at issue. We therefore hold the trial court erred in admitting defendant's entire driving record. Nevertheless, in light of defendant's numerous convictions, including four convictions for driving while intoxicated or impaired which occurred within the approximate time-frame held to be permissible in *Miller*, we hold admission of the entire record did not prejudice defendant to the extent required under a plain error analysis. Even absent evidence of convictions which were too remote, there is ample evidence to conclude the jury would have determined defendant acted with malice.

As previously discussed, this Court in *Miller* held that convictions dating back to sixteen years prior to the crime at issue are not considered remote for purposes of Rule 404(b), however, we expressed no opinion as to whether convictions more than sixteen years prior are too remote for purposes of Rule 404(b). *See Miller*, 142 N.C. App. at 440, 543 S.E.2d at 205. In this case, defendant was convicted of the following offenses within sixteen years of the date of the offense at issue: failure to yield the right of way; illegal passing; driving while impaired with an accident resulting; refusal to submit to a chemical test; and speeding. Moreover, defendant was convicted of driving while intoxicated seventeen years prior to the crime at issue, and was convicted twice of driving while intoxicated eighteen years prior. Because these three additional convictions for driving while intoxicated occurred outside the sixteen-year time-frame of *Miller*, they are considered remote to the crime at issue.

However, it is well-established that,

> remoteness in time between evidence of other crimes . . . and the charged crime is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident [as opposed to a common scheme or plan]. Indeed, " 'remoteness in time generally affects only the weight to be given such evidence, not its admissibility.' "

State v. Parker, 354 N.C. 268, 287, 553 S.E.2d 885, 899 (2001) (citations omitted); *see also e.g.*, *State v. Wilds*, 133 N.C. App. 195, 202, 515 S.E.2d 466, 473 (1999) (under 404(b), "remoteness in time generally

goes to the weight of the evidence rather than to its admissibility"). While the dissent argues this proposition is erroneous based upon *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988), we rely on the Supreme Court's most recent statement of the law. *See Parker*, 354 N.C. at 287, 553 S.E.2d at 899. Although we agree that some of the convictions dating back to 1962 are too remote, and thus should not have been admitted, the remoteness of defendant's three convictions for driving while intoxicated occurring only one and two years outside the permissible period should go to the weight of that evidence, not its admissibility. Several of defendant's convictions, including three convictions for driving while intoxicated, one for driving while impaired which resulted in an accident, and one for refusing to submit to a chemical test, occurred within the approximate time-frame held to be permissible in *Miller*. *See Miller*, 142 N.C. App. at 440, 543 S.E.2d at 205.

In addition to these alcohol-related offenses, defendant was convicted of other traffic violations within the permissible time-frame under Rule 404(b), as set forth above. Although defendant maintains the non-alcohol-related convictions are too dissimilar to be admissible, we held in *Miller* that prior convictions for reckless driving were admissible to prove malice in the defendant's killing of another as a result of driving while impaired. *Id.* at 439, 543 S.E.2d at 204; *see also Rich*, 351 N.C. at 400, 527 S.E.2d at 307 (evidence of defendant's prior speeding violations relevant to establish defendant's malice in prosecution for second degree murder resulting from defendant's driving while impaired); *State v. Fuller*, 138 N.C. App. 481, 484, 531 S.E.2d 861, 864 (defendant's prior convictions for reckless driving, speeding and driving while license revoked admissible to establish malice element of second degree murder resulting from defendant's driving while impaired), *disc. review denied*, 353 N.C. 271, 546 S.E.2d 120 (2000). "These cases establish that a wide range of prior convictions have been held admissible to establish malice in cases where an impaired driver causes a death and is charged with second-degree murder." *Gray*, 137 N.C. App. at 349, 528 S.E.2d at 49.

In summary, we emphasize defendant's driving record was introduced for the permissible purpose of proving malice. The trial court properly instructed the jury as follows:

> [T]he state has introduced into evidence defendant's prior traffic violations and the jury can consider such evidence to establish a pattern of reckless and inherently dangerous conduct to substan-

> tiate malice and to show the absence of accident. You may not convict the defendant in this case because of something he may have done in the past but you may consider his prior record to establish a pattern of reckless and inherently dangerous conduct to substantiate malice . . . .

Defendant's driving record was not offered to show his propensity to commit the crime charged, and its admission therefore does not violate Rule 404(b). Although we agree that the entire driving record should not have been admitted due to concerns of temporal proximity, to the extent three convictions for driving while intoxicated occurred only one and two years outside of the permissible time-frame set forth in *Miller*, the jury must assess the weight and credibility to afford that evidence. Further, defendant's prior non-alcohol-related driving convictions, such as failing to yield the right of way, illegal passing, reckless driving, and speeding, are not too dissimilar to be probative of a pattern of recklessness and inherently dangerous conduct which could substantiate defendant's malice in the present case.

Even excluding evidence of defendant's convictions prior to eighteen years before the conviction at issue, there is ample evidence to conclude the jury would have found defendant acted with malice. Defendant cannot therefore establish that a different result would have occurred absent any error. He has failed to show plain error, and this argument is therefore overruled.

VI.

[6] In his final argument, defendant contends he is entitled to a new sentencing hearing because the State failed to prove his prior convictions with competent evidence, and therefore, the trial court's finding of defendant's prior record level is not supported by the evidence. Specifically, defendant argues the State failed to prove defendant's prior convictions as required by N.C. Gen. Stat. § 15A-1340.14(f) (1999):

> A prior conviction shall be proved by any of the following methods:
>
> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.

(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.

(4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f). The statute further provides that the State "bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). Originals or copies of court records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts constitute *prima facie* evidence of a prior conviction. N.C. Gen. Stat. § 15A-1340.14(f). "The prosecutor shall make all feasible efforts to obtain and present to the court the offender's full record." *Id.*

In the present case, the State did not offer into evidence any document which tended to prove that defendant had been convicted of the prior crimes. The State submitted its prior record level worksheet in which it calculated defendant's record level based upon his prior convictions. Defendant objected to the worksheet, contending that not all convictions listed on the worksheet were correct. Although the prosecutor stated that the worksheet was based upon a criminal information printout which she had and which she provided to defense counsel, it does not appear from the record that the State ever offered the printout into evidence and to the trial court. The trial court sentenced defendant based upon the information provided by the State's unverified prior record level worksheet.

We hold that the State failed to prove by a preponderance of the evidence that defendant was the same person convicted of the prior crimes listed on his prior record level worksheet. Indeed, the State did not submit any evidence tending to prove that fact. Although we recognize that the trial court can accept any method of proof which it deems reliable, the trial court in this case made no findings regarding the reliability of the information provided by the State.

The requirements of proving a prior conviction are not stringent. *See State v. Rich*, 130 N.C. App. 113, 116, 502 S.E.2d 49, 51 (computerized printout containing record of defendant's criminal history as maintained by the Division of Criminal Information sufficiently reli-

able to prove defendant's prior convictions under N.C. Gen. Stat. § 15A-1340.14(f)), *disc. review denied*, 349 N.C. 374, 516 S.E.2d 605 (1998); *State v. Ellis*, 130 N.C. App. 596, 598, 504 S.E.2d 787, 789 (1998) (certified computer printout from Administrative Office of the Courts sufficiently reliable to prove defendant's prior conviction), *cert. denied*, 352 N.C. 151, 544 S.E.2d 231 (2000). Nevertheless, we believe the law requires more than the State's unverified assertion that a defendant was convicted of the prior crimes listed on a prior record level worksheet.

This case is remanded for a resentencing hearing, at which the State shall prove defendant's prior convictions by a preponderance of the evidence using any method allowable under N.C. Gen. Stat. § 15A-1340.14(f) or which the trial court deems reliable. Defendant's conviction for second degree murder is undisturbed.

No error in part; remanded for resentencing.

Judge TYSON concurs.

Judge GREENE dissents in a separate opinion.

GREENE, Judge, dissenting.

The majority holds that although the trial court erred in admitting defendant's entire driving record, the "admission of the entire record did not prejudice defendant to the extent required under a plain error analysis." I disagree.

I agree that prior driving convictions of a defendant are admissible to show malice, and the showing of malice in a second-degree murder case is a proper purpose within the meaning of Rule 404(b). The admissibility of any evidence under Rule 404(b), however, is guided by two "constraints—similarity and temporal proximity." *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993).

Rule 404(b) evidence is limited by a temporal proximity requirement because even though offenses may be similar, if they "are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor," a purpose for which 404(b) evidence is excluded. *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *sentence vacated on other grounds*, 494 U.S. 1023,

108 L. Ed. 2d 604 (1990). Moreover, after the passage of time, the "[a]dmission of other crimes . . . allows the jury to convict [a] defendant because of the kind of person he is, rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged." *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988). Thus, "the passage of time must play an integral part in the balancing process to determine admissibility." *Id.* at 590, 369 S.E.2d at 825. To relegate the remoteness question to one of "weight" and not of "admissibility," as the majority does in this case, decimates Rule 404(b) and the fundamental principles on which it is based, and thus is contrary to *Jones*. *Id.* (Supreme Court specifically rejects argument that "lapse of time between prior occurrences and the offenses charged goes only to the weight and credibility").

In this case, the admission of defendant's driving record dating back to 1962 (some 37 years) violates the temporal proximity requirement of Rule 404(b) and thus constitutes error. Although defendant has six prior driving while impaired convictions dating back to 1962, only one of those occurred in the sixteen years prior to the crime at issue and none within the eight years prior to the crime at issue.[1] Furthermore, defendant's driving record contained convictions older than sixteen years of reckless driving, driving while license suspended, hit and run with property damage, unsafe moving violations, speeding, driving too fast for conditions, and driving on the wrong side of the road. This error is of a fundamental nature and, in my opinion, had a "probable impact on the jury's finding of guilt" and thus constitutes plain error. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). From the record, it appears the jury had difficulty in determining whether defendant had acted with malice because during its deliberations, the jury requested to have the definition of malice read twice. The jury later requested the trial court permit it to have a written definition of malice along with defendant's driving record to consider during its deliberations. Accordingly, I would grant defendant a new trial.

1. Although I am bound by this Court's holding in *State v. Miller*, 142 N.C. App. 435, 440, 543 S.E.2d 201, 205 (2001), that driving convictions dating back sixteen years are admissible to prove malice, any conviction dating beyond sixteen years, however slight, runs afoul of the temporal proximity requirement of Rule 404(b).

RALPH G. WILLEY, GUARDIAN AD LITEM FOR ELIZABETH MULLINS, MINOR DAUGHTER OF WILLIAM HENRY MULLINS, DECEASED, EMPLOYEE, PLAINTIFF v. WILLIAMSON PRODUCE, EMPLOYER, THE GOFF GROUP, CARRIER, DEFENDANTS

No. COA01-226

(Filed 5 March 2002)

Workers' Compensation— death benefits—truck driver—findings of fact—impairment—proximate cause

The Industrial Commission erred in a workers' compensation case by awarding plaintiff guardian ad litem death benefits for the use and benefit of decedent truck driver employee's minor daughter under N.C.G.S. §§ 97-38 and 97-39 based on defendants' presentation of sufficient evidence of the affirmative defense found in N.C.G.S. § 97-12 that the employee's death from a single tractor-trailer accident was proximately caused by his being under the influence of a non-prescribed controlled substance at the time of his fatal accident, including cocaine and marijuana, because: (1) the Commission did not make an express finding on the issue of whether decedent was impaired at the time of the accident; (2) the Commission improperly excluded the testimony of an expert who did not base his opinion on decedent's height, weight, and medical history since the record is void of any testimony that height, weight, and medical history are necessary facts to determine impairment; (3) the Commission did not make an express finding of fact as to the proximate cause of the accident, and there is a lack of sufficient competent evidence to support the finding that the proximate cause of the accident was fatigue; and (4) the Commission failed to address the testimony of the two eyewitnesses of the accident and failed to enter a finding of fact with respect to their testimony.

Judge GREENE dissenting.

Appeal by defendants from opinion and award of the North Carolina Industrial Commission filed 7 December 2000. Heard in the Court of Appeals 8 January 2002.

Keel O'Malley, L.L.P., by Susan M. O'Malley, for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by John H. Ruocchio, for defendant-appellants.

TYSON, Judge.

Williamson Produce ("Williamson") and The Goff Group (collectively "defendants") appeal the amended opinion and award of the Full Commission ("Commission") of the North Carolina Industrial Commission filed 7 December 2000 awarding Ralph G. Willey ("plaintiff"), the guardian ad litem, workers compensation death benefits for the use and benefit of Elizabeth Mullins.

I. Facts

The undisputed facts show that on 17 November 1997, William Henry Mullins ("Mullins") was driving a truck for Williamson during the course and in the scope of his employment, and was killed in an accident. At the time of the accident, Elizabeth Mullins was a minor and the only dependent of Mullins. The guardian ad litem requested a hearing before the deputy commissioner to determine defendant's liability for benefits available to Elizabeth Mullins pursuant to N.C.G.S. § 97-38 and § 97-39. Defendants denied liability under N.C.G.S. § 97-12.

Two eyewitnesses of the accident reported that Mullins was driving erratically, weaving from one lane to the other, for a period of forty-five minutes prior to the accident, before his tractor-trailer left the pavement on the right side of the road and slid down an embankment.

Mullins' urine contained cocaine and marijuana at the time of his death. The metabolites of cocaine found in Mullins' urine measured at least 300 nanograms per milliliter.

Dr. Arthur E. Davis, Jr. ("Davis") was qualified as an expert in pathology and toxicology. Dr. Davis testified that at the time of the fatal collision, the employee was impaired by cocaine and that this impairment caused the accident and the employee's death. Dr. Davis formulated his opinion after reviewing all of the documents and records in evidence, including: the accident report, coroner's report, death certificate, three separate toxicology reports, case reports, and employment records. Dr. Davis further testified that the threshold levels established by the federal government of 300 nanograms per milliliter is a level sufficient to have a pharmacological effect or show impairment.

Dr. Arthur John McBay ("McBay") was qualified as an expert in forensic toxicology. Dr. McBay's review consisted of the accident

report, coroner's report, death certificate, and toxicology reports. Dr. McBay testified that it was impossible to determine from the drug screens and other information whether Mullins was impaired at the time of the fatal collision. Dr. McBay further testified that it is not possible to tell from a urine drug screen whether either drug was introduced to Mullins' system within twelve hours before Mullins' death and that it is not possible for anyone to determine whether the substances impaired Mullins.

The deputy commissioner, considering the testimony of two eyewitnesses of Mullins' erratic driving, placed greater weight on the testimony of Dr. Davis. The deputy commissioner denied benefits, finding that "the employee was under the influence of and impaired by cocaine" and that "[t]he employee's death was proximately caused by his being under the influence of cocaine."

The Commission, with one commissioner dissenting, reversed the deputy commissioner. The Commission found in pertinent part:

> 5. A urinary drug screen was performed post mortem [on Mullins] which showed a positive screen for the metabolites for cocaine and marijuana . . . The cut off [sic] for the drug screen for the cocaine metabolite is 300 nanograms. A nanogram is a billionth of a gram. There was no evidence of the quantitative amount of the cocaine or marijuana metabolites in decedent's system at the time of the accident which resulted in his death.
>
> 6. There is no evidence of when either cocaine or marijuana entered [Mullins'] system, how much was introduced or the mode of administration. It is possible for an individual to test positive for the cocaine metabolite for 3 or 4 days after it is introduced to their system. It is possible to test positive for the marijuana metabolite for as long as 20 days after it is introduced to an individual's system.
>
> 7. Based on the post mortem urine drug screen performed on [Mullins'] body, there is no scientific basis for determining what impact, if any, the drug metabolites had on [Mullins] at the time of the accident. Drug screens are only meant to demonstrate an analytically significant amount of a metabolite, not a pharmacologically significant amount. An analytically significant amount simply means an amount that can be determined with certainty. A pharmacologically significant amount is an amount that has a measurable effect on an individual. Therefore, it cannot be shown

that 300 nanograms of the metabolite of cocaine in [Mullins'] urine had a measurable pharmacological effect on him at the time of the accident.

8. The opinion of Dr. Art Davis that [Mullins] was impaired at the time of the accident is not given any weight. Dr. Davis based his opinion on a review of only four documents. He did not know [Mullins'] height, weight, medical history, when cocaine was introduced to [Mullins'] system or how much was introduced. As such, Dr. Davis' opinions regarding [Mullins'] potential impairment or intoxication at the time of the accident were given on an inadequate factual basis to be accepted. Dr. Davis provided no opinion on the effect of the marijuana metabolites on [Mullins'] at the time of the accident.

. . . .

10. Dr. Arthur McBay has extensive experience in the area of forensic toxicology and has served as the Chief Toxicologist at the Office of Chief Medical Examiner in North Carolina. Dr. Arthur McBay testified that based on the data obtained subsequent to [Mullins'] death that it is impossible to determine the time and means of administration of marijuana or cocaine into [Mullins'] system. He also testified that the leading cause of single tractor-trailer accidents is fatigue. The accident in question occurred at 11:20 p.m. The Full Commission gives greater weight to the opinions of Dr. McBay.

11. Defendants have failed to produce sufficient evidence to prove that the accident which resulted in [Mullins'] death was proximately caused by [Mullins] being under the influence of cocaine or marijuana or that he was intoxicated at the time it occurred.

II. Issues

The only question raised on appeal is whether defendants presented sufficient competent evidence to establish the affirmative defense found in N.C.G.S § 97-12, which provides that:

> No compensation shall be payable if the injury or death of the employee was proximately caused by:
>
> (2) His being under the influence of any controlled substance listed in the North Carolina Controlled Substances Act,

G.S. 90-86, et seq., where such controlled substance was not by prescription by a practitioner.

N.C. Gen. Stat. § 97-12(2) (1999).

The employer bears the burden of proof for the affirmative defense of intoxication or impairment. *Harvey v. Raleigh Police Dept.*, 85 N.C. App. 540, 545, 355 S.E.2d 147, 150 (1987). The employer is not required to disprove all other possible causes or that intoxication or impairment was the sole proximate cause of the employee's injury. *Sidney v. Raleigh Paving & Patching, Inc.*, 109 N.C. App. 254, 256, 426 S.E.2d 424, 426 (1993) (citing *Anderson v. Century Data Sys., Inc.*, 71 N.C. App. 540, 322 S.E.2d 638 (1984)). The employer is required to prove only that it is more probable than not that intoxication or impairment was a cause in fact of the injury. *Id.*

Appellate review of an opinion and award by the Commission is limited to two questions: "(1) [w]hether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision." *Inscoe v. DeRose Indus., Inc.*, 292 N.C. 210, 216, 232 S.E.2d 449, 452 (1977). The Commission is "the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Melton v. City of Rocky Mount*, 118 N.C. App. 249, 255, 454 S.E.2d 704, 708 (1995) (citation omitted).

The evidence presented in this case raised two issues for the Commission's determination: (1) whether Mullins was under the influence of controlled substances at the time of the fatal accident and if so, (2) whether Mullins' impairment was a proximate cause of the accident. Defendants contend that the findings of the Commission were not based on competent evidence and that the Commission failed to make specific findings regarding crucial facts and resolve all the issues raised. We conclude that competent evidence existed in the record to establish the defense of intoxication. We reverse the opinion and award and remand to the Commission for findings of fact resolving all the issues raised by the evidence in this case.

A. Impairment

"It is the duty of the Commission to make findings of fact resolving all issues raised by the evidence given in the case." *Anderson v. Century Data Sys., Inc.*, 71 N.C. App. 540, 544, 322 S.E.2d 638, 640 (1984). The Commission did not make an express finding on the issue of whether Mullins was impaired. The Commission found and con-

cluded that defendants failed to produce evidence that Mullins was impaired at the time of the accident.

The Commission did not give any weight to the opinion of Dr. Davis that Mullins was impaired at the time of the accident. The Commission found that Dr. Davis' opinions were based on inadequate facts, stating that Dr. Davis "based his opinion on a review of only four documents," did not know "decedent's height, weight, or medical history," and did not know "when cocaine was introduced to decedent's system or how much was introduced." There is a lack of competent evidence to support this finding by the Commission.

Dr. Davis specifically testified that Mullins' height and weight were totally irrelevant to absorption of cocaine and whether he was impaired. Dr. Davis further testified that the only thing relevant to the determination of impairment is the amount of metabolite present in Mullins' urine. The record here is completely void of any testimony that height, weight, and medical history are necessary facts to determine impairment.

Additionally, Dr. Davis testified that he examined more than the four documents found by the Commission. Dr. Davis testified that he reviewed all of the documents introduced into evidence, which included Mullins' employment records and the case reports. The Commission's finding is not supported by any competent evidence, thus the opinion testimony of Dr. Davis should have been considered by the Commission.

N.C.G.S. § 97-12(2) denies compensation when "the injury or death of the employee was proximately caused by his being under the influence of any controlled substances . . . ." The Legislature's intention was to relieve an employer of the obligation to pay compensation when the accident giving rise to the employee's injuries or death is proximately caused by his intoxication, being under the influence of a controlled substance, or his willful intention to injure or kill. *See Anderson*, 71 N.C. App. at 547, 322 S.E.2d at 642. Plaintiff recites the often quoted rule that the Worker's Compensation Act should be liberally construed in favor of the claimant to effectuate the intent of the statute. *See Dayal v. Provident Life & Accident Ins. Co.*, 71 N.C. App. 131, 132, 321 S.E.2d 452, 453 (1984). We have previously stated that this rule "does not license either the Commission or the courts to disregard the manifest intention of the Legislature in enacting G.S. § 97-12. *Anderson*, 71 N.C. App. at 547, 322 S.E.2d at 642.

The exception within the Workers' Compensation Act reinforces our State's policy of "no tolerance" with respect to driving while intoxicated or impaired. *See* N.C. Gen. Stat. § 20-138.1(a)(2) (1999) (blood alcohol level for the offense of impaired driving lowered from .10 to .08 or more). This is especially true for commercial vehicles as was involved here. *See* N.C. Gen. Stat. § 20-138.2(a)(2) (1999) (blood alcohol level for the offense of impaired driving in commercial vehicle is .04 or more).

The General Assembly could have required that testing show a certain level of illegal drugs necessary for impairment, as it has required with alcohol under the impaired driving statutes. *See* N.C. Gen. Stat. §§ 20-138.1(a) and 20-138.2(a). Such a requirement was not enacted.

We have reviewed the statutes and cases of other states which reinforce their "no tolerance" for driving while intoxicated from alcohol or impaired from controlled substances. These states apply a presumption of impairment and shift the burden of proof to plaintiff to show that he was not intoxicated or impaired or that his intoxication or impairment was not a contributing cause of the accident. *See Ross v. Ellard Constr. Co., Inc.*, 686 So.2d 1190, 119-93 (Ala. Civ. App. 1996) (statute provides that employee who tests positive for drug use is conclusively presumed to have been under the influence of drugs but "conclusive presumption" does not apply to the issue of causation); *Bice v. Waterloo Industries, Inc.*, 26 S.W.3d 129 (Ark. App. 2000) (statute provides that the presence of illegal drugs creates a rebuttable presumption that the injury was substantially occasioned by their use); *Lastinger v. Mill & Machinery, Inc.*, 512 S.E.2d 327, 328 (Ga. Ct. App. 1999) (statute provides in part that where a chemical analysis reveals the presence of any marijuana or controlled substance, there is a rebuttable presumption that the injury was due to the ingestion of drugs); *Stepanek v. Rinker Materials Corp.*, 697 So.2d 200 (Fla. Dist. Ct. App. 1997) (statute provides a rebuttable presumption that employee's intoxication or impairment primarily caused his injury); *Williams v. Louisiana Coca-Cola Co.*, 652 So.2d 108, 111 (La. App. 1995) (statute provides that the use of a nonprescribed controlled substance creates a presumption of intoxication or impairment and causation, with the burden of proof shifting to the employee to prove that intoxication or impairment was not a contributing cause); *but see Seamans v. Maaco Auto Painting & Bodyworks*, 918 P.2d 1192, 1197 (Idaho 1996) (deletion of the burden of proof language does not place the burden of disproving intoxica-

tion upon the claimant, had the legislature intended such an allocation of the burden, it could have so stated).

Accordingly, we apply a rebuttable presumption under N.C.G.S. § 97-12. Once the employer proves use of a non-prescribed controlled substance, it is presumed that the employee was impaired. Once the employer presents competent evidence that the impairment was a proximate cause of the accident, the burden shifts to the employee to rebut the presumption of impairment or that impairment was not a contributing proximate cause of the accident.

Here, the evidence is undisputed that cocaine and marijuana were present in Mullins' system at the time of his death. Plaintiff failed to offer any competent evidence that Mullins was not impaired at the time of the accident. The testimony of Dr. McBay offered by plaintiff merely opines that it is impossible to determine whether Mullins was or was not impaired. We reverse the decision of the Commission and remand for findings of fact and resolution of the issue of impairment.

B. Proximate Cause

The Commission did not make an express finding of fact as to the proximate cause of the accident. Upon examination of the findings made, the Commission implicitly found that the proximate cause of the accident was fatigue. We hold that there is a lack of sufficient competent evidence to support this finding by the Commission and reverse the decision. *See Strickland v. Carolina Classics Catfish, Inc.*, 119 N.C. App. 97, 105, 458 S.E.2d 10, 15 (1995) (Greene J., dissenting) (citing *Hildebrand v. Furniture Co.*, 212 N.C. 100, 109, 193 S.E. 294, 300 (1937) (findings by the Commission which lack sufficient competent evidence to support them will be set aside)).

The Commission relied on the testimony of Dr. McBay, that the leading cause of single tractor-trailer accidents is fatigue, and the fact that the accident occurred at 11:20 p.m. This is nothing more than speculation and cannot support a finding of fatigue as the proximate cause of the accident. *See Aycock v. Cooper*, 202 N.C. 500, 504, 163 S.E. 569, 570 (1932) (there must be evidence of "sufficient probative force" to support the Commission's findings); *Strickland*, 119 N.C. App. at 105, 458 S.E.2d at 15 (Commission's finding cannot be based on speculation and conjecture) (citations omitted). Dr. McBay was not tendered as an expert in accident reconstruction or in-

vestigation, he did not rely on this causation testimony to form his opinions, and his testimony was void of any facts to support this opinion as to causation.

The Commission further found that defendants failed to meet their burden of proof that Mullins' death was proximately caused by his being under the influence of cocaine or marijuana. We hold that there is a lack of sufficient competent evidence to support this finding by the Commission.

In the present case, the employer offered substantial evidence tending to show that the accident was proximately caused by Mullins' impairment from cocaine, a controlled substance. The coroner's report and a lab test at Columbus Regional Hospital indicated cocaine in Mullins' urine. A separate confirmation test by Nichol's Institute in San Diego, California, indicated cocaine and marijuana present in Mullins' urine. Two eyewitnesses reported that Mullins was traveling between sixty-five and seventy miles per hour and that the truck was weaving all over the road for approximately forty-five minutes before the accident. Both Dr. Davis and Dr. McBay testified that cocaine can effect body movement, awareness, judgment, and motivation. Both experts testified that cocaine is metabolized out of the blood within forty-five minutes to an hour and a half. For this reason, Dr. Davis opined that only urine tests have a predictive value for the presence of cocaine. Dr. Davis further testified that, with a level of at least 300 nanograms, Mullins was under the influence of cocaine and that his impairment was a cause of the accident. Finally, both experts testified that an individual coming off of the effects of cocaine can have a "craving for sleep."

Plaintiff failed to offer any competent evidence that the cause of the accident resulting in death was other than Mullins' impairment from controlled substances. We agree with the statement made by Commissioner Riggsbee in her dissenting opinion, that Dr. McBay's testimony regarding a cause of trucking accidents in general does not "provide grounds for rejecting the likely causal connection between the accident and the controlled substances in decedent's system." We reverse the decision of the Commission and remand for findings of fact and resolution of the issue of whether Mullins' impairment was a proximate cause of the accident.

We conclude that defendants produced substantial competent evidence which supports a finding that Mullins was under the influence of a controlled substance and that Mullins' impairment was

more probably than not a cause of the accident resulting in the employee's death. *See Coleman v. City of Winston-Salem*, 57 N.C. App. 137, 291 S.E.2d 155 (remanded to the Commission for more specific findings where the Commission found only that there was "no evidence that the death was caused by intoxication," and the record contained "ample evidence" that the employee's intoxication proximately caused his death), *disc. review denied*, 306 N.C. 382, 294 S.E.2d 206 (1982), *cert. denied*, 459 U.S. 1112, 74 L. Ed. 2d 963 (1983). Defendants are not required to prove that Mullins' impairment was the sole proximate cause of the accident. *Rorie v. Holly Farms Poultry, Co.*, 306 N.C. 706, 711, 295 S.E.2d 458, 462 (1982).

C. Specific Findings Regarding Crucial Facts

Defendants further contend that the Commission failed to make specific findings with regard to crucial facts. We agree. *See Morgan v. Thomasville Furniture Indus., Inc.*, 2 N.C. App. 126, 128, 162 S.E.2d 619, 620 (1968).

The Commission failed to address the testimony of the two eyewitnesses to the accident and enter a finding of fact with respect to their testimony. The Commission should have considered and made findings with respect to the expert testimony of Dr. Davis. *See Coleman*, 57 N.C. App. at 141, 291 S.E.2d at 157 (Commission must consider all of the evidence, make definitive findings and proper conclusions therefrom). Additionally, there were no findings made by the Commission with respect to the lack of evidence presented by plaintiff. Specifically there was no evidence that Mullins was without sleep before the accident and that there were no adverse or dangerous driving conditions at the time of the accident. The findings of fact of the Commission should "tell the full story of the event giving rise to the claim for compensation." *Thomason v. Red Bird Cab Co., Inc.*, 235 N.C. 602, 605, 70 S.E.2d 706, 709 (1952).

The opinion and award of the Commission is vacated. The case is remanded for a new hearing consistent with this opinion.

Reversed and remanded.

Judge HUNTER concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

As I believe the majority has not properly applied the competent evidence standard required by this Court in its review of decisions by the North Carolina Industrial Commission and has ignored the burden imposed on defendants by N.C. Gen. Stat. § 97-12, I respectfully dissent. I restate the facts in order to aid the analysis below.

On 17 November 1997, William Henry Mullins (Mullins) died when his truck ran off the road and overturned during the course and in the scope of his employment with Williamson Produce.[1] A post mortem urinary drug screen indicated the presence cocaine and marijuana metabolites, the waste products of cocaine and marijuana, in Mullins' system. Deposition testimony of Dr. Arthur John McBay (McBay), an expert in forensic toxicology, revealed that based on the reports available, it was impossible to determine the actual amount of cocaine and marijuana in Mullins' system at the time of the accident. The available reports included a toxicology report of a drug screen performed on Mullins using a minimum threshold of 300 nanograms of cocaine metabolites present in a person's urine as the cut-off rate for a positive test for cocaine.[2] McBay stated that it was impossible to establish from Mullins' urinary drug screen whether either drug was introduced into Mullins' system within twelve hours of the accident or how they were administered into his system. McBay explained that cocaine, depending on the quantity, can stay in a person's system for three to four days, whereas a test for marijuana can show positive for over twenty days. The pharmacological effect of the drugs, which measures the level of impairment experienced by a person, however, cannot be determined by a mere urine drug screen.

Dr. Arthur E. Davis, Jr. (Davis) testified at his deposition as an expert in pathology and toxicology. Davis had performed a documentary autopsy on Mullins by reviewing the crash report, offense/case report, coroner's verdict, death certificate, and toxicology reports. He testified that the threshold established by the federal government of 300 nanograms per millimeter is a sufficient level to have a pharmacological effect on a person. The height and weight of an individual are irrelevant when determining the absorption of cocaine into an individual's system. Moreover, a urine test is the only test to use in

1. The parties do not dispute this fact.

2. McBay testified he established this threshold amount for the detection of cocaine metabolites for the Department of Defense when it wanted to detect the activity of drug use, not the impairment caused by drugs.

order to determine whether cocaine is still having an effect on an individual which would impair his ability to drive. Because of the amount of cocaine metabolites found in Mullins' system, Davis found by "a reasonable [degree of] medical certainty as a physician, that [Mullins] used cocaine almost assuredly within the last six to twelve hours [prior to the accident] and that he was [at that time] still under the influence of cocaine and it was having a profound, adverse effect on his driving ability."[3]

On appeal from the deputy commissioner, the Full Commission (the Commission) found in pertinent part that:

> 5. A urinary drug screen was performed post mortem [on Mullins] which showed a positive screen for the metabolites for cocaine and marijuana . . . . The cut[-]off for the drug screen for the cocaine metabolite is 300 nanograms. A nanogram is a billionth of a gram. There was no evidence of the quantitative amount of the cocaine or marijuana metabolites in [Mullins'] system at the time of the accident which resulted in his death.
>
> 6. There is no evidence of when either cocaine or marijuana entered [Mullins'] system, how much was introduced or the mode of administration. It is possible for an individual to test positive for the cocaine metabolite for 3 or 4 days after it is introduced [in]to their system. It is possible to test positive for the marijuana metabolite for as long as 20 days after it is introduced [in]to an individual's system.
>
> 7. Based on the post mortem urine drug screen performed on [Mullins'] body, there is no scientific basis for determining what impact, if any, the drug metabolites had on [Mullins] at the time of the accident. Drug screens are only meant to demonstrate an analytically significant amount of a metabolite, not a pharmacologically significant amount. An analytically significant amount simply means an amount that can be determined with certainty. A pharmacologically significant amount is an amount that has a measurable effect on an individual. Therefore, it cannot be shown that 300 nanograms of the metabolite of cocaine in [Mullins'] urine had a measurable pharmacological effect on him at the time of the accident.

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3. Davis also expressed an opinion that Mullins was under the toxic effect of marijuana at the time of the accident. Because Davis gave no factual basis for this conclusion, this analysis focuses solely on the possible impairment a person might suffer with 300 nanograms of cocaine metabolites in his system.

8. The opinion of [Davis] that [Mullins] was impaired at the time of the accident is not given any weight. [Davis] based his opinion on a review of only four documents. He did not know [Mullins'] height, weight, medical history, when cocaine was introduced [in]to [Mullins'] system or how much was introduced. As such, [Davis'] opinions regarding [Mullins'] potential impairment or intoxication at the time of the accident were given on an inadequate factual basis to be accepted. [Davis] provided no opinion on the effect of the marijuana metabolites on [Mullins] at the time of the accident.

. . . .

10. [McBay] has extensive experience in the area of forensic toxicology and has served as the Chief Toxicologist at the Office of Chief Medical Examiner in North Carolina. [McBay] testified that based on the data obtained subsequent to [Mullins'] death that it is impossible to determine the time and means of administration of marijuana or cocaine into [Mullins'] system. . . . [The Commission] gives great weight to the opinions of [McBay].

11. Defendants have failed to produce sufficient evidence to prove that the accident which resulted in [Mullins'] death was proximately caused by [Mullins] being under the influence of cocaine or marijuana or that he was intoxicated at the time it occurred.

The Commission subsequently concluded that Plaintiff was not barred from recovering compensation because defendants had not met their burden under N.C. Gen. Stat. § 97-12 to show the accident was proximately caused by a drug impairment.

The dispositive issue is whether there was competent evidence to support the Commission's findings that "it cannot be shown that 300 nanograms of the metabolite of cocaine in [Mullins'] urine had a measurable pharmacological effect on him at the time of the accident," and defendants therefore did not "produce sufficient evidence to prove that the accident . . . was proximately caused by [Mullins] being under the influence of cocaine."

Appellate review of an opinion and award by the 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). This Court " 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "[T]his Court is bound by such evidence, even though there is [other] evidence that would have supported a finding to the contrary." *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980). Moreover, the Commission is "the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Melton v. City of Rocky Mount*, 118 N.C. App. 249, 255, 454 S.E.2d 704, 708 (citation omitted), *disc. review denied*, 340 N.C. 568, 460 S.E.2d 319 (1995).

Under the Workers' Compensation Act, "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by . . . [h]is being under the influence of any controlled substance." N.C.G.S. § 97-12 (1999). The burden rests on the employer to prove that an employee's intoxication or impairment was "more probably than not a cause in fact of the accident resulting in injury to the employee." *Anderson v. Century Data Systems*, 71 N.C. App. 540, 545, 322 S.E.2d 638, 641 (1984), *cert. denied*, 313 N.C. 327, 327 S.E.2d 887 (1985).

In this case, the Commission was presented with conflicting expert testimony regarding the question of whether Mullins' driving ability was impaired by drugs at the time of his accident. Davis testified 300 nanograms of cocaine metabolites found in a person's urine indicates impairment. McBay, on the other hand, stated it was impossible to determine a person's impairment from a urinary drug screen. Thus, in accepting one expert's opinion, the Commission necessarily had to reject the testimony of the other expert. Accordingly, if the Commission believed McBay's testimony that it was impossible to establish from the urinary drug screen whether cocaine was introduced into Mullins' system within twelve hours of the accident, the Commission had to find that Davis could not have known "when cocaine was introduced [in]to [Mullins'] system," thus rejecting Davis' testimony "that [Mullins] used cocaine almost assuredly within the last six to twelve hours" prior to the accident. The Commission also accepted McBay's testimony that it was impossible to determine the actual amount of cocaine in Mullins' system at the time of the

accident. Consequently, the Commission was justified in rejecting Davis' opinion on the basis that "[h]e did not know . . . when cocaine was introduced [in]to [Mullins'] system or how much was introduced."

The majority holds that Davis' testimony presented competent evidence. Even if this were so, it would not warrant a reversal of the Commission's opinion and award. *See Porterfield*, 47 N.C. App. at 144, 266 S.E.2d at 762 ("[i]f there is any evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary"). McBay's experience with the threshold for the cocaine metabolites and his testimony that impairment could not be established by a urinary drug screen using this threshold was sufficient to support the Commission's finding that "it cannot be shown that 300 nanograms of the metabolite of cocaine in [Mullins'] urine had a measurable pharmacological effect on him at the time of the accident," and in turn supported the finding that defendants failed to meet their burden under section 97-12 to show Mullins' death "was proximately caused by [his] being under the influence of cocaine."

The majority finds significance in the fact that the Commission noted in its findings of fact that the accident occurred at 11:20 p.m. and that McBay testified to fatigue as the leading cause of single tractor-trailer accidents. The majority reads these findings as an implicit finding of causation. Nowhere in its opinion and award, however, does the Commission make a finding as to what caused the accident. The only finding on the issue of causation relates to defendants' failure to show that impairment was more probable than not a cause in fact of the accident. The majority's reliance on the above findings in reversing the Commission's opinion and award is thus misplaced because it ignores the burden on the party asserting the defense of impairment under section 97-12.[4] *See Anderson*, 71 N.C. App. at 545,

4. The majority reads section 97-12 as merely imposing on the employer the burden of proving the use of a non-prescribed controlled substance by the employee. Once the employer has met this requirement, the majority holds, the burden shifts to the employee to prove that the use of the controlled substance was not a contributing proximate cause of the accident. In support of its position, the majority cites several statutes enacted by other states that provide for a rebuttable presumption of impairment sufficient to satisfy the causation requirement once intoxication or the presence of a controlled substance has been shown. While the trend reflected in these statutes may support a legislative change in our laws, section 97-12, the statute in effect in North Carolina at this time, does not include such language. The plain language of our statute dictates that for "an injury or death" to be "proximately caused by" an employee

322 S.E.2d at 641. The Commission's only obligation was to find whether defendants had met their burden, and the Commission did so based on competent evidence. The issue of fatigue played no role in this analysis.

Finally, in holding there is a lack of sufficient competent evidence to support the Commission's finding as to defendants' failure to meet their burden of proof, the majority focuses on the competence of Davis' testimony and the accounts of the eyewitnesses. As noted above, this analysis does not comply with our standard of review on appeal, which is to decide whether there is any competent evidence to support the Commission's findings, not whether there was any competent evidence to support a different finding. *See Porterfield*, 47 N.C. App. at 144, 266 S.E.2d at 762. In weighing expert testimony, issues of credibility remain within the sole discretion of the Commission and cannot be second-guessed on appeal. *Melton*, 118 N.C. App. at 255, 454 S.E.2d at 708.

Because McBay's testimony supports the Commission's finding that impairment could not be established and therefore defendants failed to meet their burden under section 97-12, I would uphold the Commission's opinion and award.

RICHARD GILES AND WIFE, JOANN GILES, PLAINTIFF-APPELLANTS v. FIRST VIRGINIA CREDIT SERVICES, INC., AND PROFESSIONAL AUTO RECOVERY, INC., DEFENDANT-APPELLEES

No. COA00-1252

(Filed 5 March 2002)

1. Appeal and Error— appealability—partial summary judgment—claim determined

A trial judge's grant of partial summary judgment for defendant credit company determined plaintiff's claim for wrongful conversion and repossession of plaintiff's automobile, making it a

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"being under the influence of any controlled substance," the controlled substance must have an impairing effect on the employee. N.C.G.S. § 97-12. Without a showing of impairment, there cannot be causation, and without a showing of causation, the employer has not sustained *its* burden under the statute. *See Anderson*, 71 N.C. App. at 545, 322 S.E.2d at 641.

final judgment as to that claim and therefore reviewable on appeal.

2. Uniform Commercial Code— secured transactions—repossession of collateral—breach of peace—definition

The definition of breach of the peace in the context of a self-help repossession pursuant to N.C.G.S. § 25-9-503 (1999) (replaced by § 25-9-609) is broader than the criminal law definition, and whether a breach of the peace occurred should be based upon the reasonableness of the time and manner of the repossession. When there is no confrontation, five factors are balanced: where the repossession occurred; the debtor's express or constructive consent; the reactions of third parties; the type of premises entered; and the creditor's use of deception.

3. Uniform Commercial Code— secured transactions—wrongful repossession—summary judgment

The trial court did not err by granting summary judgment to defendant credit company on a claim for wrongful conversion and repossession where defendant contended that whether a breach of the peace had occurred is a question for the jury but there was no factual dispute about what happened during the repossession. Defendant recovery company went into plaintiff's driveway early in the morning, decreasing the possibility of confrontation; the recovery company did not enter plaintiff's home or any enclosed area; consent to repossession was expressly given in the contract with the credit company; although a neighbor was awakened, plaintiffs were not and there was no confrontation; and there was no evidence that any type of deception was used in repossessing the vehicle.

4. Uniform Commercial Code— secured transaction—default—check mailed before repossession, received after

The trial court did not err by granting summary judgment for a creditor in a wrongful repossession action on the issue of whether the account was in default when the automobile was repossessed. If the default is not cured before repossession, the fact that the check was mailed before the repossession is immaterial when it is not received until after the collateral is repossessed.

5. Uniform Commercial Code— secured transactions—statutory repossession scheme—not unconstitutional—no state action

State provisions allowing a secured party to repossess collateral without notice or judicial process, and a waiver in the finance contract in this case, were both constitutional. There was no participation by any state official; N.C.G.S. § 25-9-503 (1999) codifies a right existing at common law and is wholly self-executing. There was no state action.

Appeal by plaintiffs from order signed 15 June 2000 by Judge Forrest Donald Bridges in Superior Court, Lincoln County. Heard in the Court of Appeals 12 September 2001.

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

Kirschbaum, Nanney, Brown & Keenan, P.A., by Pamela P. Keenan and Stephen B. Brown, for defendant-appellee First Virginia Credit Services, Inc.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Sara H. Young, for defendant-appellee Professional Auto Recovery, Inc.

McGEE, Judge.

Richard Giles and Joann Giles (plaintiffs) appeal the trial court's order granting First Virginia Credit Services, Inc.'s (First Virginia) motion for summary judgment in part.

Plaintiffs filed a complaint against defendants First Virginia and Professional Auto Recovery, Inc. (Professional Auto Recovery) for wrongful repossession of an automobile. Plaintiffs alleged in an amended complaint that: (1) First Virginia and Professional Auto Recovery wrongfully converted and/or repossessed the automobile and plaintiffs' personal property located within the automobile; (2) plaintiffs made a payment on the account which First Virginia accepted immediately prior to First Virginia's repossession of the automobile and which First Virginia subsequently cashed and applied to plaintiffs' account after the repossession; (3) removal of the automobile constituted breach of the peace in violation of N.C. Gen. Stat. § 25-9-503; (4) N.C. Gen. Stat. § 25-9-503 is unconstitutional; and (5) First Virginia was negligent in hiring Professional Auto Recovery and

committed unfair or deceptive trade practices entitling plaintiffs to treble damages.

First Virginia filed an answer stating the automobile was repossessed due to the default of Joann Giles in making the payments to First Virginia on a loan secured by the automobile. First Virginia stated that N.C. Gen. Stat. § 25-9-503 permitted a secured lender to peaceably repossess its collateral upon default by a debtor and that such repossession could not, as a matter of law, constitute conversion of the collateral or an unfair or deceptive trade practice. First Virginia moved to dismiss plaintiffs' complaint for failure to state a claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

Joann Giles entered into an installment sale contract on or about 18 January 1997 for the purchase of an automobile. The contract was assigned to First Virginia, which obtained a senior perfected purchase money security interest in the automobile. The terms of the contract required Joann Giles to make sixty regular monthly payments to First Virginia. The contract stated that Joann Giles' failure to make any payment due under the contract within ten days after its due date would be a default. The contract contained an additional provision agreed to by Joann Giles that stated:

> If I am in default, you may consider all my remaining payments to be due and payable, without giving me notice. I agree that your rights of possession will be greater than mine. I will deliver the property to you at your request, or you may use lawful means to take it yourself without notice or other legal action. . . .
>
> . . .
>
> If you excuse one default by me, that will not excuse later defaults.

During the early morning hours of 27 June 1999, Professional Auto Recovery, at the request of First Virginia, repossessed the locked automobile from plaintiffs' front driveway. According to First Virginia, the account of Joann Giles was in arrears for payments due on 2 May 1999 and 2 June 1999, and pursuant to the terms of the contract, repossession was permitted.

In an affidavit filed by plaintiffs in opposition to First Virginia's motion for summary judgment, plaintiffs' neighbor, Glenn A. Mosteller (Mr. Mosteller), stated that he was awakened around 4:00 a.m.

by the running of a loud diesel truck engine on the road outside my house. Evidentially [sic] the truck was stopped because I lay in bed for a while and did not get up. I then became concerned and went to the window to see what was going on. At this time I saw a large rollback diesel truck with a little pickup truck on the truck bed behind it. The truck only had its parking lights on. The truck . . . started going toward the Giles' yard. It still only had its parking lights on. About that time, a man jumped out of the truck and ran up the Giles' driveway. Their car was parked up at their house. Then the car came flying out back down the driveway making a loud noise and started screeching off . . . . At about the same time, the rollback also pulled off real fast making a real loud diesel noise and went down [the road]. . . . I got to the phone, called the Giles and told them someone was stealing their car. . . . My lights were on . . . and the Giles' lights were on and that portion of our neighborhood had woken up. Richard Giles came out in his yard and we hollared a few words back and forth and I jumped in my truck . . . to try to get the police. About 5 minutes later a police car came up and pulled into the Giles' yard. Then another police car came then a Sheriff's Deputy car came. Then another police car came. . . . There was a great commotion going on out in the street and in our yard all to the disturbance of the quietness and tranquility of our neighborhood. . . . It scared me and it scared the Giles.

Joann Giles stated in a deposition that she was awakened by Mr. Mosteller's telephone call in which he told her that someone was stealing her car. She stated she ran to see if the automobile was parked outside and confirmed that it was gone. Joann Giles testified she woke up her husband and gave him the telephone; he ran outside into the yard and heard Mr. Mosteller "hollering" at him from across the street. Plaintiffs testified in their depositions that neither of them saw the car being repossessed but were only awakened by their neighbor after the automobile was gone. During the actual repossession, no contact was made between Professional Auto Recovery and plaintiffs, nor between Professional Auto Recovery and Mr. Mosteller.

First Virginia filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. Plaintiffs filed a motion to amend their complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 15. These motions were heard by the trial court on 17 May 2000. In an order dated 15 June 2000, the trial court: (1) granted plaintiffs' motion to amend their

complaint; (2) granted First Virginia's motion for summary judgment in part, stating there was no genuine issue as to any material fact as to the conversion or repossession of the motor vehicle; (3) denied First Virginia's motion for summary judgment in part, concluding that there were genuine issues of material fact as to the reasonableness of the taking into possession or conversion of plaintiffs' personal property located within the automobile and related damages; (4) declined plaintiffs' request to declare N.C. Gen. Stat. § 25-9-503 unconstitutional; and (5) ruled on other motions not at issue in this appeal. The trial court certified in an order filed 6 July 2000 that its decisions in the 15 June 2000 order constituted a final judgment as to some of plaintiffs' claims and found the order was immediately appealable pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Plaintiffs appeal.

I.

[1] We must first determine whether plaintiffs' appeal is properly before this Court in that the trial court's order does not resolve all issues among the parties and is therefore interlocutory. *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). *See also* N.C. Gen. Stat. § 1A-1, Rule 54(a) (1999). The purpose of this rule is "to prevent fragmentary, premature and unnecessary appeals" by allowing the trial court to determine all the issues in the case before it is presented to the appellate courts for review. *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978).

There are, however, two circumstances in which a party may appeal an interlocutory order. First, an immediate appeal may lie if the order of the trial court is final as to some but not all of the claims or parties, and the trial court certifies the case for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (1999). Second, an appeal is permitted where the order appealed from affects a substantial right of the parties. N.C. Gen. Stat. § 7A-27(d)(1) (1999) and N.C. Gen. Stat. § 1-277 (1999). *See also Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 490-91, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989).

A Rule 54(b) certification is reviewable by our Court on appeal because a "trial court's denomination of its decree [as] 'a final . . . judgment does not make it so,' if it is not such a judgment." *First Atl.*

Mgmt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (quoting *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979)). Although the trial court's determination that there is no just reason for delay of an appeal is accorded great deference, it does not bind our appellate courts because "ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984). *See also DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 500 S.E.2d 666 (1998).

In this case, the trial court granted partial summary judgment for First Virginia on the issue of wrongful conversion and/or repossession of plaintiffs' automobile, and refused plaintiffs' request to declare N.C. Gen. Stat. § 25-9-503 unconstitutional. Additionally, the trial court denied First Virginia's motion for summary judgment on the issue of wrongful conversion and/or taking into possession plaintiffs' personal property located within the automobile, concluding that there were issues of material fact as to the reasonableness of those actions. The trial court stated that "these rulings constitute a final Judgment to some but not all of the various claims in the action and that there is no justifiable reason for delay." A judgment is final when it "in effect determines the action[.]" N.C. Gen. Stat. § 1-277. The trial court's judgment granting First Virginia's motion for summary judgment determined plaintiffs' claim for wrongful conversion and/or repossession of plaintiffs' automobile, making it a final judgment as to this claim, and we therefore may review this issue on appeal.

Before turning to the merits of plaintiffs' appeal, we note that First Virginia filed a motion to dismiss plaintiffs' appeal based upon alleged violations of the N.C. Rules of Appellate Procedure. We deny First Virginia's motion to dismiss and exercise our discretion under N.C.R. App. P. 2 to consider the merits of plaintiffs' appeal.

II.

[2] By their first assignment of error, plaintiffs argue the trial court erred in granting in part First Virginia's motion for summary judgment dismissing plaintiffs' claim for wrongful conversion and/or repossession of their automobile. Plaintiffs specifically argue that (1) the determination of whether a breach of the peace occurred in violation of N.C. Gen. Stat. § 25-9-503 is a question for the jury and not one to be determined by summary judgment, and (2) there is a dispute as to whether plaintiffs were in default.

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. Gen. Stat. § 1A-1, Rule 56(c) (1999).

A.

Plaintiffs first argue the trial court erred in granting partial summary judgment to First Virginia because the issue of whether a breach of the peace occurred is a question for the jury.

Our Courts have long recognized the right of secured parties to repossess collateral from a defaulting debtor without resort to judicial process, so long as the repossession is effected peaceably. *See e.g., Rea v. Credit Corp.*, 257 N.C. 639, 641, 127 S.E.2d 225, 227 (1962); *Freeman v. Acceptance Corp.*, 205 N.C. 257, 258, 171 S.E. 63, 63 (1933). Our General Assembly codified procedures for self-help repossessions, including this common law restriction, in the North Carolina Uniform Commercial Code (UCC). N.C. Gen. Stat. § 25-9-503 (1999), in effect at the time of the repossession in this case, reads in part,

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

The General Assembly did not define breach of the peace but instead left this task to our Courts, and although a number of our appellate decisions have considered this self-help right of secured parties, none have clarified what actions constitute a breach of the peace.

N.C. Gen. Stat. § 25-9-503, at issue in this appeal, has been replaced by N.C. Gen. Stat. § 25-9-609 (Interim Supp. 2000) (Effective 1 July 2001), which states that a secured party, after default, may take possession of the collateral without judicial process, if the secured party proceeds without breach of the peace. In Number 3. of the Official Comment to the new statutory provision, our General Assembly continued to state that, "[l]ike former Section 9-503, this section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts." N.C.G.S. § 25-9-609. The General Assembly clearly may further define and/or limit the time, place and conditions under which a repossession is permitted, but it has not yet done so.

In a pre-UCC case, *Rea v. Credit Corp.*, 257 N.C. 639, 127 S.E.2d 225 (1962), a defaulting debtor left his locked automobile on his front lawn. An agent of the mortgagee went to the debtor's home to repossess the automobile, saw the automobile parked on the lawn, found no one at home, and asked a neighbor where the debtor was. The agent was told no one was at home and he thereafter opened the automobile door with a coat hanger and removed the automobile on a wrecker. Our Supreme Court found that this evidence could not warrant a finding by a jury that the mortgagee's agent wrongfully took possession of the automobile because no breach of the peace occurred. In *Rea*, although our Supreme Court did not define breach of the peace, it reiterated the common law rule that the right of self-help repossession "must be exercised without provoking a breach of the peace[.]" *Id.* at 641-42, 127 S.E.2d at 227. Our Supreme Court thought the law "well stated" by the South Carolina Supreme Court in the case of *Willis v. Whittle*, that

> "if the mortgagee finds that he cannot get possession without committing a breach of the peace, he must stay his hand, and resort to the law, for the preservation of the public peace is of more importance to society than the right of the owner of a chattel to get possession of it."

Rea, 257 N.C. at 641-42, 127 S.E.2d at 227 (quoting *Willis v. Whittle*, 82 S.C. 500, 64 S.E. 410 (1909)).

In a case addressing the issue of whether prior notice of repossession is required under N.C. Gen. Stat. § 25-9-503, our Court stated that repossession can be accomplished under the statute without prior notice so long as the repossession is peaceable. *Everett v. U.S. Life Credit Corp.*, 74 N.C. App. 142, 144, 327 S.E.2d 269, 269 (1985). Without specifically defining breach of the peace, our Court explained that "[o]f course, if there is confrontation at the time of the attempted repossession, the secured party must cease the attempted repossession and proceed by court action in order to avoid a 'breach of the peace.' " *Id.* at 144, 327 S.E.2d at 270. This indicates, as argued by First Virginia, that confrontation is at least an element of a breach of the peace analysis.

In that breach of the peace has not heretofore been clarified by our appellate courts, but instead only vaguely referred to, we must construe this term as the drafters intended. "In construing statutes the court should always give effect to the legislative intent." *Electric Service v. City of Rocky Mount*, 20 N.C. App. 347, 348, 201 S.E.2d 508,

509, *aff'd*, 285 N.C. 135, 203 S.E.2d 838 (1974). "The intent of the Legislature may be ascertained from the phraseology of the statute as well as the nature and purpose of the act and the consequences which would follow from a construction one way or another." *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979). In determining what conduct constitutes a breach of the peace we consider each of these contributing elements.

The phrase "breach of the peace" is defined in Black's Law Dictionary as the "criminal offense of creating a public disturbance or engaging in disorderly conduct, particularly by an unnecessary or distracting noise." Black's Law Dictionary 183 (7th ed. 1999). The phrase is also commonly understood to mean a "violation of the public order as amounts to a disturbance of the public tranquility, by act or conduct either directly having this effect, or by inciting or tending to incite such a disturbance of the public tranquility." 12 Am. Jur. 2d *Breach of Peace* § 5 (1997).

In a criminal case, our Supreme Court defined breach of the peace as "a disturbance of public order and tranquility by act or conduct not merely amounting to unlawfulness but tending also to create public tumult and incite others to break the peace." *State v. Mobley*, 240 N.C. 476, 482, 83 S.E.2d 100, 104 (1954). *See also Perry v. Gibson*, 247 N.C. 212, 100 S.E.2d 341 (1957) (wrongful death case stating the same definition for breach of the peace). Such " '[a] breach of the peace may be occasioned by an affray or assault, by the use of profane and abusive language by one person toward another on a public street and in the presence of others, or by a person needlessly shouting and making loud noise.' " *Mobley*, 240 N.C. at 482, 83 S.E.2d at 104 (quoting 4 Am. Jur. *Arrest* § 30). A breach of the peace, as used in Chapter 19 of our General Statutes, entitled "Offenses Against Public Morals," is defined as "repeated acts that disturb the public order including, but not limited to, homicide, assault, affray, communicating threats, unlawful possession of dangerous or deadly weapons, and discharging firearms." N.C. Gen. Stat. § 19-1.1(1) (1999).

We must also consider the nature and purpose of Chapter 25 of the North Carolina General Statutes, the UCC, which is to be "liberally construed and applied to promote its underlying purposes and policies." N.C. Gen. Stat. § 25-1-102 (1999). Its stated purposes are:

> (a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

Id.

In carrying out the policy of uniformity with other jurisdictions, we consider their treatment of the term of breach of the peace. While cases from other jurisdictions are not binding on our courts, they provide insight into how this term has been analyzed by other courts and therefore are instructive.

The courts in many states have examined whether a breach of the peace in the context of the UCC has occurred. Courts have found a breach of the peace when actions by a creditor incite violence or are likely to incite violence. *Birrell v. Indiana Auto Sales & Repair*, 698 N.E.2d 6, 8 (Ind. App. 1998) (a creditor cannot use threats, enter a residence without debtor's consent and cannot seize property over a debtor's objections); *Wade v. Ford Motor Credit Co.*, 668 P.2d 183, 189 (Kan. App. 1983) (a breach of the peace may be caused by an act likely to produce violence); *Morris v. First National Bank & Trust Co. of Ravena*, 254 N.E.2d 683, 686-87 (Ohio 1970) (a physical confrontation coupled with an oral protest constitutes a breach of the peace).

Other courts have expanded the phrase breach of the peace beyond the criminal law context to include occurrences where a debtor or his family protest the repossession. *Fulton v. Anchor Sav. Bank, FSB*, 452 S.E.2d 208, 213 (Ga. App. 1994) (a breach of the peace can be created by an unequivocal oral protest); *Census Federal Credit Union v. Wann*, 403 N.E.2d 348, 352 (Ind. App. 1980) ("if a repossession is . . . contested at the actual time . . . of the attempted repossession by the defaulting party or other person in control of the chattel, the secured party must desist and pursue his remedy in court"); *Hollibush v. Ford Motor Credit Co.*, 508 N.W.2d 449, 453-55 (Wis. App. 1993) (in the face of an oral protest the repossessing creditor must desist). Some courts, however, have determined that a mere oral protest is not sufficient to constitute a breach of the peace. *Clarin v. Minnesota Repossessors, Inc.*, 198 F.3d 661, 664 (8th Cir. 1999) (oral protest, followed by pleading with repossessors in public parking lot does not rise to level of breach of the peace); *Chrysler Credit Corp. v. Koontz*, 661 N.E.2d 1171, 1173-74 (Ill. App. 1996) (yelling "Don't take it" is insufficient).

If a creditor removes collateral by an unauthorized breaking and entering of a debtor's dwelling, courts generally hold this conduct to be a breach of the peace. *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 29 (Tenn. App. 1991) and *General Elec. Credit Corp. v. Timbrook*, 291 S.E.2d 383, 385 (W. Va. 1982) (both cases stating that breaking and entering, despite the absence of violence or physical confrontation, is a breach of the peace). Removal of collateral from a private driveway, without more however, has been found not to constitute a breach of the peace. *Hester v. Bandy*, 627 So.2d 833, 840 (Miss. 1993). Additionally, noise alone has been determined to not rise to the level of a breach of the peace. *Ragde v. People's Bank*, 767 P.2d 949, 951 (Wash. App. 1989) (unwilling to hold that making noise is an act likely to breach the peace).

Many courts have used a balancing test to determine if a repossession was undertaken at a reasonable time and in a reasonable manner, and to balance the interests of debtors and creditors. *See e.g.*, *Clarin v. Minnesota Repossessors, Inc.*, 198 F.3d 661, 664 (8th Cir. 1999); *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 29 (Tenn. App. 1991). Five relevant factors considered in this balancing test are: "(1) where the repossession took place, (2) the debtor's express or constructive consent, (3) the reactions of third parties, (4) the type of premises entered, and (5) the creditor's use of deception." *Davenport*, 818 S.W.2d at 29 (citing 2 J. White & R. Summers, *Uniform Commercial Code* § 27-6, at 575-76 (3d ed. 1988)).

Relying on the language of our Supreme Court in *Rea*, plaintiffs argue that the "guiding star" in determining whether a breach of the peace occurred should be whether or not the public peace was preserved during the repossession. *Rea*, 257 N.C. at 641-42, 127 S.E.2d at 228. Plaintiffs contend "the elements as to what constitutes a breach of the peace should be liberally construed" and urge our Court to adopt a subjective standard considering the totality of the circumstances as to whether a breach of the peace occurred.

Plaintiffs claim that adopting a subjective standard for N.C. Gen. Stat. § 25-9-503 cases will protect unwitting consumers from the "widespread use of no notice repossessions, clandestine and after midnight repossessions" and will protect "our State's commitment to law and order and opposition to vigilante policies, opposition to violence and acts from which violence could reasonably flow[.]" If a lender is not held to such a high subjective standard, plaintiffs contend that self-help repossessions should be disallowed altogether.

First Virginia, in contrast, argues that a breach of the peace did not occur in this case, as a matter of law, because there was no confrontation between the parties. Therefore, because the facts in this case are undisputed concerning the events during the actual repossession of the automobile, the trial court did not err in its partial grant of summary judgment.

First Virginia disputes plaintiffs' contention that a determination of whether a breach of the peace occurred should be a wholly subjective standard, because if such a standard is adopted, every determination of whether a breach of the peace occurred would hereafter be a jury question and "would run directly contrary to the fundamental purpose of the Uniform Commercial Code, which is to provide some degree of certainty to the parties engaging in various commercial transactions." Further, First Virginia argues that applying a subjective standard to a breach of the peace analysis could be detrimental to borrowers, with lenders likely increasing the price of credit to borrowers to cover the costs of having to resort to the courts in every instance to recover their collateral upon default. The standard advocated by plaintiffs would "eviscerate" the self-help rights granted to lenders by the General Assembly, leaving lenders "with no safe choice except to simply abandon their 'self help' rights altogether, since every repossession case could [result] in the time and expense of a jury trial on the issue of 'breach of the peace[.]' " Finally, First Virginia argues that a subjective standard would be detrimental to the judicial system as a whole because "[w]ith a case-by-case, wholly subjective standard . . . the number of lawsuits being filed over property repossessions could increase dramatically[.]"

Based upon our review of our appellate courts' treatment of breach of the peace in pre-UCC and UCC cases, as well as in other areas of the law, the purposes and policies of the UCC, and the treatment other jurisdictions have given the phrase, we find that a breach of the peace, when used in the context of N.C. Gen. Stat. § 25-9-503, is broader than the criminal law definition. A confrontation is not always required, but we do not agree with plaintiffs that every repossession should be analyzed subjectively, thus bringing every repossession into the purview of the jury so as to eviscerate the self-help rights duly given to creditors by the General Assembly. Rather, a breach of the peace analysis should be based upon the reasonableness of the time and manner of the repossession. We therefore adopt a balancing test using the five factors discussed above to determine whether a breach of the peace occurs when there is no confrontation.

[3] In applying these factors to the undisputed evidence in the case before us, we affirm the trial court's determination that there was no breach of the peace, as a matter of law. Professional Auto Recovery went onto plaintiffs' driveway in the early morning hours, when presumably no one would be outside, thus decreasing the possibility of confrontation. Professional Auto Recovery did not enter into plaintiffs' home or any enclosed area. Consent to repossession was expressly given in the contract with First Virginia signed by Joann Giles. Although a third party, Mr. Mosteller, was awakened by the noise of Professional Auto Recovery's truck, Mr. Mosteller did not speak with anyone from Professional Auto Recovery, nor did he go outside until Professional Auto Recovery had departed with the Giles' automobile. Further, neither of the plaintiffs were awakened by the noise of the truck, and there was no confrontation between either of them with any representative of Professional Auto Recovery. By the time Mr. Mosteller and plaintiffs went outside, the automobile was gone. Finally, there is no evidence, nor did plaintiffs allege, that First Virginia or Professional Auto Recovery employed any type of deception when repossessing the automobile.

There is no factual dispute as to what happened during the repossession in this case, and the trial court did not err in granting summary judgment to First Virginia on this issue.

B.

[4] Plaintiffs next argue there was a factual dispute over whether or not a default occurred in the repayment of the note and therefore summary judgment was improper.

N.C. Gen. Stat. § 25-9-503 states that "unless otherwise agreed a secured party has on default the right to take possession of the collateral." The contract signed by Joann Giles stated that she would be in default if she "fail[ed] to make any payment within 10 days after its due date." Additionally, she agreed that if the bank chose to excuse a default, that would not excuse later defaults.

Plaintiffs argue in their brief to this Court that Joann Giles was "one payment behind" when her automobile was repossessed on 27 June 1999. They claim a payment was made to First Virginia before the automobile was repossessed, bringing her account up to date, but that payment was cashed and credited to Joann Giles' account two days after the repossession. Plaintiffs thus imply that because the check was ultimately received and cashed, Joann Giles' account was

not in default when the repossession occurred. This position, however, is untenable. If a default is not cured before repossession, the fact that the check was mailed before repossession is immaterial when it is not received until after the collateral is repossessed. 10 Ronald A. Anderson, *Anderson on The Uniform Commercial Code*, § 9-503:52 (3d ed. 1999 Revision).

Plaintiffs also argue in their brief that *Credit Co. v. Jordan*, 5 N.C. App. 249, 168 S.E.2d 229 (1968) "espouses the proposition that acceptance of late payments along with evidence of unconscionable or improper action on the part of the financial institution would constitute waiver or estoppel." Plaintiffs contend that First Virginia had accepted late payments in the past from Joann Giles and that First Virginia's repossession of the automobile was unconscionable; therefore, First Virginia was estopped from repossessing her automobile on 27 June 1999.

Plaintiffs' reliance on *Credit Co.*, however, is misplaced because the proposition stated by plaintiffs is taken from dicta in that case and is not binding on this Court in the case before us. Further, plaintiffs do not direct us to any evidence in the record supporting a conclusion that First Virginia intended to forbear plaintiffs' payments or that First Virginia acted unconscionably. In fact, Joann Giles agreed in the contract that acceptance of a late payment by First Virginia would not excuse a later default. Plaintiffs' argument of forbearance by First Virginia is without merit.

The trial court found, and we agree, that there is no genuine issue of material fact as to whether Joann Giles' account was in default when the automobile was repossessed. The trial court did not err in granting summary judgment to First Virginia on this issue.

Plaintiffs' first assignment of error is overruled.

III.

[5] Plaintiffs next argue that the provisions of N.C. Gen. Stat. § 25-9-503 granting a secured party the right to take possession of collateral without judicial process, without notice and/or a right to be heard, are unconstitutional as applied to the facts in this case. They further argue that the waiver of notice in the contract Joann Giles signed with First Virginia deprived her of her constitutional rights under the Fourteenth Amendment to the United States Constitution.

Plaintiffs claim that the statutory scheme providing for non-judicial repossession under N.C. Gen. Stat. § 25-9-503 constitutes state action sufficient to evoke the protection of the due process clause of the Fourteenth Amendment of the United States Constitution. As support for their position, plaintiffs rely on *Turner v. Blackburn*, 389 F.Supp. 1250 (W.D.N.C. 1975). *Turner*, however, is distinguishable from the case before us because in *Turner*, the court's determination that state action was involved, thereby requiring application of the provisions of the Fourteenth Amendment, was based upon the direct participation of the clerk of court in the statutory procedure for foreclosure and sale under deed of trust. *Id.* at 1254-58. In the case before us, however, plaintiffs cite no participation on the part of any state official in First Virginia's self-help repossession, nor can we find any in our review of the record.

Plaintiffs argue the state action in this case, requiring our Court to declare N.C. Gen. Stat. § 25-9-503 unconstitutional, is based on our state's statutory scheme permitting the Department of Motor Vehicles to title a motor vehicle, to create and perfect a lien on a motor vehicle, to transfer title of a motor vehicle when the motor vehicle is sold pursuant to a repossession, and to transfer title absent the owner's signature. Further, plaintiffs argue state action is present through our statutory scheme which provides for repossession without judicial process, where payment of any surplus from sale of the repossessed vehicle is paid to the clerk of superior court who is liable on a bond for safekeeping the funds. Except for the reference to N.C. Gen. Stat. § 25-9-503, the statutes as recited by plaintiff, do not apply to this case and will not be addressed.

A majority of the federal circuit courts have considered the question before us and are in agreement that self-help repossession pursuant to UCC provisions does not constitute "state action" within the purview of the due process provision of the Fourteenth Amendment. *Shirley v. State National Bank of Connecticut*, 493 F.2d 739 (2d Cir. 1974); *Gibbs v. Titelman*, 502 F.2d 1107 (3rd Cir. 1974), *cert. denied, Gibbs, et al. v. Garver, Director, Bureau of Motor Vehicles, et al.*, 419 U.S. 1039, 42 L. Ed. 2d 316 (1974); *James v. Pinnix*, 495 F.2d 206 (5th Cir. 1974); *Turner v. Impala Motors*, 503 F.2d 607 (6th Cir. 1974); *Nichols v. Tower Grove Bank*, 497 F.2d 404 (8th Cir. 1974); *Nowlin v. Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir. 1974), *cert. denied*, 419 U.S. 1006, 42 L. Ed. 2d 283 (1974); *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006, 42 L. Ed. 2d 282 (1974). While this Court is not obliged to

follow decisions from other jurisdictions, these decisions are instructive in our determination of whether there was sufficient state action in this case to sustain a challenge under the Fourteenth Amendment.

We agree with First Virginia's contention that N.C. Gen. Stat. § 25-9-503 is "wholly self-executing and takes no involvement by any state employee to fully effect its purpose." In enacting N.C. Gen. Stat. § 25-9-503, our General Assembly codified a right existing at common law; it did not delegate to private parties authority previously held by the state. Therefore, plaintiffs' argument that state action was involved in this case is without merit.

Plaintiffs also claim that the waiver of notice in the contract signed by Joann Giles is void because it deprives her of her property without notice and an opportunity to be heard, as required by the Fourteenth Amendment. Because we find that there is no state action under N.C. Gen. Stat. § 25-9-503, this argument also fails. Plaintiffs' second assignment of error is overruled.

The trial court's order granting partial summary judgment for First Virginia is affirmed.

Affirmed.

Judges WALKER and HUDSON concur.

JENNIFER J. EFFINGHAM, EMPLOYEE, PLAINTIFF v. THE KROGER COMPANY, EMPLOYER, CNA CONTINENTAL CASUALTY, CARRIER, DEFENDANTS

No. COA01-24

(Filed 5 March 2002)

1. Workers' Compensation— compensable injury—Commission is sole judge of credibility of witnesses

The Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff grocery cashier's neck injury was not caused by her compensable back injury, because: (1) the Commission is the sole judge of the credibility of the witnesses; and (2) there is competent evidence in the record to support the Commission's finding that the history plaintiff provided to a doctor was not credible.

2. Workers' Compensation— benefits—temporary total disability

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff grocery cashier temporary total disability benefits instead of permanent total disability benefits, because: (1) an employer's admission of compensability and liability through the use of a Form 60 does not create a presumption of continuing disability as does a Form 21 agreement; and (2) although defendants presented evidence that a "greeter" job was available to plaintiff which met the restrictions placed on plaintiff for return to work and paid plaintiff the same wages she had earned prior to her back injury, defendants did not establish that the position offered to plaintiff is an accurate measure of plaintiff's ability to earn wages in the competitive job market and there is no evidence that other employers would hire plaintiff to do a similar job at a comparable wage.

3. Workers' Compensation— permanent disability—proof of loss of wage-earning capacity

The Industrial Commission erred in a workers' compensation case by failing to determine whether plaintiff grocery cashier proved her loss of wage-earning capacity was permanent when she elected to seek permanent disability benefits under N.C.G.S. § 97-29 after reaching maximum medical improvement.

4. Workers' Compensation— late payment penalty—payment of benefits during employee's attempt to return to work

The Industrial Commission did not err in a workers' compensation case by failing to find and conclude that plaintiff grocery cashier was entitled to a ten percent late payment penalty under N.C.G.S. § 97-18(g) based on defendants' failure to pay plaintiff temporary partial disability benefits during her attempt to return to work, because the record and award of the Commission supports the conclusion that defendants paid plaintiff all temporary partial disability benefits owed.

5. Workers' Compensation— attorney fees—unreasonable denial and defense of claim

The Industrial Commission did not abuse its discretion in a workers' compensation case by failing to award plaintiff grocery cashier her attorney fees under N.C.G.S. § 97-88.1 for defendants' alleged unreasonable denial and defense of this claim regarding plaintiff's retained wage-earning capacity based

on plaintiff's return to work in a greeter position, because the parties brought, prosecuted, or defended this matter with reasonable grounds based on the facts that: (1) the Commission found the greeter position offered to plaintiff employee by defendant employer in the present case was an actual job not created especially for plaintiff, and the position was advertised by the company before plaintiff was placed in that position; and (2) while the position was modified by giving plaintiff a chair so that she could change positions from standing to sitting as needed, it was not so highly modified to make it one that never existed before or one that no one but plaintiff would be hired to fill that position.

6. Workers' Compensation— partial disability—denial of credit for payment

The Industrial Commission did not abuse its discretion in a workers' compensation case by failing to allow defendants a credit for payment to plaintiff grocery cashier of partial disability associated with plaintiff's neck injury, because defendants have not been ordered to pay compensation for plaintiff's neck problems since the Commission held that plaintiff's neck problems and herniated cervical disc were not caused by her compensable back injury.

7. Workers' Compensation— medical expenses—statutory limitations

The Industrial Commission's award of medical expenses for plaintiff grocery cashier's compensable back injury in a workers' compensation case is remanded to the Commission to incorporate the statutory limitations under N.C.G.S. §§ 97-25.1 and 97-2(19).

Judge HUDSON concurring in a separate opinion.

Appeals by plaintiff and defendants from Opinion and Award entered 22 August 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 December 2001.

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

Young, Moore and Henderson, P.A., by Joe E. Austin, Jr. and Dawn M. Dillon, for defendants.

TYSON, Judge.

Jennifer J. Effingham ("plaintiff") appeals the denial of her claim for permanent total disability by the North Carolina Industrial Commission ("Commission"). Defendants, The Kroger Company ("defendant-employer") and CNA Continental Casualty ("defendant-carrier"), appeal an award of temporary total disability by the Commission. We affirm in part and reverse in part.

I. Facts

Plaintiff filed a motion for payment of past due workers' compensation benefits, ten percent penalty pursuant to N.C.G.S. § 97-18, and attorney's fees pursuant to N.C.G.S. § 97-88.1 in her Form 33, Request for Hearing, on 5 February 1998. Defendants filed a response to plaintiff's motions on 17 February 1998.

The Commission unanimously made the following findings of fact: Plaintiff began working for defendant-employer as a cashier in May 1995. Plaintiff's job duties included lifting and scanning grocery items.

While at work on 18 December 1995, plaintiff felt a pain in her lower back, after she lifted a bag of cat liter from the bottom of the shopping cart and onto the scanner. Plaintiff's injury was accepted as compensable by defendants pursuant to a Form 60, Employer's Admission of Employee's Right to Compensation, filed 14 February 1996.

Plaintiff had surgery on 24 January 1996. Dr. Fulghum removed two large disc fragments at L4-5. On 30 July 1996, Dr. Derian performed a decompression at plaintiff's L4-5.

The Commission found that plaintiff had degenerative disc disease, prior to her accident, and that the compensable injury on 18 December 1995 significantly aggravated her back condition, resulting in a herniated disc at L4-5. The surgeries performed by Dr. Fulghum and Dr. Derian were reasonably necessary to treat plaintiff's back injury and provide her relief from pain.

As a result of her injury, plaintiff has a condition known as failed low back syndrome. The Commission found that plaintiff will need ongoing treatment, including medication, to manage her pain. The Commission also found that because of her back pain, plaintiff is not capable of working full-time and that plaintiff is unable to compete for part-time jobs available for unskilled workers.

The Commission further found that plaintiff's neck problems and herniated cervical disc were not caused by her compensable injury and that the treatment and neck surgery by Dr. Haglund on 12 October 1997 were not compensable.

The Commission concluded that plaintiff is entitled to temporary total disability benefits at the rate of $229.34 per week, beginning 27 January 1997 and continuing until further order. Defendants are entitled to offset wages paid to plaintiff while employed. Plaintiff and defendants appeal.

II. Issues

The issues presented by plaintiff are whether: (1) the Commission erred by finding and concluding that plaintiff's herniated cervical disc was not caused by her compensable injury, (2) the Commission erred by failing to award plaintiff permanent and total disability benefits, (3) the Commission erred by failing to find and conclude that plaintiff was entitled to a late payment penalty, and (4) the Commission erred by failing to award plaintiff her attorney's fees for defendants' unreasonable denial and defense of this claim.

The issues presented by defendants are whether: (1) the Commission erred in awarding plaintiff temporary total disability benefits, (2) the Commission erred by failing to allow defendants a credit for payment of partial disability, and (3) the Commission erred by failing to tailor the award of medical expenses in conformity with the Workers' Compensation Act. Those assignments of error relating to the findings of facts and conclusions of law that are not argued are deemed abandoned. N.C.R. App. R. 28(b)(5) (1999).

III. Standard of Review

This Court's review is limited to a determination of (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the Commissioner's conclusions of law are supported by the findings of fact. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). The Commission's findings of fact are conclusive on appeal if supported by competent evidence, even where there is evidence to support contrary findings. *Id.* The Commission's conclusions of law, however, are reviewable *de novo* by this Court. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). The Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testi-

mony. *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951).

IV. Plaintiff's Appeal

A. Herniated cervical disc not compensable

[1] Plaintiff argues the Commission's findings, that her herniated cervical disc was not caused by her compensable accident, are contrary to the undisputed evidence and other findings of fact. We disagree.

On 14 February 1997, plaintiff contacted Dr. Blackburn with a burning sensation in her upper back. Dr. Blackburn prescribed muscle relaxants. Plaintiff then sought treatment from Dr. Esposito, an orthopaedic surgeon, with complaints of neck pain on 1 May 1997.

In July 1997, Dr. Esposito diagnosed plaintiff with a herniated disc at C5-6. Dr. Esposito referred plaintiff to Duke University Medical Center for further treatment. Plaintiff was examined by Dr. Haglund on 6 October 1997, at Duke. Plaintiff reported to Dr. Haglund a history of neck pain that was continuous from the date of her compensable injury. Dr. Haglund performed an anterior cervical discectomy and fusion on 12 October 1997.

Plaintiff was not treated for neck pain by her prior doctors, Fulghum and Derian, and did not report any neck pain to either until her last visits. Dr. Esposito did not treat plaintiff until eighteen months after her injury. Plaintiff told Dr. Esposito that her neck pain had developed over the last couple of months.

Dr. Haglund opined that plaintiff's herniated cervical disc was caused or aggravated by her injury on 18 December 1995. The Commission determined that Dr. Haglund relied on the medical history provided by plaintiff which was inconsistent, unsupported by medical documentation, and not credible. The Commission concluded that: (1) plaintiff's neck problems and herniated cervical disc were not caused by her compensable injury and (2) the treatment and neck surgery by Dr. Haglund were not compensable.

We hold that there is competent evidence in the record to support the Commission's finding that the history plaintiff provided to Dr. Haglund was not credible. The Commission is the sole judge of the credibility of the witnesses and it rejected plaintiff's evidence that her neck problems resulted from her back injury. *See Anderson*, 233 N.C. at 376, 64 S.E.2d at 268. This assignment of error is overruled.

B. Disability Award

The Workers' Compensation Act ("the Act") defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (1999). "Compensation must be based upon loss of wage-earning power rather than the amount actually received." *Hill* v. *DuBose*, 234 N.C. 446, 447-48, 67 S.E.2d 371, 372 (1951). If the employee has the capacity to earn some wages, but less than she was earning at the time of injury, she is entitled to partial disability benefits under N.C.G.S. § 97-30. *Gupton v. Builders Transp.*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987). If the employee's earning capacity has been "totally obliterated," she is entitled to total disability benefits under N.C.G.S. § 97-29. *Id.*

[2] Plaintiff contends the Commission erred in denying her permanent total disability benefits. The Commission awarded plaintiff temporary total disability at the rate of $229.34 per week, beginning 27 January 1997 and continuing until further order of the Commission. Defendants appeal the Commission's award of temporary total disability and argue that the Commission erred in concluding that plaintiff did not have wage earning capacity.

1. Burden of Proof

"In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent." *Hendrix*, 317 N.C. at 185, 345 S.E.2d at 378. To support a conclusion of disability, the plaintiff must prove and the Commission must find that: (1) plaintiff was incapable after her injury of earning the same wages earned prior to injury in the same employment, (2) plaintiff was incapable after her injury of earning the same wages she earned prior to injury in any other employment, and (3) plaintiff's incapacity to earn wages was caused by her compensable injury. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. After these elements are proven, "the burden shifts to [the employer] to show that plaintiff is employable." *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 284, 458 S.E.2d 251, 257 (1995).

One method for establishing disability is the use and approval of a Form 21 agreement, which entitles employees to a presumption of disability. *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 476 S.E.2d 434 (1996). N.C.G.S. § 97-18(b) permits an employer to admit that the injury suffered by the employee is compensable, that

the employer is liable for compensation, and to notify the Commission of such action by use of a Form 60. *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159, 542 S.E.2d 277, 281 (2001).

Admitting compensability and liability, through the use of a Form 60, does not create a presumption of continuing disability as does a Form 21 agreement. *Id.* at 159-60, 542 S.E.2d at 281-82. The Form 60 in the present case does not entitle plaintiff to a presumption of continuing disability. Therefore, the burden of proving disability is on plaintiff.

Here, Dr. Fulghum testified that plaintiff suffers from chronic back pain and was temporarily totally disabled from full-time competitive employment as of the last time he saw her in April 1996. Dr. Derian testified that plaintiff suffers from chronic back pain, is disabled from full-time competitive employment, and that she is permanently disabled. Dr. Haglund testified that plaintiff suffers from chronic back pain and is permanently and totally disabled from sustaining any full-time or part-time competitive employment. Dr. Blackburn testified that plaintiff is permanently and totally disabled from full-time work. David Arthur, vocational rehabilitation counselor, testified that plaintiff is permanently and totally disabled from full-time competitive employment while she suffers from chronic back pain.

Defendants contend that plaintiff is capable of earning wages. To rebut evidence of disability, defendants must show "not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990). "An employee is 'capable of getting' a job if 'there exists a reasonable likelihood . . . that he would be hired if he diligently sought the job.' " *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73-4, 441 S.E.2d 145, 149 (1994) (quoting *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984)).

In this case, defendants presented evidence that a "greeter" job was available to plaintiff which met the restrictions placed on plaintiff for return to work, and paid plaintiff the same wages she had earned prior to her back injury.

In *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798, (1986), our Supreme Court stated:

> If the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level.

Id. at 438, 342 S.E.2d at 806.

Defendants did not establish that the greeter position offered to plaintiff is an accurate measure of plaintiff's ability to earn wages in the competitive job market. There is no evidence that other employers would hire plaintiff to do a similar job at a comparable wage. We hold that there is sufficient evidence to support the Commission's findings that plaintiff is temporarily totally disabled as defined by the Act, as of the date of hearing.

2. Temporary vs. Permanent Disability Benefits

Plaintiff filed a Form 33, Request for Hearing, asking the Commission to find that she was entitled to benefits for "total and permanent disability" under N.C.G.S. § 97-29. In order to prove her entitlement to "total and permanent disability," plaintiff sought a determination that the "greeter" job did not reflect her actual wage-earning capacity. Alternatively, defendants sought a determination that plaintiff retained wage-earning capacity in the "greeter" job and was only entitled to "partial permanent disability" under N.C.G.S. § 97-30.

The Commission made no findings as to whether plaintiff's loss of wage-earning capacity was permanent. The Commission did conclude that the "greeter" position did not indicate that plaintiff is presently able to compete with others for wages. We have already held that this conclusion of law was supported by the findings of fact which in turn were supported by competent evidence. *See Hendrix*, 317 N.C. at 186, 345 S.E.2d at 379.

The Workers' Compensation Act provides two basic categories of benefits as the result of an injury by accident: (1) indemnity benefits for loss of wage-earning capacity under N.C.G.S. § 97-29 (total incapacity) or N.C.G.S. § 97-30 (partial incapacity) and (2) benefits for physical impairment, without regard to its effect on wage-earning capacity, under N.C.G.S. § 97-31 (schedule of injuries). N.C.G.S. §§ 97-29 and 97-30 are alternate sources of compensation for an employee who suffers an injury which is also included under the

schedule of injuries found in N.C.G.S. § 97-31. *Harrington v. Pait Logging Co./Georgia Pac.*, 86 N.C. App. 77, 80, 356 S.E.2d 365, 366 (1987). The employee is allowed to select the more favorable remedy. *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 90, 348 S.E.2d 336, 340 (1986). The employee cannot recover compensation under both sections, because 97-31 is "in lieu of all other compensation." *Harrington*, 86 N.C. App. at 80, 356 S.E.2d at 366-67.

[3] Plaintiff argues that she is entitled to "total and permanent" disability benefits under N.C.G.S. § 97-29 after reaching maximum medical improvement. Plaintiff cites *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 204-05, 472 S.E.2d 382, 385 (1996), for the proposition that once an employee reaches maximum medical improvement she may seek to establish permanent incapacity.

Maximum medical improvement has been held to be "the prerequisite to determination of the amount of permanent disability for purposes of G.S. 97-31," *see Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 330, 477 S.E.2d 197, 203 (1996) (citation omitted), or the end of the "healing period," *see Neal v. Carolina Management*, 350 N.C. 63, 510 S.E.2d 375 (1999) (adopting dissenting opinion of Timmons-Goodson, J.); *Franklin*, 123 N.C. App. at 204-05, 472 S.E.2d at 385.

We have held that "temporary disability" is payable only "during the healing period" under N.C.G.S. § 97-31. *Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 329-30 (1985). This Court in *Anderson v. Gulistan Carpet, Inc.*, 144 N.C. App. 661, 670, 550 S.E.2d 237, 243-44 (2001) (citing *Franklin*, 123 N.C. App. at 204-05, 472 S.E.2d at 385), implied that "temporary disability" benefits for loss of wage-earning capacity under N.C.G.S. §§ 97-29 or 97-30 are only payable before the employee has reached maximum medical improvement. In light of the Workers' Compensation Act, the case law prior to *Franklin*, and the cases cited by *Franklin*, we interpret *Franklin* to hold that an employee may seek a determination of her entitlement to permanent disability under N.C.G.S. §§ 97-29, 97-30, or 97-31, only after reaching maximum medical improvement. We hold that maximum medical improvement is the initial point at which either party can seek a determination of permanent loss of wage-earning capacity.

Temporary disability benefits are for a limited period of time. *See* Leonard T. Jernigan, Jr., *North Carolina Workers' Compensation Law and Practice*, § 12-1 at 89 (3d ed. 1999). "There is a presumption

that [the employee] will eventually recover and return to work." *Id.* Therefore, the employee must make reasonable efforts to go back to work or obtain other employment.

In determining an employee's loss of wage-earning capacity, the Commission must determine whether the employee has made reasonable efforts to seek and obtain employment, whether there is a reasonable probability that with training and education the employee can achieve suitable employment, and whether it is in the best interest of the employee to undertake such training and education. Additionally, the Commission must take into account the physical impairment from the injury, as well as the age, education, job skills, and other physical limitations of the worker, plus other vocational factors, such as the availability of jobs within the worker's limitations. *Hillard*, 305 N.C. at 596, 290 S.E.2d at 684.

Here, the plaintiff exercised her election to seek permanent disability benefits after reaching maximum medical improvement. The Commission failed to determine whether plaintiff proved her loss of wage-earning capacity was permanent. We remand to the Commission for a hearing to determine plaintiff's alleged permanent disability, if any, consistent with this opinion. Either party may offer additional evidence to support their claims or defenses.

C. Late Payment Penalty

[4] Plaintiff argues that she is due a 10% penalty under N.C. Gen. Stat. § 97-18(g) (1999), which provides that "[i]f any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof . . . ." Plaintiff contends that defendants owed her temporary partial disability benefits during her attempt to return to work and failed to pay them.

In January 1997, plaintiff attempted a trial return to work, part-time for defendant-employer in the greeter position, as approved by Dr. Derian. Defendant-employer filed a Form 28T to terminate plaintiff's temporary total disability benefits pursuant to N.C.G.S. § 97-18.1(b). During the trial return to work, plaintiff was entitled to temporary partial disability benefits pursuant to N.C.G.S. § 97-30 which provides in pertinent part:

> where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly

> compensation equal to sixty-six and two-thirds percent (66 2/3%) of the difference between his *average* weekly wages before the injury and the *average* weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury.

N.C. Gen. Stat. § 97-30 (1999) (emphasis added).

The record shows that plaintiff's average weekly wage before injury was $344.00 and that plaintiff's average weekly wage, which she earned based on the approved twenty hours per week, was $172.00. Defendants contend that they paid all of the temporary partial disability due to plaintiff. Plaintiff concedes that defendants paid plaintiff $114.67 per week in addition to the hours she actually worked each week.

Although the Commission failed to enter any specific findings regarding the payment of temporary partial disability, the Commission awarded plaintiff temporary total disability beginning 27 January 1997 and concluded that defendants were entitled to offset for wages paid. *See Carothers v. Ti-Caro*, 83 N.C. App. 301, 306, 350 S.E.2d 95, 98 (1986) (an injured employee cannot be simultaneously totally and partially disabled); *Smith v. American and Efird Mills*, 51 N.C. App. 480, 490, 277 S.E.2d 83, 89-90 (1981) (stacking of total benefits on top of partial benefits, for the same period, is not authorized by the Act), *modified on other grounds and aff'd*, 305 N.C. 507, 290 S.E.2d 634 (1982).

The record and award of the Commission supports our conclusion that defendants paid plaintiff all temporary partial disability benefits owed. Plaintiff is not entitled to a late payment penalty pursuant to N.C.G.S. § 97-18(g).

D. Unreasonable Defense

[5] Plaintiff also contends she is due attorney's fees under N.C.G.S. § 97-88.1 for defendant's unreasonable defense of this claim. Under N.C.G.S. § 97-88.1, the Commission may award attorney's fees if it determines that "any hearing has been brought, prosecuted, or defended without reasonable ground." N.C. Gen. Stat. § 97-88.1 (1999). The purpose behind this section is to prevent "stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to

injured employees." *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990) (citations omitted). The Commission, therefore, may assess the whole costs of litigation, including attorney fees, against any party who prosecutes or defends a hearing without reasonable grounds. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54, 464 S.E.2d 481, 485 (1995).

"The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Id.* at 54-55, 464 S.E.2d at 486 (citations omitted). An abuse of discretion results only where a decision 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, 464-65, 528 S.E.2d 633, 635 (2000) (citation omitted).

Defendants argued before the Commission and on appeal that plaintiff retained wage-earning capacity, entitling her only to partial disability and not total disability benefits. Plaintiff contends that defendants' argument is premised on the greeter position. Plaintiff argues that the greeter position was a highly modified job not available in the competitive job market or "make-work." We disagree.

On 27 January 1997, plaintiff was released from Dr. Derian's care. Dr. Derian opined that plaintiff was capable of performing part-time work with the following restrictions: no lifting greater than ten pounds; no repetitive or prolonged bending; lifting, or stooping; and frequent changes from sitting and standing to walking. Plaintiff subsequently attempted a trial return to work, part-time for defendant-employer as a greeter. The Commission found that:

> [t]he greeter position is an *actual* job that exists in some of defendant-employer's stores, but before plaintiff was offered the position, a greeter was not used at the store where plaintiff worked. The greeter position had been modified to fit plaintiff's work restrictions. Plaintiff was given a chair and was allowed frequent breaks. The position was scheduled for twenty hours per week, but due to chronic back pain, plaintiff averaged only 14.84 hours per week.
>
> (Emphasis added).

Plaintiff relies on *Peoples* and *Saums* to support her contention that this was not a reasonable basis upon which to defend the claim. We find this case to be distinguishable from *Peoples* and *Saums*.

In *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 487 S.E.2d 746 (1997), plaintiff-employee was working as a housekeeper prior to her back injury. A new position, quality control clerk, was created for plaintiff-employee's return to the work place by defendant-employer. *Id.* at 761, 487 S.E.2d at 748. Similarly, in *Peoples*, 316 N.C. 426, 342 S.E.2d 798, plaintiff-employee worked in the card room prior to his pulmonary disease. Defendant-employer highly modified an existing third shift supply room position for plaintiff-employee's return to work. *Id.* at 428-29, 342 S.E.2d at 801. The personnel manager testified that: (1) a job such as the one offered to plaintiff never existed before, (2) it was created especially for plaintiff with his physical limitations in mind, and (3) no other person other than plaintiff would be hired to work in that position at the wages he was offered. *Id.* at 429-30, 342 S.E.2d at 801.

Here, the Commission found that the greeter position in the present case was an actual job, not created especially for plaintiff. While the position was modified, to the extent that defendants gave plaintiff a chair so that she could change positions from standing to sitting as needed, it was not so highly modified as the position in *Peoples* to make it one that never existed before or one that no one but plaintiff would be hired to fill that position. In fact, the store manager, Janet Novak, testified that the greeter position was advertised before plaintiff was placed in that position and that if profits allowed, she would again fill the greeter position if a qualified person came along.

We find this case to be distinguishable from *Saums* and *Peoples*, and conclude that the parties "brought, prosecuted, or defended" this matter with reasonable grounds. We hold that an award of attorney's fees is not warranted pursuant to N.C.G.S. § 97-88.1.

V. Defendants' Appeal

We have already addressed defendants' argument regarding the disability award in section IV, B of this opinion.

A. Credit for Partial Disability Benefits

[6] Plaintiff received $400.00 in private disability benefits under a plan funded by defendants in December 1997 for problems associated with her neck. Defendants contend that the Commission erred in concluding that defendants are not entitled to a credit. We disagree.

This Court has held that N.C.G.S. § 97-42 is the only statutory authority for allowing an employer in North Carolina any credit against workers' compensation payments due an injured employee. *Johnson v. IBM, Inc.*, 97 N.C. App. 493, 494-95, 389 S.E.2d 121, 122 (1990). N.C.G.S. § 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 not 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, Inc.*, 105 N.C. App. 480, 484, 414 S.E.2d 102, 104 (1992). The decision of whether to grant a credit is within the sound discretion of the Commission. *Moretz v. Richards & Associates, Inc.*, 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). Such decision to grant or deny a credit will not be disturbed on appeal in the absence of an abuse of discretion. *Id.*

At bar, the Commission held that plaintiff's neck problems and herniated cervical disc were not caused by her compensable back injury. We affirm this conclusion. Since defendants have not been ordered to pay compensation for plaintiff's neck problems, we conclude the Commission did not abuse its discretion by denying defendants a credit for this payment.

B. Award of Medical Expenses

[7] Defendants final argument is that the award by the Commission that defendants pay all reasonably necessary medical expenses incurred or to be incurred as a result of plaintiff's compensable back injury is overly broad. Defendants contend that the award should be subject to the limitations of N.C.G.S §§ 97-25.1 (two-year statute of limitations) and 97-2(19) (definition of medical compensation).

The Commission incorporated these limitations in its Conclusion of Law No. 3. We believe that the Commission also intended to incorporate these limitations into the award of medical expenses. Since we have remanded to the Commission for a determination of permanent disability, we also remand to the Commission to incorporate these statutory limitations into the award.

Affirmed in part, reversed in part and remanded.

Judge TIMMONS-GOODSON concurs.

Judge HUDSON concurs with separate opinion.

HUDSON, Judge, concurring.

While I agree with the majority in almost every respect, I write separately to clarify one point pertaining to the issue of attorneys fees under N.C.G.S. § 97-88.1 (Issue IV.D). As to this issue, the majority states that the Commission has not abused its discretion in declining to award such fees, because the defendants did not "defend without reasonable grounds." With this conclusion, I agree. However, I believe that the basis for this conclusion is that the defendant presented sufficient evidence to create a dispute as to whether the plaintiff's greeter job accurately reflected her wage earning capacity. As such, the Commission was justified in declining to award attorneys fees.

The plaintiff presented evidence that the job was highly modified, and that, even so, because of her irregular attendance due to chronic pain, she could not hold the job. The Commission found, and we have affirmed, based on *Peoples*, 316 N.C. 426, 342 S.E.2d 798, the following:

> [the modified greeter position] was scheduled for twenty hours per week, but due to chronic back pain, plaintiff was unable to perform the job for the full twenty hours . . . [but] on average, plaintiff worked only 14.84 hours per week. . . . Plaintiff's irregular attendance would not be tolerated by most employers. Under the totality of the circumstances, the greeter position performed by plaintiff was not indicative of plaintiff's ability to compete with others for wages.

I believe that *Peoples*, 316 N.C. at 428, 342 S.E.2d at 806, and *Saums*, 346 N.C. 760, 487 S.E.2d 746, bear on whether or not the greeter job reflects plaintiff's wage earning capacity, and do not resolve the issue of attorneys fees. Despite the above finding, there were significant disputes in the evidence. Therefore, the Commission's conclusion to award no attorneys fees was justified. Having made this clarification, I concur.

WARD B. ZIMMERMAN, PETITIONER v. APPALACHIAN STATE UNIVERSITY; BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, RESPONDENTS

No. COA00-1363

(Filed 5 March 2002)

1. Colleges and Universities— non-tenured university faculty member—refusal of reappointment—authority of provost to override dean's recommended decision

The trial court erred by reversing the Board of Governors' final agency decision denying petitioner non-tenured university faculty member further review of his grievance against a university and by concluding that a university provost lacked authority to override a university dean's recommendation to reappoint petitioner, because: (1) N.C.G.S. § 116-11.2 provides that the Board of Governors is responsible for the constituent universities, and the Board of Governors created a code with regulations stating that the chancellor and provost generally have authority to make employment decisions regarding faculty members; and (2) the university's regulations provide that the provost has specific power to overrule a dean's recommendation of reappointment.

2. Colleges and Universities— non-tenured university faculty member—refusal of reappointment—whole record test—prima facie case of wrongful nonreappointment

The whole record test reveals that the trial court erred by reversing the Board of Governors' final agency decision denying petitioner non-tenured university faculty member further review of his grievance against a university and by concluding petitioner made a prima facie case that he had been wrongfully nonreappointed, because: (1) the evidence only established that petitioner was a tenure-track professor who, despite recommendation of his dean, was not reappointed; and (2) petitioner did not allege that he was the victim of discrimination, that his First Amendment rights had been abridged, or that there was personal malice.

3. Colleges and Universities— non-tenured university faculty member—refusal of reappointment—whole record test—arbitrary and capricious

A review of the whole record reveals that the trial court erred by reversing the Board of Governors' final agency decision deny-

ing petitioner non-tenured university faculty member further review of his grievance against a university and by concluding the Board of Governors' denial of further review of petitioner's appeal was arbitrary and capricious and infected with errors of law, because: (1) the findings and conclusions of the FGHC, the Chancellor, the Trustees, and the Board of Governors regarding the issue of personal malice and the issues raised by petitioner in his application for a FGHC hearing, other than the erroneous conclusion that petitioner had presented a prima facie case, were supported by substantial evidence; and (2) at each level of university appeal the correct standard of decision-making and review was applied, and the Board of Governors' decision to leave undisturbed the decision of the Trustees was based upon its conclusions.

Appeal by respondents from interlocutory orders entered 16 February 1998 by Judge Forrest Bridges, and from judgment entered 15 August 2000 by Judge Jessie B. Caldwell, III, all orders entered in Watauga County Superior Court. Cross-appeal by petitioner from order of 18 August 2000. Heard in the Court of Appeals 10 October 2001.

Ferguson, Stein, Wallas, Adkins, Gresham, & Sumter, P.A. by John W. Gresham, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge, for the respondent.

BIGGS, Judge.

This appeal arises from a 1995 decision by administrators of Appalachian State University (ASU) not to offer a reappointment contract to Ward B. Zimmerman (petitioner), at that time a non-tenured faculty member. The trial court's order reversed the decision of the Board of Governors to leave undisturbed the earlier decisions by ASU's Chancellor and its Trustees, and ordered petitioner reinstated to the ASU faculty. For the reasons that follow, we reverse the trial court.

The record, including the transcript of a hearing conducted by ASU's Faculty Grievance Hearing Committee (FGHC), establishes the following facts: Petitioner was first employed by ASU in 1990, when he accepted a position as Vice Chancellor for Business Affairs. He served ASU in this capacity until 1994, during which time he also

taught classes at ASU on an intermittent basis. For the 1990-91 school year, he held a one-year appointment, carrying "no remuneration or tenure consideration," as an associate professor in his "home" school, the Walker College of Business.

ASU hired a new Chancellor, Francis T. Borkowski, in 1993. Shortly after his arrival, Chancellor Borkowski asked petitioner to resign as Vice Chancellor for Business Affairs, and offered to assist him with a transition to another position. Chancellor Borkowski and petitioner agreed that after petitioner resigned as Vice Chancellor, he would receive an appointment as an untenured faculty member at ASU. On 17 November 1993, Chancellor Borkowski and petitioner signed a "Letter of Understanding," memorializing their agreement on petitioner's future status at ASU. This memorandum provided that after petitioner resigned as Vice Chancellor, he would be allowed "reasonable use" of university facilities "to pursue his search for a Presidency," and would "be awarded faculty status as a full professor," in an appointment which would be "ongoing, continuing and accrue the full benefits which are awarded to other University individuals of this rank." Thereafter, administrators within ASU sought a faculty position for petitioner. In July 1994, Provost Durham (Provost) found a teaching position for petitioner in the College of Education, within the Department of Leadership and Educational Studies. On 29 July 1994, petitioner was offered a one year, tenure-track appointment to a faculty position at ASU, for the 1994-95 school year, which he accepted. In September, 1995, petitioner's contract was renewed for another one year term, for the 1995-96 school year.

In October, 1995, the Provost received a letter from Dean Duke of the College of Education (the dean), ratifying the recommendation of petitioner's department chair, that petitioner be reappointed for a three-year contract upon the expiration of the 1995-96 school year. The Provost contacted Chancellor Borkowski, and expressed his disagreement with this recommendation. On 13 November 1995, the Provost notified petitioner by mail that he would not be reappointed when his current contract expired. After receiving the nonreappointment letter, Petitioner met with ASU administrators to discuss his situation, and then, on 26 February 1996, petitioner wrote to the FGHC to request a hearing.[1]

1. The FGHC is an advisory committee comprised of ASU faculty members, which is authorized by the ASU faculty handbook to conduct hearings to determine if a "right or entitlement . . . conferred by university policy or state or federal laws, [has been] abridged[.]" FGHC then submits a report to ASU administrators, containing its findings and recommendations.

Petitioner's application for a hearing raised a number of issues regarding the validity of his nonreappointment; these issues are summarized as follows:

1. Procedural defects in the notice of nonreappointment: the letter was sent by the Provost, rather than by the Dean, and it did not directly reference the ASU faculty handbook sections on the grievance procedure.

2. Length of notice: petitioner received 180 days notice of nonreappointment, rather than 365 days.

3. Provost's nonreappointment authority: petitioner contended that the Provost lacked the power to override a Dean's recommendation of reappointment of a provisional faculty member.

4. Petitioner's status: petitioner contended that he was already a tenured professor, because his 1990-91 faculty appointment had never been explicitly rescinded, and thus his 1994 appointment as "full professor" was a "promotion" that conferred tenure.

The FGHC conducted a hearing on these issues during April, 1996, and issued its report 26 April 1996. The report addressed each of petitioner's allegations, and found none of them to be proven by the preponderance of the evidence; its findings of fact are summarized as follows:

1. Petitioner was not prejudiced by the procedural defects in the notice of nonreappointment.

2. Petitioner had only one year continuous service as a faculty member, and was entitled to only 180 days notice of nonreappointment.

3. The provost "has authority to participate in decision-making" on nonreappointments.

4. FGHC found that petitioner was fired as Vice Chancellor, that the school of business, his home college, did not want him on their faculty, that finding him a faculty position was difficult, and that to "construe this as a promotion is absurd."

Pursuant to these findings, the FGHC dismissed all of petitioner's claims. In addition to the above findings and conclusions, which addressed each of the issues raised in petitioner's application for a hearing, the FGHC made these additional findings and recommendations summarized as follows:

1. FGHC held that a tenure candidate who has demonstrated "professional competence" and "potential for future contributions" to the university, but is not awarded tenure, has made a *prima facie* case of wrongful nonreappointment.

2. FGHC held that the Provost's proffer of institutional need as an explanation for the nonreappointment had shifted the burden to respondents, requiring a "clear showing of institutional need sufficient to outweigh consideration of [petitioner's] demonstrated professional competence and potential for future contributions."

3. FGHC concluded that it needed more guidance in order to "judge the validity of a non-reappointment based on institutional need," and recommended petitioner's reinstatement while guidelines were developed.

4. FGHC found that ASU administrators had used petitioner's tenure-track faculty appointment as a "golden parachute," or "springboard for job-hunting," and advised ASU administrators not to "meddle in the affairs of the faculty."

On 31 July 1996, Chancellor Borkowski issued his decision regarding petitioner's grievances, stating that such decision was made "after careful review" of the FGHC's report. Chancellor Borkowski accepted all of the FGHC's conclusions and holdings regarding the issues raised by petitioner in his request for a hearing. He concluded that the FGHC had found none of the grievances that petitioner raised in his application for a hearing to be proven by a preponderance of the evidence, and that petitioner had not established a right to continued employment under any university policy, or state or federal law. With respect to the FGHC's findings on matters not raised in petitioner's application for hearing, Chancellor Borkowski rejected the FGHC's proposal that a new basis for faculty challenge to nonreappointment be identified, and its recommendation that petitioner be reinstated, finding these to be based upon the committee's consideration of matters not within its purview. Accordingly, Chancellor Borkowski denied relief to petitioner.

Chancellor Borkowski agreed to take under advisement the FGHC's suggestions for amendments to the faculty handbook clarifying the extent of the Provost's authority, and to consider its recommendations on the proper use of faculty appointments. However, he also stated that the issue of "institutional need" should not have been

considered by the FGHC, because (1) it had not been raised by petitioner in his application for a hearing, (2) ASU administrative assessment of institutional need in making personnel decisions was not a proper basis for a grievance, because administrators are *required* to consider institutional need, and (3) the FGHC did not have jurisdiction to conduct an evaluation of the relative weight accorded by ASU administrators to factors, such as institutional need, that are properly a part of a personnel decision.

On 8 August 1996, petitioner appealed Chancellor Borkowski's decision to the ASU Board of Trustees (Trustees). Petitioner presented two issues to the Trustees. First, he argued that he had not received timely notice of appeal, in that he was entitled to 365 days notice, not 180 days. Secondly, he contended that "the nature of the non-renewal was substantially flawed and raised an inference of bias which was not rebutted by the Provost." The Trustees reviewed the record established by the FGHC's hearing, to determine whether Chancellor Borkowski's decision was "clearly erroneous." On 26 March 1996, the Trustees issued their decision, which concurred with the FGHC and Chancellor Borkowski that (1) petitioner was a tenure-track faculty member entitled to only 180 days notice of nonreappointment, (2) petitioner was not prejudiced by receiving notice from the Provost instead of the Dean, and (3) the Provost was authorized to make determinations regarding reappointment. In addition, the Trustees found that petitioner had "never presented evidence that amounted to a *prima facie* case of personal malice." They therefore concluded that it was "never incumbent upon the [Provost] to offer any explanation for his decision," and that there was "no proper occasion to inquire into the *bona fides* of the 'institutional needs' rationale." The Trustees stated that, as a general rule, the validity of alleged institutional needs "properly becomes an issue in a grievance inquiry" only "when the aggrieved faculty member first establishes a *prima facie* case of wrongdoing . . . and the respondent seeks to rebut that showing with a claim of institutional need." Based upon their findings and conclusions, the Trustees determined that there was "no basis for recommending that the Chancellor's disposition of Dr. Zimmerman's grievance be reversed."

On 16 April 1997 petitioner sought review by the University of North Carolina's Board of Governors (Board of Governors). He claimed that (1) he was entitled to 365 days notice of nonreappointment, (2) ASU's grievance process was "fatally flawed" in that Chancellor Borkowski had made "critical rulings" regarding "his own

conduct and representations," and (3) the Trustees' determination that petitioner had failed to present a *prima facie* case of wrongdoing was "clearly erroneous."

The Board of Governors' Committee on Personnel and Tenure reviewed the record to determine whether petitioner's appeal merited action by the Board of Governors. The committee's report addressed the issues raised by petitioner. Their findings and conclusions may be summarized as follows:

1. Required notice: The committee concurred with the findings of the FGHC, Chancellor Borkowski, and the Trustees, that at the time of his nonreappointment, petitioner was a tenure-track assistant faculty member entitled to 180 days notification.

2. Chancellor's role in review process: The committee found that (a) administrators' review of their own decisions "is inherent in any institutional grievance process," and did not justify reversal without some proof of bias, (b) the FGHC's findings did not personally attack Chancellor Borkowski, (c) Chancellor Borkowski had accepted the FGHC's findings on "all procedural points," and (d) the Trustees had conducted their own review.

3. Personal malice. The committee stated that their standard of review for evidentiary issues focuses on the consistency of decision-makers below, that further review is appropriate if there has been disagreement, and that neither the FGHC, Chancellor Borkowski, nor the Trustees "found such a contention [of personal malice] established."

Upon these findings, the Committee on Personnel and Tenure concluded that further review by the Board of Governors was not appropriate. On 12 September 1997, the Board of Governors received and approved the report of the committee, and held that it would "decline to entertain this appeal further, and leave undisturbed the decision below."

From the decision of the Board of Governors, petitioner on 15 October 1997 appealed to the superior court for judicial review. Respondents filed a motion to dismiss on 20 November 1997, alleging that petitioner had failed to "explicitly state what exceptions are taken to the decision or procedure," as required by N.C.G.S. § 150B-46. The motion to dismiss was denied, and an amended petition for judicial review was filed on 28 February 1998. Issues raised in the amended petition can be summarized as follows:

1. Notice: petitioner argued he was entitled to 365 days notice.

2. Chancellor's role: petitioner argued that Chancellor Borkowski's role in reviewing the FGHC's findings violated petitioner's state and federal right to due process.

3. Personal malice: petitioner asserted error in the Board of Governors's findings and conclusions on this issue.

4. Petitioner argued that the Board of Governors violated provisions of its Code by denying his request for review.

5. Petitioner alleged that "based upon the whole record, the decision below is arbitrary and capricious[.]"

The trial court's order was entered 15 August 2000. The trial court did not rule on petitioner's claim that Chancellor Borkowski had "made critical findings regarding his own conduct," and concurred with the FGHC, Chancellor Borkowski, the Trustees, and the Board of Governors, that petitioner was entitled to 180 days notice of reappointment, and that petitioner had failed to establish the existence of personal malice. The trial court also held that the Board of Governors's decision not to grant review to petitioner was (a) arbitrary and capricious, and (b) in violation of petitioner's right to substantive due process, and (c) "infected by" errors of law. On this basis, the court ordered petitioner reinstated as a full professor at ASU, and awarded his costs. Respondents appealed from this order, and from the denial of their motion to dismiss petitioner's motion for judicial review. Petitioner appealed the trial court's denial of his request to be awarded back pay.

Standard of Review

The trial court's order was entered pursuant to petitioner's appeal from a final agency decision, in this case the decision by the Board of Governors denying further review of his grievance against ASU. Judicial review of a final agency decision is governed by N.C.G.S. § 150B-51(b) (1999), "Scope of review:"

> (a) [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30 . . . in view of the entire record as submitted;

or

(6) Arbitrary or capricious.

The standard of review employed by the reviewing court is determined by the type of error asserted; errors of law are reviewed *de novo*, while the "whole record" test is applied to allegations that the administrative agency decision was not supported by the evidence, or was arbitrary and capricious. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994). "*De novo* review requires a court to consider the question anew, as if the agency has not addressed it." *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475-76, 546 S.E.2d 177, 182 (2001). Under the whole record test, "the reviewing court [must] examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118). Substantial evidence is " 'more than a scintilla' and is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Williams v. N.C. Dep't of Env't & Natural Res.*, 144 N.C. App. 479, 483, 548 S.E.2d 793, 796 (2001) (quoting *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)). However, the whole record test "does not permit the court 'to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*,' " *N.C. Dept. of Correction v. McNeely*, 135 N.C. App. 587, 592, 521 S.E.2d 730, 733 (1999) (quoting *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)); but "merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Dept. of Correction v. Gibson*,

58 N.C. App. 241, 257, 293 S.E.2d 664, 674 (1982), *rev'd on other grounds*, 308 N.C. 131, 301 S.E.2d 78 (1983). If the agency's findings are supported by substantial evidence, they must be upheld. *Id.* On appeal:

> 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. . . . Further, this Court determines the actual nature of the contended error and then proceeds with an application of the proper standard of review.

Tucker v. Mecklenburg Cty. Zoning Bd. of Adjust., 148 N.C. App. 52, 55-56, —— S.E.2d ——, —— (2001).

In its order regarding an agency decision, the trial court should state the standard of review it applied to resolve each issue. *In re Appeal of Willis*, 129 N.C. App. 499, 500 S.E.2d 723 (1998). In the instant case, the trial court set out generally the standards that it would apply to the issues before it. Although in several instances the trial court did not explicitly state the standard employed in its review of a specific issue, we can discern from the record which standard of review was applied. Review by this Court is further complicated by the organization of the trial court's order. The order contains three sections: "findings of fact," "operative findings of fact," and "conclusions of law." Certain of the findings of fact and "operative" findings of fact should properly be labeled conclusions of law. *See Wilder v. Wilder*, 146 N.C. App. 574, 553 S.E.2d 425 (2001) (finding of fact that states no factual basis is actually a conclusion of law). In *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 358 S.E.2d 339 (1987), the Court stated:

> Findings of fact are statements of what happened in space and time. These facts, when considered together, provide the basis for concluding, as the Commission did here, whether an action or decision was reasonable or prudent. . . . In this case, [in] the Commission's summary of evidence, findings of fact and conclusions of law are mixed together . . . . Proper labeling might have made this Court's task a little easier, but we nonetheless have been able to separate facts from conclusions in examining appellants' various assignments of error.

Id. at 352, 358 S.E.2d at 346.

We will review conclusions of law *de novo* regardless of the label applied by the trial court. *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000) (conclusions of law, even if erroneously labeled as findings of fact, are reviewable *de novo* on appeal; Court "not bound by the label used by the trial court"); *State v. Rogers*, 52 N.C. App. 676, 681-82, 279 S.E.2d 881, 885 (1981) ("[f]indings of fact that are essentially conclusions of law will be treated as such upon review," and will be "upheld when there are other findings upon which they are based").

I.

[1] Respondents argue that the trial court erred in its interpretation of relevant agency regulations. We agree.

The FGHC, Chancellor Borkowski, the Trustees, and the Board of Governors concurred that the Provost acted within his authority when he made the decision regarding petitioner's reappointment. The trial court, however, disagreed, and held in its order that "ASU regulations unequivocally state that the decision not to reappoint 'shall be made by the dean' . . . [t]hus, ASU has governing regulations that require the nonreappointment decision not be left to the unchecked whim of the administration." The issue before this Court is whether the Provost had authority to override the dean's recommendation of reappointment. The resolution of this question requires our interpretation of ASU regulations, and thus is reviewed *de novo*.

We first examine the overall nature and extent of ASU administrators' authority. "The Chancellor and the UNC-CH Board of Trustees derive their authority from the Board of Governors of the University of North Carolina (UNC) which, in turn, derives its authority from N.C. Gen. Stat. § 116-11(2) (1994) and Article IX, Section 8 of our North Carolina Constitution." *DTH Publishing Corp. v. UNC-Chapel Hill*, 128 N.C. App. 534, 539, 496 S.E.2d 8, 11, *disc. review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998). Under N.C.G.S. § 116-11(2) (1999), the Board of Governors "is responsible for the general determination, control, supervision, management and governance of all affairs of the constituent institutions." Pursuant to this statutory authority, the Board of Governors has created The Code of the Board of Governors (the Code), which contains regulations applicable to all UNC campuses, including ASU. Code Appendix, § I.A.2, delegates to UNC Chancellors the authority to make recommendations for employment of faculty members, which recommendations must be forwarded to

the Trustees for approval. We conclude, therefore, that the Chancellor and Provost of ASU generally have authority to make employment decisions regarding faculty members.

Further, our interpretation of ASU regulations convinces us that the Provost has the specific power to overrule a dean's recommendation of reappointment. ASU rules and procedures governing reappointment of tenure-track faculty members are set out in § 3.6.3 and § 3.6.4 of the ASU faculty handbook. "Reappointment, Promotion, and Tenure" is addressed in § 3.6.3, which states in relevant part the following:

> b. A faculty member who is to be considered for reappointment . . . must be notified by the department chairperson . . . [and] may submit to the chairperson materials . . . and may appear before the committee to speak to the issue. The committee shall consider all materials submitted. . . .
>
> c. The department chairperson shall give the dean of the particular college his or her written recommendations on . . . the faculty member being considered for reappointment. . . . The dean of the college shall attach her or his recommendation and then forward all material to the Provost. . . . **If the personnel action involves a reappointment and the Provost . . . concurs with the recommendation, a notice of reappointment shall be sent to the faculty member**. . . . If the Chancellor decides not to recommend a personnel action favorable to the faculty member, the Chancellor shall convey that decision to the faculty member[.] (emphasis added)

Petitioner, however, has relied on language in another ASU faculty handbook section, § 3.6.4, "Nonreappointment of Faculty Members of Probationary Term Appointments" to support his contention that the Provost has no authority to override the dean's recommendation of reappointment. This section states, in relevant part:

> 3.6.4.B. The decision not to reappoint . . . shall be made by the dean of the appropriate college[,] . . . after the dean has received the recommendations of the Departmental Personnel Committee and the department chairperson. This decision is final except as it may later be reviewed in accordance with the provisions of Chapter IV. Before such decision is communicated to the faculty member, the decision shall be communicated for information to the Provost. . . .

Thus, under § 3.6.4.B, if the dean rejects a particular faculty member, the decision "is final," and is only communicated to the Provost "for information." The significance of the finality of a dean's nonreappointment decision is that a college may not be compelled to reappoint or promote a faculty member after the dean has rejected the candidate. This finality is not part of § 3.6.3.c, which provides for notice to the faculty member of his reappointment if "the Provost . . . concurs with the recommendation[.]" This language clearly contemplates situations in which the Provost does not concur. We conclude that, although senior administrators may not overrule the dean's recommendation of nonreappointment, and force the college to accept a candidate, they may overrule the dean's decision to reappoint, if it appears to be in the overall best interests of the university. This is consistent with the obligation of senior administrators to consider "institutional needs and resources" in making personnel decisions.

In the instant case, petitioner's department personnel committee recommended reappointment, as did his department chair. The dean accepted their recommendation, and forwarded a reappointment recommendation to the Provost, all in compliance with the procedures described in § 3.6.3. We conclude that because the dean recommended reappointment, rather than nonreappointment, it is § 3.6.3, rather than § 3.6.4, which governs the present situation; the dean recommended reappointment, but the Provost did not "concur with the recommendation."

This Court concludes that the Provost had the authority to decide not to reappoint petitioner, and further concludes that the trial court erred in its conclusion that the Provost and Chancellor Borkowski "exceeded their power when they rejected the recommendation of the dean." We hold that the trial court erred in its interpretation of relevant agency regulations on this issue.

II.

[2] Respondents next allege that the trial court erred in its application of the whole record test to other issues. We agree.

In the instant case, the trial court concluded, based upon its review of the whole record, that "the [Board of] Governors' decision not to review the findings of the Trustees and the FGHC is not only arbitrary and capricious, but also violates Dr. Zimmerman's substantive due process rights[, and was] . . . infected with errors of law[.]"

We will, therefore, examine the Board of Governors' decision, to determine if the trial court correctly applied the whole record test in reaching this conclusion.

The trial court's review of the Board of Governors' decision not to hear petitioner's appeal was the fifth level of appeal by petitioner from his nonreappointment. The earlier stages of ASU's grievance process are summarized below:

1. The FGHC conducts a hearing to determine if a preponderance of the evidence establishes that a right or entitlement, conferred by university policy or state or federal laws, was abridged.

2. Chancellor Borkowski reviews the FGHC recommendations, but makes the final decision on a personnel matter.

3. The Trustees review the record to determine if Chancellor Borkowski's decision not to grant relief to petitioner was "clearly erroneous."

4. The Board of Governors examines the record to determine if significant procedural or substantive errors below require review.

ASU faculty handbook § 4.6.4 confers jurisdiction upon FGHC to conduct hearings only upon "those matters specified in the request for a hearing." In the present case, the FGHC made findings regarding each of petitioner's contentions, and held against him on all. Their findings and conclusions addressed the factual issues regarding (1) petitioner's faculty status at the time he received notice of nonreappointment, (2) length of required notice of nonreappointment, and (3) significance of any procedural defects in the notice of nonreappointment. The FGHC's findings on the issues that petitioner "specified in the request for a hearing" were accepted by Chancellor Borkowski, and subsequently ratified by the Trustees, the Board of Governors, and the trial court. Our review of the record reveals that these findings were supported by substantial evidence, and thus could not properly form the basis of the trial court's conclusion that the Board of Governors' decision was arbitrary and capricious. Indeed, as indicated, the trial court concurred on each of the issues outlined in petitioner's request for an FGHC hearing.

However, notwithstanding petitioner's failure to establish any of his stated grievances, the FGHC concluded that petitioner had made a *prima facie* case of wrongful nonreappointment. Its recommendation stated that where the dean's recommendation of reappointment

is "overturned on the basis of administrator judgments of institutional need, a *prima facie* case has been established." The trial court agreed with this, stating in its order that the following evidence constituted a *prima facie* showing: (1) petitioner applied for reappointment, (2) was qualified for the position, (3) was recommended for reappointment by his department chair and the dean of his college, but (4) petitioner was not reappointed. The trial court concluded that upon this evidence, ASU "was then required to put forth a legitimate reason to justify its nonreappointment of Dr. Zimmerman." We disagree with this conclusion.

University regulations require decisions regarding reappointment and nonreappointment to be made within the following parameters:

> 1. The decision "may be based on any factor(s) considered relevant to the total institutional interests[.]"
>
> 2. Decision makers "must consider the faculty member's demonstrated professional competence, potential for future contributions, and institutional needs and resources.
>
> 3. The decision "may not be based upon [a] the faculty member's exercise of rights guaranteed by either the First Amendment to the United States Constitution or Article I of the North Carolina Constitution, [b] discrimination based upon the faculty member's race, color, religion, sex, age, handicap, or national origin, or [c] personal malice."

ASU faculty handbook, § § 3.6.3 and 3.6.4. A *prima facie* case of wrongful nonreappointment requires that "the evidence presented by the faculty member is sufficient, alone and without rebuttal" to establish that "some right or entitlement, conferred by university policy or state or federal laws was abridged to the faculty member's detriment, by the policy or action of the respondent." ASU faculty handbook § 4.6.1.

In the instant case, the evidence established only that petitioner was a tenure-track professor who, despite the recommendation of his dean, was not reappointed. Petitioner's basic contention is that, inasmuch as he was qualified and had been recommended by his department, his nonreappointment should be presumed to be based upon a violation of law, or some impermissible consideration. This flies in the face of the language of the ASU faculty handbook, which states that the decision may be based on any relevant factor, other than the

three impermissible considerations stated in § § 3.6.3 and 3.6.4 of the handbook. Petitioner did not allege that he was the victim of discrimination, or that his First Amendment rights had been abridged. Nor did he demonstrate the existence of personal malice; on this issue, the trial court was in agreement with the Trustees and the Board of Governors.

On this record, Chancellor Borkowski, the Trustees, and the Board of Governors all concluded that petitioner had not made out a *prima facie* case. However, despite petitioner's failure to establish that his nonreappointment had been based upon one of the three impermissible grounds, the trial court nevertheless concluded that he had made out a *prima facie* case. On this question, the trial court's reliance on FGHC's conclusion that a *prima facie* case had been established is misplaced. The FGHC's factual conclusions are not herein disputed, for as noted by the trial court, the FGHC was "the only body to hear and determine the credibility of witnesses and facts." However, the existence of a *prima facie* case requires legal analysis as well as fact finding, and thus must be carefully reviewed. We conclude that the petitioner failed to establish a *prima facie* case, and that the trial court misapplied the whole record test when it reached a contrary conclusion.

[3] Upon review of the whole record, including the transcript of the FGHC hearing, we hold that, with the exception of the FGHC's erroneous conclusion that petitioner had presented a *prima facie* case, the findings and conclusions of the FGHC, Chancellor Borkowski, the Trustees, and the Board of Governors regarding the issues raised by petitioner in his application for a FGHC hearing, and on the issue of personal malice, were supported by substantial evidence. We further conclude that at each level of university appeal the correct standard of decision-making and review was applied, and that the Board of Governors' decision to leave undisturbed the decision of the Trustees was based upon its conclusions. For these reasons, we reverse the trial court's conclusion that the decision of the Board of Governors denying further review of petitioner's case was arbitrary and capricious, affected by errors of law, and in violation of his right to substantive due process.

For the reasons discussed herein, we conclude that the trial court erred in its conclusions that (1) the Provost lacked authority to decide whether petitioner would be reappointed, (2) petitioner had made a *prima facie* case that he had been wrongfully nonreappointed, and (3) that the Board of Governors' denial of further review

of petitioner's appeal was arbitrary and capricious, and "infected with" errors of law. Accordingly, we reverse the trial court's order, and remand for reinstatement of the Board of Governors' decision not to review petitioner's appeal.

Having reversed the trial court's order, we have no need to address respondents' appeal from the trial court's interlocutory order, nor petitioner's cross-appeal.

Reversed.

Judges McGEE and TIMMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. ANDRA VENCENTA RAY

No. COA00-1511

(Filed 5 March 2002)

1. **Homicide— short-form indictment—first-degree murder—felony murder**

A short-form murder indictment under N.C.G.S. § 15-144 is sufficient to allege first-degree murder under theories of premeditation and deliberation and felony murder.

2. **Evidence— cross-examination—statement by defendant—not basis of opinion testimony**

Defendant had no right to cross-examine a trooper regarding a statement defendant made about how a crash in which the victim was killed occurred where the trooper testified that defendant's statement did not represent a basis for his opinion testimony at trial.

3. **Evidence— lay opinion—wounds not consistent with accident**

The trial court did not err in a prosecution for a robbery and murder which was discovered after an automobile accident by overruling defendant's objection to a detective's testimony that lacerations on the victim's hand were not consistent with a traffic accident. The detective was offering a lay opinion based on his

personal observations at the scene and his investigative training as a police officer; moreover, the medical examiner testified that the lacerations were consistent with defensive wounds.

4. **Homicide— first-degree murder—lesser included offenses—instruction not required**

The trial court did not err in a prosecution for a first-degree murder arising from a robbery by not instructing on the lesser included offenses of second-degree murder and involuntary manslaughter. The robbery and the murder constituted a continuous transaction which led to felony murder and there was no evidence to support instructions on either lesser offense.

5. **Kidnapping— purpose of restraint—allegation unsupported by evidence**

The trial court erred by denying defendant's motion to dismiss a kidnapping charge where the indictment alleged that defendant restrained the victim for the purpose of causing serious bodily harm, the evidence showed that defendant restrained the victim only for the purpose of facilitating an armed robbery, and defendant's cutting of the victim with a utility knife was the means rather than the purpose of the restraint.

Judge GREENE concurring in part and dissenting in part.

Appeal by defendant from judgments entered 3 March 2000 by Judge Orlando F. Hudson, Jr., in Harnett County Superior Court. Heard in the Court of Appeals 27 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant appellant.

McCULLOUGH, Judge.

Defendant Andra Vencenta Ray was tried before a jury at the 7 February 2000 Criminal Session of Harnett County Superior Court after being charged with one count of first-degree murder, one count of first-degree kidnapping, and one count of robbery with a dangerous weapon. Evidence for the State showed that around 3:00 p.m. on the afternoon of 10 December 1998, Carolina Power and Light (CP&L) employees Larry Whitley and Ronnie Fincher were traveling north on

MacArthur Road in Harnett County when Whitley saw a red pickup truck stopped in the middle of the road facing north. As Whitley looked on, the driver's door swung open; the truck then sped off with the driver's door still open.

Although the pickup truck began accelerating and moving erratically, Whitley was able to see two occupants inside. Because the force should have closed the open driver's door, Whitley thought it must have been lodged open. Whitley and Fincher, who were driving at a speed between forty-five and fifty miles per hour, lost sight of the truck for five to seven seconds as it rounded a curve. When they saw the truck again, it had wrecked, and dust was still blowing in the air.

When Whitley and Fincher made it to the accident site, they saw an elderly white man lying on the ground, apparently dead, and a black man running back down the road in the direction from which the truck had just come. The elderly victim was later identified as Mr. Kyle Archie Harrington, an eighty-seven-year-old resident of Harnett County. The black man, whom Whitley and Fincher identified at trial as defendant, ran along the road for about one hundred yards, then turned into the woods. Defendant was described as "dusty dirty," shoeless, and had blood on his face. According to Fincher, defendant was wearing a light-colored jacket with writing or a stripe down his sleeve.

Another witness, Greg Batten, testified that he observed the pickup truck at approximately 3:15 p.m. on 10 December 1998, while he was traveling south on MacArthur Road. Batten saw the pickup truck traveling at approximately seventy to seventy-five miles per hour with the driver's door open. The truck initially drove on Batten's side of the road but returned to its own lane as it neared Batten's car. Batten saw an elderly white male driving and a younger black male in the passenger seat. Batten testified that the two appeared to be struggling for control of the truck's steering wheel. The young black man was seated in the middle of the seat and was reaching over toward the driver's area of the pickup truck. No other vehicles were in the immediate vicinity. These observations were made by Mr. Batten within a matter of seconds, after which the truck disappeared out of sight. Batten then called the highway patrol on his cell phone to warn of a possible wreck.

Robin Moore, who lived in a mobile home adjacent to MacArthur Road, testified that around 3:30 p.m. on 10 December 1998, defendant

came to his house. Moore stated that defendant was wearing a pullover sweatshirt, but had no shoes on. He also stated that defendant had blood around his nose, and had broomstraw in his hair and on his clothes. Defendant told Moore he and a friend were going to the victim's home to get haircuts; however, on the way, two black men had run them off the road. Defendant explained that these men were now beating his friend, and defendant had gone to call for help. Defendant also told Moore he had ridden his bike over to the victim's home earlier that day. Moore called 911, and defendant waited approximately fifteen minutes for the police to arrive.

Agent Eddie Jaggers, a narcotics agent with the Harnett County Sheriff's Office, was patrolling near MacArthur Road when he heard about an accident nearby. Agent Jaggers went to the accident site, checked on Kyle Harrington's condition, then got information about a black male who ran away from the scene. Agent Jaggers ascertained defendant's whereabouts and picked defendant up at Moore's home. Jaggers searched and handcuffed defendant and took him back to the accident site. Once there, Agent Jaggers turned defendant over to Detective Richard Hendricks.

Danny Tadlock was a paramedic with Harnett County Emergency Medical Services. He assisted at the accident site on MacArthur Road on 10 December 1998. Mr. Tadlock examined defendant, whose face was scratched. When asked what happened, defendant told Tadlock a black vehicle had run the pickup truck off the road and both he and Harrington were thrown from the truck. Afterwards, defendant said, he had run for help.

The State also called State Highway Patrolman Mark Smith to testify, over defendant's objections, as an expert in accident reconstruction. Trooper Smith went to the accident site and observed various tire impressions and tire marks and noted extensive damage to the truck's left front quarter panel and to the driver's door. There was no damage to the rear, top, or right side of the truck. The windshield and back glass were intact, but the window on the driver's side was broken out. Dirt, debris, pine needles, and branches were in the interior of the truck and blood-like stains were on the padded center of the steering wheel. Two hiking boots were found on the floorboard.

Based on the physical findings at the accident site, Trooper Smith expressed an opinion on the direction in which the truck was traveling and stated his belief that Harrington was ejected from the truck

on the driver's side. Trooper Smith offered no opinion as to how the accident occurred. He merely testified to having prepared a limited reconstruction of the accident based on the report by the investigating officer, the field sketch of measurements taken at the scene, and a statement defendant made to the police as to how the truck crash came about.[1] When asked if he had relied on defendant's statement as a basis for any opinion expressed during his testimony, Trooper Smith answered, "Absolutely not."

Detective Hendricks of the Harnett County Sheriff's Office testified that, upon arriving at the accident site, he examined Harrington's body and noted lacerations "that were not consistent in [his] opinion with a traffic accident." The lacerations were "more defined as smooth in nature." After observing these wounds, Detective Hendricks searched the truck for anything that could have caused the lacerations. Detective Hendricks found a bloody box cutter (the utility knife) on the floorboard of the truck; at that point, the focus of the investigation changed from a traffic accident to a homicide investigation. Other than blood on the windshield on the passenger side of the truck, the police did not find any glass with blood on it.

Dr. John Butts, the Chief Medical Examiner for the State of North Carolina, was tendered as an expert in the field of forensic pathology. Dr. Butts performed the autopsy on Kyle Harrington on 11 December 1998. Dr. Butts determined Harrington died from massive blunt force injuries, instantly fatal and consistent with impact injuries from a vehicle accident. Dr. Butts also noted one cut at the bottom of Harrington's neck, two on his jaw, and several on the back of his right hand toward the wrist, which were made by a sharp object capable of cutting the skin cleanly, possibly a utility knife. Dr. Butts added that it was hard to distinguish cuts from a particular instrument, including glass. Dr. Butts opined that the cuts on Harrington's hands were "consistent with defensive wounds."

The State also called Mr. Kelly Harrington, the victim's son, to testify. Mr. Harrington testified that he learned of his father's death shortly after it happened. When he was told that the investigating officers suspected foul play, Mr. Harrington went to look around his father's house. As he pulled into his father's yard, Mr. Harrington noticed a bicycle, which did not belong to his father, lying on its side.

1. Upon the State's motion *in limine*, the trial court prohibited defense counsel from referring to the substance of this statement.

Mr. Harrington also noticed that the door to the crawl space was open and the water hose was hooked up, with the water spigot on. Mr. Harrington stated his father's house was locked and there were no signs of a struggle inside the house. He also conceded that it was not unusual for his father to give someone a ride.

Mr. Harrington testified his father normally carried his wallet and between $200.00 and $600.00 with him. Mr. Harrington's wallet was not found on his person or at the accident site. On 10 January 1999, a month after the accident occurred, Harrington's friends and family organized a search for Harrington's wallet, concentrating on the area they believed defendant had run from immediately after the accident. In a swampy area amidst thick briars, broomstraw, and vines, they found a white jacket, Mr. Harrington's wallet, and several of his personal papers.

Defendant was employed through Mid-Carolina Temporary Services as a material handler. As such, he had access to utility knives of the type found in the truck. On 10 December 1998 at approximately 10:00 a.m., defendant received his weekly paycheck in the amount of $135.13 and left work about thirty minutes later, though his normal workday lasted until 4:30 p.m.

Later testimony from Detective Hendricks showed that $446.00 was found on defendant when he was processed, including four one hundred dollar bills, even though the inventory list prepared by Hendricks at that time stated the four one hundred dollar bills were found in the truck. The State also elicited testimony from the tenants of Mr. Harrington's two rental homes. Each tenant testified they recently paid Mr. Harrington their rent using two one hundred dollar bills.

The State's final witness was Special Agent David Freeman of the State Bureau of Investigation, who testified as an expert in the field of forensic DNA analysis. He stated the DNA banding pattern from blood on the utility knife found in the truck and blood on defendant's pants matched the DNA profile of the victim and did not match defendant's DNA profile.

The trial court instructed the jury on first-degree kidnapping, robbery with a dangerous weapon, and first-degree murder in the perpetration of a robbery with a dangerous weapon. The jury found defendant guilty of all three counts and recommended that he be sentenced to life in prison without parole for the first-degree murder conviction.

The trial court noted that the jury convicted defendant of first-degree murder solely on the theory of felony murder, and therefore arrested judgment on the robbery with a dangerous weapon conviction. The trial court further ordered that defendant serve a term of life imprisonment without parole for the first-degree murder conviction, followed by 125-159 months' imprisonment for the kidnapping conviction. Defendant appealed.

On appeal, defendant argues the trial court committed error by (I) denying his motion to dismiss and his motion to set aside the verdict on the grounds that defendant received insufficient notice of the State's intent to try him for felony murder; (II) (A) declining to allow defendant to cross-examine Trooper Smith about a prior statement by defendant that had been excluded under a motion *in limine*, (B) overruling defendant's objection to Detective Hendricks' opinion testimony that the lacerations on the victim's hands were not consistent with a traffic accident; (III) denying defendant's motion for an instruction on second-degree murder and involuntary manslaughter; and (IV) denying defendant's motion to dismiss the kidnapping charge. For the reasons set forth herein, we reverse defendant's kidnapping conviction, but find no merit to his other arguments.

I. The Indictment

[1] By his first assignment of error, defendant argues the trial court should have granted his motion to dismiss and his motion to set aside the verdict because the short-form murder indictment provided defendant with insufficient notice of the State's intent to try him for felony murder and thus violated his due process rights. This argument fails in light of our Supreme Court holdings that have routinely recognized the short-form murder indictment under N.C. Gen. Stat. § 15-144 (1999) as sufficient to allege first-degree murder under theories of both premeditation and deliberation and felony murder. *See, e.g., State v. Davis*, 353 N.C. 1, 44-45, 539 S.E.2d 243, 271 (2000), *cert. denied*, — U.S. —, 151 L. Ed. 2d 55 (2001); *State v. Leroux*, 326 N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990); *State v. Brown*, 320 N.C. 179, 191, 358 S.E.2d 1, 11, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987); *State v. Avery*, 315 N.C. 1, 14, 337 S.E.2d 786, 793 (1985). Based on our Supreme Court's clearly delineated position regarding the validity of the short-form murder indictment, defendant's first assignment of error is overruled.

II. Evidence

A. Trooper Smith's Testimony

[2] The trial court granted the State's pretrial motion *in limine* to prohibit defense counsel from referring to the substance of a statement defendant made to the police in which he explained how the crash came about.[2] Defendant now contends the trial court improperly denied his request to cross-examine Trooper Smith about this statement when Trooper Smith based his opinion testimony in part on defendant's statement. We disagree.

Data underlying an expert's opinion is a proper subject for cross-examination if it is relied upon by the testifying expert. *State v. McCarver*, 341 N.C. 364, 398, 462 S.E.2d 25, 44 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). This is so because the statement of an opinion without its basis would impart a meaningless conclusion to the jury. *State v. Wade*, 296 N.C. 454, 463, 251 S.E.2d 407, 412 (1979). Consequently, disclosure of the basis of an opinion is essential to the jury's assessment of the credibility and weight which it is to be given. *State v. Jones*, 322 N.C. 406, 412, 368 S.E.2d 844, 847 (1988).

In this case, Trooper Smith testified that he prepared a limited reconstruction of the accident based on the report by the investigating officer at the accident site, the field sketch of measurements taken at the scene, and a statement defendant made to the police. At no time, however, did Trooper Smith make a statement as to how the accident occurred. Trooper Smith's remaining testimony covered his observations at the accident site and his opinions, based upon those observations, as to the direction in which the truck was traveling and the manner in which the victim was ejected from the truck. The prosecutor then asked the following question:

> Q. Trooper Smith, did you consider or rely upon the statement of the defendant just shown to you in forming any of the opinions about which you testified in the presence of the jury earlier this afternoon?
>
> A. Absolutely not.

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2. Defendant assigned as error the trial court's grant of the State's motion *in limine*. As this assignment of error is not discussed in defendant's brief, it is deemed abandoned under N.C.R. App. P. 28(b)(5) (2000).

Thus, defendant's statement did not represent a basis for Trooper Smith's opinion testimony at trial, and defendant had no right to cross-examine Trooper Smith regarding the statement. *See McCarver*, 341 N.C. at 398, 462 S.E.2d at 44. We therefore conclude the trial court acted properly in denying defendant's motion to cross-examine Trooper Smith in regard to defendant's statement.

B. Detective Hendricks' Testimony

[3] Defendant also contends the trial court erred in overruling his objection to Detective Hendricks' opinion testimony that the lacerations on Harrington's hand "were not consistent . . . with a traffic accident," because Detective Hendricks was not qualified as a medical expert under Rule 702 of the North Carolina Rules of Evidence. The State, however, did not tender Detective Hendricks as an expert witness. Detective Hendricks offered a lay witness opinion based on his personal observations at the scene and his investigative training background as a police officer. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (1999) (lay witness may testify as to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue"); *see also State v. Rich*, 132 N.C. App. 440, 512 S.E.2d 441 (1999), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000) (police officer permitted to give lay witness opinion based on past experience and his encounter with the defendant). Even if inclusion of Detective Hendricks' opinion testimony was erroneous, it would be harmless error in light of Dr. Butts' expert testimony that the lacerations on Harrington's hand "were consistent with defensive wounds" and could have been caused by the utility knife. Thus, the trial court properly overruled defendant's objection to Detective Hendricks' testimony.

III. Jury Instructions

[4] By his third assignment of error, defendant argues the trial court erred in denying his motion to instruct the jury on the lesser offenses of second-degree murder and involuntary manslaughter, because the instructions were supported by the indictment and the evidence presented at trial. After careful consideration of the entire record, we do not agree.

It is well settled that "[a] trial court must give instructions on all lesser-included offenses that are supported by the evidence[.]" *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000), *cert. denied*,

531 U.S. 1083, 148 L. Ed. 2d 684 (2001). Failure to do so amounts to "reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense." *Id.* The trial court may decline to submit the lesser offense to the jury if "the State's evidence is positive as to each element of the crime charged" and there is no "conflicting evidence relating to any of [the] elements." *Leroux*, 326 N.C. at 378, 390 S.E.2d at 322.

The jury returned a guilty verdict for first-degree murder after having been instructed that it could so find if defendant killed Harrington in the perpetration of robbery with a dangerous weapon. "A killing is committed in the perpetration or attempted perpetration of another felony when there is no break in the chain of events between the felony and the act causing death, so that the felony and homicide are part of the same series of events, forming one continuous transaction." *State v. Wooten*, 295 N.C. 378, 385-86, 245 S.E.2d 699, 704 (1978). "Any person . . . who, having in possession or with the use or threatened use of any . . . 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" is guilty of robbery with a dangerous weapon. N.C. Gen. Stat. § 14-87(a) (1999).

Furthermore,

> [a]n interrelationship between the felony and the homicide is prerequisite to the application of the felony-murder doctrine. 40 C.J.S. *Homicide* § 21(b), at 870; [R.] Perkins, [Criminal Law at 35 (1957)]. A killing is committed in the perpetration or attempted perpetration of a felony within the purview of a felony-murder statute "when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction." 40 Am. Jur. 2d *Homicide* § 73, at 367[.]

State v. Thompson, 280 N.C. 202, 212, 185 S.E.2d 666, 673 (1972), *superseded by statute on other grounds by State v. Davis*, 305 N.C. 400, 423-24, 290 S.E.2d 574, 588-89 (1982). *See also State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985); and *State v. Murvin*, 304 N.C. 523, 284 S.E.2d 289 (1981).

In this case, the robbery with a dangerous weapon and the murder constituted one continuous transaction. Evidence at trial

revealed that the victim normally carried several hundred dollars with him. Testimony from the tenants of Mr. Harrington's rental homes showed that the tenants paid Mr. Harrington using four one hundred dollar bills. Defendant's employer testified that defendant received a paycheck totaling $135.13 at 10:00 a.m. on the day of the murder. Detective Hendricks testified that, when he processed defendant, he found $446.00 on his person, including four one hundred dollar bills. These facts support a reasonable inference that defendant used a dangerous weapon (the utility knife) to rob Mr. Harrington.

The physical evidence at trial reveals that Mr. Harrington had several defensive wounds on his body, which were not caused by the automobile accident. Dr. Butts testified that the victim was cut with a sharp object, and he further stated that the object could have been a utility knife of some type. The victim's blood was found on both the utility knife and defendant's pants.

While the evidence may permit different inferences regarding the timing of the events, the fact remains that the robbery with a dangerous weapon occurred as part of the same continuous transaction which led to the felony murder of Kyle Harrington. Since there was only one transaction, it does not matter whether Mr. Harrington's money was taken before or after the accident occurred. At some point, Mr. Harrington was threatened and harmed by defendant's brandishment and use of the utility knife.

Defendant argues the evidence supports the lesser offenses of second-degree murder and involuntary manslaughter. We do not agree. Second-degree murder is defined as "the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). In *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984), the Supreme Court explained that the type of malice applicable to vehicular homicide cases arises " 'when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.' " *Id.* at 393, 317 S.E.2d at 395 (quoting *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (citations omitted)).

Involuntary manslaughter is defined as "the unintentional killing of a human being without malice, premeditation or deliberation[.]" *State v. Fox*, 18 N.C. App. 523, 526, 197 S.E.2d 265, 267, *cert. denied*,

283 N.C. 755, 198 S.E.2d 725 (1973). The difference between involuntary manslaughter and second-degree murder is one of the degree of risk and recklessness involved. *See* 2 W. LaFave and A. Scott, *Substantive Criminal Law* § 7.4 (1986). Moreover, both second-degree murder and involuntary manslaughter may involve an act of " 'culpable negligence' that proximately causes death." *State v. Wilkerson*, 295 N.C. 559, 582, 247 S.E.2d 905, 918 (1978). Neither is applicable when the victim is killed during the course of a felony set forth in N.C. Gen. Stat. § 14-17 (1999).

After careful review of the entire record, we conclude that there is no evidence to support jury instructions on either second-degree murder or involuntary manslaughter. Here, defendant wrestled Mr. Harrington for control of the truck, which was traveling nearly seventy miles per hour. The driver's door of the truck was open while the struggle ensued, and the truck was traveling at a high speed going around a noticeable curve in the road. As previously discussed, we also believe the crimes committed by defendant were part of one continuous transaction. Consequently, defendant was not entitled to jury instructions on the lesser offenses of second-degree murder and involuntary manslaughter. Defendant's third assignment of error is hereby overruled.

IV. Motion to Dismiss

[5] By his final assignment of error, defendant argues the trial court committed error in denying his motion to dismiss the kidnapping charge.[3] We agree.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the charged offense and whether the defendant is the perpetrator of the offense. *State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). All evidence is to be considered in the light most favorable to the State. *Harding*, 110 N.C. App. at 162, 429 S.E.2d at 421.

Since kidnapping is a specific intent crime, the State must prove defendant unlawfully confined, restrained, or removed the person for

3. Although defendant appealed from the robbery with a dangerous weapon conviction and assigned error to the failure of the trial court to dismiss this charge, the issue is not addressed in defendant's brief and is therefore deemed abandoned. N.C.R. App. P. 28(a) (2000).

one of the purposes set out in N.C. Gen. Stat. § 14-39(a) (1999). *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). "The indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment." *Id.* "[T]he term 'confine' connotes some form of imprisonment within a given area . . . . The term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978).

Here, there is substantial evidence that defendant restrained Harrington's movement; however, there is no evidence which a reasonable juror might accept as adequate to support the conclusion that defendant restrained Harrington for any purpose other than facilitating the armed robbery. Assuming defendant used the utility knife to restrain Harrington for the purpose of kidnapping him, there was no evidence of intent to do bodily harm other than the harm that actually was inflicted when defendant cut Harrington with the utility knife, and that attack was the means rather than the purpose of the restraint. *Moore*, 315 N.C. at 749, 340 S.E.2d at 408 (where assault was the means rather than the purpose of the removal that amounted to kidnapping, it was error for the trial judge to instruct the jury that it could consider the infliction of serious bodily harm as a purpose for the defendant's confinement or removal of the victim). Accordingly, the trial court erred in submitting the kidnapping charge to the jury.

After carefully reviewing the entire record, we conclude that defendant's kidnapping conviction must be reversed. We find no error in defendant's other convictions for first-degree murder and robbery with a dangerous weapon.

Affirmed in part, reversed in part.

Judge CAMPBELL concurs.

Judge GREENE concurs in part and dissents in part with separate opinion.

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

As I believe the trial court erred in denying defendant's motion to instruct the jury on the lesser-included offenses of first-degree murder, I dissent. I fully concur in all other aspects of the majority opinion.

In respect to defendant's request for jury instructions on the lesser-included offenses of first-degree murder, the majority holds that the evidence was sufficient to conclude (1) the robbery with a dangerous weapon occurred and (2) it was part of the same continuous transaction which led to the homicide of Kyle Harrington (Harrington). I disagree.

"A trial court must give instructions on all lesser-included offenses that are supported by the evidence." *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000). Failure to do so amounts to "reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense." *Id.* The trial court may decline to submit the lesser offense to the jury if "the State's evidence is positive as to each element of the crime charged" and there is no "conflicting evidence relating to any of these elements." *State v. Leroux*, 326 N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990).

In this case, the jury returned a guilty verdict for first-degree murder after receiving instructions that it could so find if defendant killed Harrington in the perpetration of robbery with a dangerous weapon.[4] "Any person . . . who, having in possession or with the use or threatened use of any . . . 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" is guilty of robbery with a dangerous weapon. N.C.G.S. § 14-87(a) (1999). "A killing is committed in the perpetration or attempted perpetration of another felony when there is no break in the chain of events between the felony and the act causing death, so that the felony and homicide are part of the same series of events, forming one

4. Although the State's use of the short-form murder indictment was sufficient to charge defendant with felony murder on the basis of either kidnapping or robbery with a dangerous weapon, *see State v. Wilson*, 253 N.C. 86, 99, 116 S.E.2d 365, 373 (1960), *cert. denied*, 365 U.S. 855, 5 L. Ed. 2d 819 (1961), the State chose to submit the issue of felony murder to the jury based solely on robbery with a dangerous weapon. As such, the jury was restricted to assessing the first-degree murder charge based on the commission of a robbery with a dangerous weapon.

continuous transaction." *State v. Wooten*, 295 N.C. 378, 385-86, 245 S.E.2d 699, 704 (1978).

1

Robbery with a dangerous weapon

In this case, there is no positive evidence of robbery with a dangerous weapon. The evidence only establishes that defendant attacked Harrington with a utility knife sometime during the truck ride and the money Harrington was believed to have been carrying in his wallet was later found on defendant. While this evidence permits a reasonable inference defendant attacked Harrington in the truck with a utility knife in an attempt to take Harrington's money and as a consequence of this attack, the truck wrecked causing Harrington's death,[5] the evidence leaves room for another, equally reasonable inference. Harrington's truck could have wrecked as the result of a struggle over control of the truck when defendant attempted to restrain Harrington by use of the utility knife for the purpose of "facilitating the commission" of the robbery, and defendant robbed Harrington after the wreck had killed Harrington.[6] N.C.G.S. § 14-39(a)(2) (1999) (one of the enumerated purposes for kidnapping). Because the evidence is not positive as to the element of *robbery* with a dangerous weapon, the trial court should have submitted instructions on the lesser-included offenses of first-degree murder. *See Leroux*, 326 N.C. at 378, 390 S.E.2d at 322.

2

Continuous transaction

Even assuming positive evidence of robbery with a dangerous weapon exists, there is no positive evidence based on the record that defendant killed Harrington in the perpetration or attempted perpetration of the robbery. I agree with the majority that the evidence permits a reasonable inference that defendant attacked Harrington in the truck for the sole purpose of robbing him and that the struggle, which led to the wreck causing Harrington's death, was part of one continu-

5. Under this theory, it is immaterial whether Harrington's money and personal papers were taken from him by defendant before or after Harrington's death.

6. If defendant did in fact rob Harrington after Harrington had been thrown from the truck, there would be no basis for robbery with a dangerous weapon as the evidence establishes the utility knife was used at a time Harrington was still able to defend himself. To cover this instance, the State should have also proceeded with felony murder based on *kidnapping*. *See* N.C.G.S. § 14-39(a)(2) (1999).

ous transaction. Another reasonable inference, however, is that the robbery was completed sometime before the wreck occurred; after the robbery, but still prior to the wreck and Harrington's death, Harrington was restrained by defendant for the purpose of "facilitating [defendant's] flight." N.C.G.S. § 14-39(a)(2) (another enumerated purpose of kidnapping). As the eyewitness accounts cannot resolve this ambiguity, the evidence in this case is not positive to establish that there was "no break in the chain of events between the felony" of robbery with a dangerous weapon "and the act causing [Harrington's] death," making the felony and homicide "part of the same series of events, forming one continuous transaction." *Wooten*, 295 N.C. at 385-86, 245 S.E.2d at 704. Consequently, I believe defendant was entitled to have the jury instructed on the lesser-included offenses of first-degree murder and the trial court erred in not doing so. I would therefore reverse the first-degree murder conviction and remand this case for a new trial.

CATHY C. BASS AND RANDALL BASS, PLAINTIFFS v. LARRY BERNARD JOHNSON, DEFENDANT

No. COA01-199

(Filed 5 March 2002)

1. Motor Vehicles— automobile accident—proximate cause—direct verdict denied

The trial court did not err by denying defendant's motion for a directed verdict in a negligence action arising from a left turn made across two southbound lanes of rush-hour traffic in the rain where plaintiff had stopped to wait for backed-up traffic to clear; a driver in one southbound lane stopped and waved plaintiff out; another driver noticed defendant approaching in the second lane and waved his arm to warn defendant; and defendant was not using his headlights and was going between 40 and 50 miles an hour in a 25 mph zone. There was sufficient evidence from which the jury could have found that plaintiff was not negligent and that defendant's negligence was the proximate cause of plaintiff's injuries.

2. Pleadings— motion to amend to conform to evidence—no implied consent

The trial court did not abuse its discretion by denying plaintiffs' motion to amend the pleadings to conform to the evidence where plaintiffs did not seek to amend their pleadings to include a claim of gross negligence until after all of the evidence had been presented, defendant was not given notice or opportunity to prepare a defense to a gross negligence claim, and defendant did not impliedly consent to trying the issue of gross negligence.

3. Motor Vehicles— automobile crash—last clear chance

The trial court did not err by refusing to charge the jury on last clear chance in an automobile accident case where another driver waived his arm to try to warn defendant, but defendant's interrogatories indicated that he did not see plaintiff in time to stop. Defendant's interrogatory answers and the arm waving of another driver were not sufficient to support a reasonable inference that defendant had the time and means to avoid hitting plaintiff.

4. Motor Vehicles— automobile crash—last clear chance—instructions

The trial court did not err by adding to the Pattern Jury Instruction on last clear chance in an action arising from an automobile accident where the court instructed the jury to determine whether plaintiff could see what ought to be seen and whether she had crossed into a lane of travel in which she could not see oncoming traffic. The added language applied the evidence to the pattern instruction, did not constitute a statement of opinion, and was not likely to mislead the jury.

5. Trials— exhibits—submission to jury

The trial court did not err in a negligence action in its submission of interrogatory answers to the jury where plaintiffs did not object and waived on appeal the issue of limiting publication to reading. Moreover, defendant consented to submitting only those three interrogatories; trial exhibits can be submitted to the jury during deliberations only if both parties consent.

Appeal by plaintiffs from judgment entered 9 October 2000 by Judge Henry V. Barnette, Jr., in Durham County Superior Court. Heard in the Court of Appeals 7 January 2002.

Roberti, Wittenberg, Lauffer & Wicker, P.A., by R. David Wicker, Jr., for plaintiff-appellants.

Law Office of Robert E. Ruegger, by Robert E. Ruegger, for defendant-appellee.

EAGLES, Chief Judge.

This appeal arises out of a motor vehicle crash that occurred on 11 September 1996, on Roxboro Road in Durham, North Carolina. Roxboro Road is a north/south corridor with two northbound and two southbound lanes. At the time of the collision, it was rush hour, traffic was heavy, and it was raining.

Plaintiff Cathy Bass (Mrs. Bass) stopped at The Pampered Pooch, a dog grooming business. The Pampered Pooch was located on the southbound side of Roxboro Road. After picking up her dog, Mrs. Bass attempted to make a left turn from The Pampered Pooch onto northbound Roxboro Road. In front of the parking lot entrance to The Pampered Pooch, in the right lane of the southbound side of Roxboro Road, traffic was at a standstill. Someone in that lane allowed Mrs. Bass a space so she could proceed through the line of stopped traffic. After crossing the exterior southbound lane, as plaintiff entered the interior southbound lane, defendant Larry Johnson's southbound vehicle struck Mrs. Bass' vehicle.

Defendant admitted he was traveling 40 miles per hour just before the accident. The posted speed limit at the location of the crash was 25 miles per hour. Plaintiffs' witness Bob Ritscher testified that he was stopped in his car in the exterior southbound lane several cars back from where the crash occurred. At trial, Mr. Ritscher testified that: (1) just before the crash he saw Mrs. Bass' vehicle as she was entering Roxboro Road; (2) from his rear-view mirror, Mr. Ritscher saw defendant approaching from behind; (3) defendant's headlights were not on; (4) Mr. Ritscher stuck his arm out of the driver's window of his car and waved in an attempt to warn defendant of impending danger; and (5) despite the attempted warning, defendant did not slow down and the crash ensued. Mr. Ritscher also testified that he estimated defendant was traveling 50 miles per hour.

Mrs. Bass' injuries from the crash were quite severe. She suffered a broken pelvis, ruptured bladder, broken ribs, and a head injury that resulted in seizures. Her medical expenses totaled $36,426.90.

At trial at the close of the evidence, plaintiffs moved to amend the pleadings to conform to the evidence and allow plaintiffs to plead defendant's gross negligence as a bar to the alleged contributory negligence of Mrs. Bass. The trial court denied plaintiffs' motion.

At the charge conference, plaintiffs requested jury instructions on last clear chance and gross negligence. The trial court denied plaintiffs' request. The trial court indicated that on the issue of contributory negligence it would provide the jury with North Carolina Civil Pattern Jury Instruction 203.29, Entering a Highway from a Road or Drive. During the jury charge on contributory negligence, the trial court added language not contained in the pattern jury instruction. The trial court overruled plaintiffs' objection.

On 12 September 2000, the jury returned a verdict finding that Mrs. Bass was injured by the negligence of defendant and that Mrs. Bass, by her own negligence, contributed to her injuries. On 9 October 2000, the trial court entered judgment reflecting the jury's verdict. Plaintiffs appeal.

On appeal, plaintiffs raise the following issues: (1) whether the trial court erred by denying plaintiffs' motion to amend the pleadings and plaintiffs' request for an instruction on gross negligence; (2) whether the trial court erred by refusing to charge the jury on the issue of last clear chance; (3) whether the trial court erred by adding language to the North Carolina Civil Pattern Jury Instruction 203.29 on contributory negligence; and (4) whether the trial court erred by submitting to the jury only a part of plaintiffs' Exhibit 26. On cross-appeal, defendant raises the following issue: whether the trial court erred by denying defendant's motion for directed verdict at the close of plaintiffs' evidence.

I.

[1] On cross-appeal, defendant contends that the trial court erred by denying defendant's motion for directed verdict. Defendant argues that plaintiffs' evidence established that Mrs. Bass was contributorily negligent as a matter of law.

When considering a motion for directed verdict, the trial court must consider all the evidence in the light most favorable to the nonmoving party and the nonmoving party is to receive the benefit of every reasonable inference that can be drawn from the evidence. *Southern Ry. Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 4, 318 S.E.2d 872, 875 (1984). When the evidence adduced at trial estab-

lishes contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom, then a directed verdict is not only appropriate, it is mandated. *U.S. Industries, Inc. v. Tharpe*, 47 N.C. App. 754, 760-61, 268 S.E.2d 824, 829 (1980). Where more than one conclusion can reasonably be drawn, determination of the issue is properly left for the jury. *Manness v. Fowler-Jones Const. Co.*, 10 N.C. App. 592, 598, 179 S.E.2d 816, 819 (1971). We review the denial of defendant's motion for directed verdict to determine whether there is substantial evidence that defendant's negligence was the proximate cause of Mrs. Bass' injuries. *Pruitt v. Powers*, 128 N.C. App. 585, 590, 495 S.E.2d 743, 746 (1998).

At trial, the evidence, when viewed in the light most favorable to plaintiffs, established that as Mrs. Bass was leaving The Pampered Pooch on Roxboro Road, she came to a stop to wait for traffic to clear. When traffic backed up, a driver stopped and waved Mrs. Bass out so that she could make her left turn. As Mrs. Bass started making her turn, Mr. Ritscher observed defendant approaching. Mr. Ritscher waved out of his car's window to warn defendant of the impending peril. Defendant's vehicle then collided with Mrs. Bass' vehicle. At the time of the crash it was raining, traffic was heavy, and it was rush hour. Defendant was not burning his headlights. The speed limit at the location of the crash was 25 miles per hour. Defendant was traveling between 40 and 50 miles per hour immediately before the collision occurred.

Viewing the evidence in the light most favorable to plaintiffs, the trial court was reasonable to conclude that there was sufficient evidence from which the jury could have found that Mrs. Bass was not negligent and that defendant was the proximate cause of Mrs. Bass' injuries. Accordingly, we hold that the trial court did not err by denying defendant's motion for directed verdict.

II.

[2] As plaintiffs' first assignment of error, plaintiffs contend that the trial court erred by denying plaintiffs' motion to amend the pleadings to conform to the evidence and by denying plaintiffs' request for a jury instruction on gross negligence. At the close of all of the evidence, plaintiffs, pursuant to Rule 15(b), moved to amend the pleadings to include a claim that defendant's actions constituted gross negligence. Here, plaintiffs argue that during the trial the evidence established that defendant's actions amounted to gross negligence. Plaintiffs point specifically to the testimony showing that defendant

was driving in heavy traffic, on a rainy afternoon, without burning his headlights, at a speed of 40 to 50 miles per hour in a 25 mile per hour zone.

A trial court's ruling on a motion to amend pleadings may be reversed on appeal only upon a showing of abuse of discretion. *Delta Env. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999). "[P]roper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party." *Id.* at 166, 510 S.E.2d at 694. Rule 15(b) of the North Carolina Rules of Civil Procedure states in part:

> When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings 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, but failure so to amend does not affect the result of the trial of these issues.

In ruling on plaintiffs' motion to amend, Judge Barnette stated:

> Well, the underlying reason for that is there's some sort of tacit consent that the evidence is—well, that [gross negligence] is an issue in the case. I think [defendant's] position would be that [it] is not an issue in the case . . . . [A]s far as allowing an amendment—I mean, that has not come up. That did not come up until you said it awhile ago . . . . [Defendant] doesn't have to defend something unless he knows or has reason to know that that issue is going to be tried . . . . [Defendant] has to consent, in effect, to that issue being tried . . . . Now if you had moved to amend before the trial at some earlier stage, then that's a different thing. Motion denied as to that.

From the record, it is clear that plaintiffs did not seek to amend their pleadings to include a claim of gross negligence until after all of the evidence of the case had been presented. Defendant was not given notice or opportunity to prepare a defense to a gross negligence claim, nor did defendant impliedly consent to trying the issue of gross negligence. Accordingly, we hold that the trial court did not abuse its discretion by denying plaintiffs' motion to amend.

III.

[3] Plaintiffs next contend that the trial court erred by refusing to instruct the jury on the issue of last clear chance.

The issue of last clear chance must be submitted to the jury if the evidence, viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine. *Nealy v. Green*, 139 N.C. App. 500, 504, 534 S.E.2d 240, 243 (2000). Failure to submit the issue of last clear chance, when proper, is reversible error that mandates a new trial. *Id.* In *Exum v. Boyles*, 272 N.C. 567, 576, 158 S.E.2d 845, 853 (1968), our Supreme Court addressed a plaintiff's entitlement to an instruction on last clear chance and wrote:

> [T]o bring into play the doctrine of last clear chance, there must be proof that after the plaintiff had, by his own negligence, gotten into a position of helpless peril . . . the defendant discovered the plaintiff's helpless peril . . . or, being under a duty to do so, should have, and, thereafter, the defendant, having the means and time to avoid the injury, negligently failed to do so.

Here, after presentation of all the evidence, plaintiffs requested that the issue of last clear chance be submitted to the jury. In support of the request, plaintiffs argued to the trial court that Mr. Ritscher's act of waving his arm in an attempt to alert defendant to impending peril coupled with defendant's answer to plaintiffs' interrogatory number 16 supported the instruction. Interrogatory 16 asked defendant to "[p]lease state in your own words . . . how you believe the accident occurred." In response to interrogatory 16, defendant answered: "There was this guy with a truck in the lane to the right of me that stopped to let Mrs. Bass out of the parking lot. While she proceeded to pull out of the parking lot, she came across my lane of travel right in front of me."

In deciding whether to instruct the jury on last clear chance, the trial court also considered defendant's answers to interrogatories 17 and 18. In response to interrogatory 17, defendant replied: "The only thing I saw was Mrs. Bass pulling out in front of me with no time to react on my part." Defendant's answer to interrogatory 18 stated in part: "I couldn't see what was happening until it was too late. From the time I saw her car, all I could do was hit the brakes, but she was too close in my lane of travel."

After careful review of the record, we agree with the trial court and conclude that plaintiffs failed to produce sufficient evidence requiring an instruction on last clear chance. Defendant's answers to plaintiffs' interrogatories and Mr. Ritscher's act of waving his arm fail to provide sufficient evidence to support a reasonable inference that defendant had both the time and means to avoid hitting Mrs. Bass. Accordingly, we hold that the trial court did not err by refusing to charge the jury on the issue of last clear chance.

IV.

[4] As the third assignment of error, plaintiffs contend that the trial court erred in its instruction to the jury on the issue of contributory negligence by adding language that is not contained in North Carolina Civil Pattern Jury Instruction 203.29. In charging the jury on the issue of contributory negligence, the trial court used North Carolina Civil Pattern Jury Instruction 203.29 and charged:

> The motor vehicle law of the State of North Carolina provides that the operator of a vehicle about to enter or to cross a public street or highway from a private road or a private driveway shall yield the right-of-way to all vehicles approaching on the highway or street to be responsible.
>
> In order to comply with this law, the operator of the vehicle is required to look for vehicles approaching on the highway, to see what ought to be seen, and to delay entry into the highway or street until all reasonable care has been first exercised to see that such entry can be made in safety.

In addition to Civil Pattern Instruction 203.29, the trial court added:

> Now, this does not mean that you may cross into a lane of travel which is blinding your view. In other words, both vehicles approaching and to see what ought to be seen means that you must not enter or cross a lane of travel unless you can see traffic that may be approaching in that lane. A violation of this law is negligence within itself.

Plaintiffs argue that the additional language added by the trial court to the pattern instruction constituted a breach of the trial court's duty of impartiality and a conveyance of opinion by the trial judge on an issue of fact to be submitted to the jury.

During the trial of a matter, "[t]he law imposes on the trial judge the duty of absolute impartiality." *Belk v. Schweizer*, 268 N.C. 50, 54,

149 S.E.2d 565, 568 (1966). The expression of an opinion by the trial court on an issue of fact to be submitted to a jury is legal error. *Id.* at 54, 149 S.E.2d at 568-69. "When charging the jury in a civil case, it is the duty of the trial court to explain the law and to apply it to the evidence" on the issues of the case. N.C.G.S. § 1A-1, Rule 51(a) (1999); *Adams v. Mills*, 312 N.C. 181, 186, 322 S.E.2d 164, 168 (1984).

On appeal, this Court considers a jury charge contextually and in its entirety. *Jones v. Satterfield Development Co.*, 16 N.C. App. 80, 86, 191 S.E.2d 435, 439 (1972). The charge will be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . ." *Id.* at 86-87, 191 S.E.2d at 440. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. *Robinson v. Seaboard System R.R., Inc.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987). "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Id.*

After careful review of the jury instructions, we conclude that plaintiffs have failed to demonstrate that the trial court's charge was likely to mislead the jury. The trial court's instruction did not constitute a statement of opinion. The language added by Judge Barnette applied the evidence to the Pattern Jury Instruction on contributory negligence. Under the instruction given by the trial court, the jury was instructed to determine whether Mrs. Bass could "see what ought to be seen" and whether Mrs. Bass crossed into a lane of travel in which she could not see oncoming traffic. In light of the entire charge and the evidence of the case, we hold that the trial court did not err in its charge to the jury on contributory negligence. Plaintiffs' assignment of error fails.

V.

[5] In their final assignment of error, plaintiffs contend that the trial court erred by submitting to the jury only a part of plaintiffs' Exhibit 26 despite the fact that the entire exhibit was admitted into evidence. During trial, plaintiffs offered, as Exhibit 26, defendant's answers to plaintiffs' first set of interrogatories. After the trial court received Exhibit 26 into evidence, plaintiffs' counsel indicated that he wanted to publish the interrogatories to the jury. The following exchange occurred:

THE COURT: You wish to publish those at this time? I would suggest that the way to publish those would be to read them. Read the questions and read the answers. Did you wish to offer them all or just—

PLAINTIFFS' COUNSEL: Your Honor, I wish to offer three of the interrogatories.

THE COURT: Okay. Read the questions and then the defendant's answers to them.

Plaintiffs' counsel then read the questions and defendant's answers to plaintiffs' interrogatories 16, 17, and 18. After reading the questions and answers, plaintiffs rested.

Plaintiffs first contend that the trial court erred by limiting plaintiffs to reading questions and answers to only interrogatories 16, 17, and 18. Plaintiffs argue that once an exhibit is admitted, the jury is permitted to review the exhibit, either in the jury room with consent of the parties or in open court in the presence of the parties and the court. *See Nelson v. Patrick*, 73 N.C. App. 1, 13-14, 326 S.E.2d 45, 53 (1985).

Here, plaintiffs' counsel failed to object to the trial court's decision limiting publication of the interrogatories to publication by reading. When told by the trial judge that he could read to the jury all or part of the interrogatories of Exhibit 26, plaintiffs' counsel chose to read only questions and answers of interrogatories 16, 17, and 18. Accordingly, plaintiffs waived their right to appeal the trial court's limitation on the publication of interrogatories 16, 17, and 18 to publication by reading.

Plaintiffs also argue that the jury should have been permitted to take with them to the jury room, during deliberation, all of the interrogatories contained in Exhibit 26. During the course of jury deliberation, the jury asked to review only questions and answers of interrogatories 16, 17, and 18. The trial court submitted only the three requested interrogatories to the jury.

In determining whether to submit these interrogatories, the following exchange between the trial court and plaintiffs' and defense counsel occurred:

THE COURT: Another thing they asked for were the three interrogatories and their answers.

DEFENDANT'S COUNSEL: That's fine.

THE COURT: Might as well let them have it all, unless they're going to be—

PLAINTIFFS' COUNSEL: I think it's No. 26.

THE COURT: I might have that. I'm looking to see. Yeah, I do have that.

DEFENDANT'S COUNSEL: Did all of them get admitted, or was it just the three?

THE CLERK: I have 26—defendant's answer to interrogatories.

THE COURT: They want three. They wanted three, but unless we tear it out of there—

DEFENDANT'S COUNSEL: I don't have any problem with just taking that one page out of there.

THE COURT: Are all three of them on one page? I think they are.

PLAINTIFFS' COUNSEL: All on one page, but the request from the plaintiff was to move to admit them all.

THE COURT: Yes. But they asked for the three interrogatories published, is what they asked for.

DEFENDANT'S COUNSEL: My understanding about the law is, it can only go back if everybody agrees and consents.

THE COURT: That's true.

DEFENDANT'S COUNSEL: I consent to the three going back, 16, 18—

THE COURT: Okay. Take that page out and send that back, then. That's what they asked for. I'm going to let them deliberate for a while.

It is well established that trial exhibits introduced into evidence can only be submitted to the jury room during deliberations if *both* parties consent. *Nunnery v. Baucom*, 135 N.C. App. 556, 559, 521 S.E.2d 479, 482 (1999) (emphasis added). After review of the record, we find that defendant consented only to submitting to the jury during deliberation interrogatories 16, 17, and 18. Pursuant to *Nunnery*, we hold that the trial court did not err by submitting only those interrogatories mutually agreed upon by the parties.

For these reasons, this assignment of error fails.

No error.

Judges McCULLOUGH and CAMPBELL concur.

STATE OF NORTH CAROLINA v. PATRICK LAMBERT

No. COA01-164

(Filed 5 March 2002)

1. **Homicide— second-degree murder—acting in concert—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder based on the theory of acting in concert, because: (1) defendant assaulted the victim by throwing glass bottles at her from a close proximity; (2) although defendant argues that the two other coparticipants' actions in beating the victim with a tree limb were a distinct act separate and apart from the initial bottle-throwing, the beating occurred immediately following the bottle-throwing and in the same location; (3) there was sufficient evidence from which a reasonable jury could conclude that these two acts, rather than being distinct and separate from one another, were part of a general assault on the victim and that the intensified assault by the two coparticipants that culminated in the victim's death was a probable and natural consequence of the initial assault in which defendant actively participated; and (4) defendant afterwards accompanied the two coparticipants to conceal evidence of the crime.

2. **Evidence— exclusion of coparticipant's plea agreement—impeachment—bias**

The trial court did not err in a second-degree murder case by excluding evidence of a plea agreement executed by one of defendant's coparticipants even though defendant sought to use the evidence for impeachment purposes to show that the coparticipant had a plea arrangement with the State and to show the coparticipant's potential bias as a witness, because: (1) the trial court did not prohibit defendant from cross-examining the coparticipant about his plea arrangement, and the judge specifically instructed defense counsel on the proper method for questioning

the witness regarding this information; (2) defense counsel abandoned his line of questioning regarding the plea agreement, and failure to pursue the right to confrontation does not constitute a denial of the right to confrontation; and (3) there was no evidence that the coparticipant was testifying in exchange for a sentence reduction.

3. **Criminal Law— prosecutor's argument—plea agreements of coparticipants—motion for mistrial**

The trial court did not abuse its discretion in a second-degree murder case by denying defendant's motion for a mistrial after the prosecutor improperly stated during closing arguments that two coparticipants who pled guilty to second-degree murder "had the same option that this Defendant had" because the trial court sustained defendant's objection to the statements by the prosecutor and gave a curative instruction to the jury immediately thereafter.

Appeal by defendant from judgment entered 7 June 2000 by Judge Gregory A. Weeks in Robeson County Superior Court. Heard in the Court of Appeals 10 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey B. Parsons, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Beth S. Posner, for defendant appellant.

TIMMONS-GOODSON, Judge.

On 7 June 2000, a jury found Patrick Lambert ("defendant") guilty of second-degree murder in the death of Loretta Alexander ("Alexander"). Evidence presented by the State tended to show the following: On 1 July 1998, at approximately 10:30 p.m., defendant joined two men, Everette Watson ("Watson") and Darnell Bethea ("Bethea"), near Canal Street in Fairmont, North Carolina. As the men stood together, Alexander approached Bethea and asked him for drugs. Bethea refused, but Alexander persisted, pulling on Bethea's shirt and pleading with him to give her drugs. Annoyed with her, Watson and Bethea then picked up several glass bottles that littered the ground and started throwing them at Alexander. Watson explained that, "I just threw [the bottles] at her. I got tired of her bugging us." Alexander fell to the ground and pleaded with the men to end their assault. In his statement to police, defendant indicated that

he then "picked up a bottle and threw it at Loretta Alexander and the bottle missed her." Bethea instructed defendant to throw another bottle at Alexander, and defendant complied. All three men stood over Alexander, striking her face and head numerous times with "[o]ver a dozen" glass bottles.

Bethea and Watson then told defendant to help them find a stick. At that point, Watson picked up "a tree branch about four inches thick and four feet long" and struck Alexander three or four times across her back. Watson handed the branch to Bethea, who continued to beat Alexander ten or eleven times, striking her back and the rear of her head. After Bethea finished hitting Alexander, she was still and "not making any noise." Watson pushed Alexander's body with his foot, but she did not move. Defendant accompanied Watson and Bethea to Watson's house, where Watson used a garden hose to clean the bloody tree limb. Bethea also washed the blood off of his legs. Defendant left soon afterwards and went to a friend's house, where he watched television and went to bed.

Watson testified at trial that defendant joined he and Bethea in standing over Alexander's body and "hitting her with the bottles up side [sic] the head," but acknowledged that it was he and Bethea who struck Alexander with the tree limb. Watson added that he and defendant had been drinking beer and smoking marijuana the night of the murder. The State's pathologist testified that Alexander died from a blunt-force injury to her head requiring a great deal of force.

Defendant's statement to police and his testimony at trial were substantially similar to the events as recited *supra*, although defendant denied that any of the bottles that he threw actually struck Alexander. Defendant testified that he was afraid of Bethea, and that Bethea ordered him not to tell anyone what had happened, or "the same thing [would] happen to [defendant]."

The jury found defendant guilty of second-degree murder, and the trial court sentenced him to a minimum term of 151 months' and a maximum term of 191 months' imprisonment. From his conviction and resulting sentence, defendant now appeals to this Court.

Defendant presents three issues for review, arguing that the trial court erred in (1) denying defendant's motion to dismiss; (2) excluding evidence of a plea agreement; and (3) denying defendant's motion for a mistrial. Upon review of the record and arguments by counsel, we find no error by the trial court.

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of second-degree murder against him. Defendant maintains there is insufficient evidence from which a reasonable jury could conclude that defendant acted in concert with Watson and Bethea in the beating death of Alexander. We disagree.

Upon a motion to dismiss in a criminal action, the trial court must view all of the evidence in the light most favorable to the State. *See State v. Pierce*, 346 N.C. 471, 491, 488 S.E.2d 576, 588 (1997). Contradictions or discrepancies in the evidence must be resolved by the jury, and the State should be given the benefit of any reasonable inference. *See State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The trial court must then decide whether there is substantial evidence of each element of the offense charged. *See State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 78-79, 265 S.E.2d at 169.

In the instant case, defendant was charged with second-degree murder under the theory of acting in concert. The doctrine of acting in concert states that where

> "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (quoting *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971)), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). In *Barnes*, our Supreme Court held that a finding that the accomplice individually possessed the *mens rea* to commit the crime is not necessary to convict a defendant of premeditated and deliberate murder under a theory of acting in concert. *See Barnes*, 345 N.C. at 233, 481 S.E.2d at 71. Thus, "if two or more persons are acting together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan." *State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). While a person may be either actually or constructively present at the scene, "[a] person is constructively present during the commission of a crime if he is close enough to provide

assistance if needed and to encourage the actual execution of the crime." *State v. Gaines*, 345 N.C. 647, 675-76, 483 S.E.2d 396, 413, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997); *see also State v. Willis*, 332 N.C. 151, 175, 420 S.E.2d 158, 169 (1992) (holding that, although the defendant was sixty-five feet away from the attack on the victim and inside the fence that enclosed her yard, there was nevertheless sufficient evidence for the jury to conclude that the defendant was actually and constructively present where she was able to witness the attack and the victim was close enough to call to her for assistance).

Defendant argues that there was insufficient evidence to establish that defendant was acting together with Watson and Bethea pursuant to a common purpose to kill Alexander. Defendant notes that the State presented no evidence that Watson and Bethea communicated to defendant their intent to beat Alexander with the tree limb. Defendant further asserts that Alexander's death was not a natural or probable consequence of the assault in which he participated. We disagree.

In the instant case, there was sufficient evidence from which a reasonable jury could conclude that defendant acted in concert with Watson and Bethea in the murder of Alexander. Watson testified that

> [Bethea] started picking up some [bottles] and started throwing and then [defendant] picked up some [bottles] and started throwing. [Alexander] fell and we all went up there and started hitting her with the bottles up side [sic] the head. Then [Bethea], he picked up like a limb, like, and started hitting her with it and I started hitting her with it. And we all left and left her there.

The evidence clearly establishes that defendant assaulted Alexander by throwing glass bottles at her from a close proximity. Although defendant argues that Bethea and Watson's actions in beating Alexander with a tree limb were a "distinct act," separate and apart from the initial bottle-throwing, the evidence shows that the beating occurred immediately following the bottle-throwing and in the same location. Thus, there was no separation by either time or proximity between the bottle-throwing and the beating with the tree limb. A reasonable jury could conclude that these two acts, rather than being distinct and separate from one another, were part of a general assault on Alexander, and that the intensified assault by Watson and Bethea that culminated in Alexander's death was a probable and natural consequence of the initial assault in which defendant actively participated.

We are unpersuaded by the cases cited by defendant in support of his argument that he did not act in concert with Watson and Bethea, and that Alexander's death was not a natural or probable consequence of the bottle-throwing. In *State v. Ikard*, 71 N.C. App. 283, 321 S.E.2d 535 (1984), the evidence showed that the defendant stood approximately twenty to twenty-five feet away from his companions while they robbed the victim. The defendant did not participate in the robbery, "[n]or was there any evidence tending to show that [the] defendant encouraged the other men in the commission of the crime, or that he by word or deed indicated to them that he stood prepared to render assistance." *Ikard*, 71 N.C. App. at 286, 321 S.E.2d at 537. Similarly, in both *State v. Gaines*, 260 N.C. 228, 132 S.E.2d 485 (1963), and *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984), there was no evidence of the defendants' involvement in the respective crimes beyond being merely present and having knowledge of the criminal acts.

Unlike the evidence in the above-cited cases, the evidence in the instant case, taken in the light most favorable to the State, reveals that defendant was an active participant in the assault on Alexander that ended in her death. Defendant stood with Watson and Bethea over Alexander while she lay prostrate on the ground, and he threw at least two bottles at her from a close proximity. He remained nearby while Watson and Bethea beat Alexander with a tree limb as she pleaded for her life, and afterwards, defendant accompanied the two men to Watson's house, where they concealed the evidence of the crime. We conclude that the above-stated evidence sufficiently supports the theory that defendant acted in concert with Watson and Bethea to commit second-degree murder. *See State v. Wilson*, 354 N.C. 493, 507-08, 556 S.E.2d 272, 282 (2001); *State v. Golphin*, 352 N.C. 364, 456-60, 533 S.E.2d 168, 228-30 (2000), *certs. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Because there was sufficient evidence to support the charge of second-degree murder, the trial court properly denied defendant's motion to dismiss, and we therefore overrule defendant's first assignment of error.

[2] By his second assignment of error, defendant contends the trial court erred by excluding evidence offered by defendant for the purpose of impeaching a witness. Specifically, defendant argues that the plea form executed by Watson was admissible to show that Watson had a plea arrangement with the State and his potential bias as a witness. Defendant maintains that exclusion of this evidence was fundamental error by the trial court, requiring a new trial.

At trial, defense counsel attempted to impeach Watson's testimony by cross-examining him with regard to details of his plea agreement with the State. After viewing a copy of his plea agreement, Watson agreed that he had pled guilty to second-degree murder. The trial court sustained the State's objections to further questions based on details of the document, however, on the grounds that the document had not been offered into evidence. Outside the presence of the jury, defense counsel confirmed that he was offering the plea agreement for purposes of impeachment. The trial court informed defense counsel that, "You can show it to [Watson]; you can ask him if it refreshes his recollection about what he did or what he said, and then you can ask him the direct question: Isn't it true that." Defense counsel never resumed his line of questioning, however.

Defense counsel later attempted to offer the plea agreement into evidence, arguing that it revealed bias on Watson's part because "it show[ed] that [Watson] got consideration" in exchange for his testimony. After examining the document, the trial court concluded that the plea form was irrelevant, as it did not "provide that [Watson] was allowed to plea[d] to the lesser charge in exchange for his testimony." The trial court also noted that Watson testified that he had requested a sentence reduction in exchange for his testimony, but had not received such a reduction.

Defendant argues that the trial court's actions in sustaining the State's objections during defense counsel's cross-examination of Watson and in excluding the plea agreement from evidence violated defendant's constitutional right to confrontation and prejudiced his case. We cannot agree. The trial court did not prohibit defendant from cross-examining Watson about his plea arrangement; in fact, the judge specifically instructed defense counsel on the proper method for questioning the witness regarding this information. Nevertheless, defense counsel abandoned his line of questioning concerning the plea agreement. Failure to pursue the right to confrontation does not constitute a denial of the right to confrontation.

Moreover, despite defendant's assertions to the contrary, there was no evidence that Watson was testifying in exchange for a sentence reduction pursuant to North Carolina General Statutes section 15A-1054. The plea agreement at issue did not indicate that Watson received a reduced sentence or other consideration for his testimony; rather, it merely stated that "upon plea of second-degree murder, the defendant shall receive an active sen-

tence of 125 months minimum and 150 months maximum." Further, Watson testified during cross-examination that he received no consideration in exchange for his testimony:

> Q [Defense counsel]: And you agreed to testify in return for getting consideration on your sentence; is that correct?
>
> A [Watson]: I wanted it but I couldn't get it, so . . . .
>
> Q: Sir?
>
> A: I testified anyway.
>
> Q: You expect to get that, don't you?
>
> A: No. [The prosecutor] said he couldn't get it for me.
>
> Q: You want that, don't you?
>
> A: I did, but I can't get it.
>
> Q: He told you that?
>
> A: That's what he told me.

Because the plea agreement did not show that Watson received any type of consideration for his testimony, the trial court properly excluded the evidence as irrelevant. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (1999). We therefore overrule defendant's second assignment of error.

[3] In his final assignment of error, defendant argues the trial court erred by denying his motion for a mistrial after the State in its closing argument made the following statement:

> [Prosecutor]: [Defense counsel] wants to say, "Well, you know, these guys, they've pled guilty to second-degree murder."
>
> Mr. Watson and Mr. Bethea had the same option that this Defendant had—
>
> [Defense counsel]: Objection.
>
> [The Court]: Sustained. Sustained.

The trial judge thereafter instructed the jury as follows:

> Members of the jury . . . counsel for the State . . . . argued to you that Mr. Watson and Mr. Bethea had the same opportunity as

> the Defendant. I instruct you that that's not a proper argument. You may not consider that argument.
>
> As I instructed you at the outset of these proceedings, the Defendant, by his plea of not guilty, has answered and denied . . . the allegation involved in this case . . . . And I instruct you that any reference in argument to Mr. Watson or Mr. Bethea, or any opportunities they may have had, have no bearing on the issue or issues before you in this case.

Defendant argues that the prosecutor's statement to the jury irreparably prejudiced his ability to receive a fair trial. We cannot agree.

"It is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable." *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998). A mistrial should only be granted when there are improprieties of such magnitude and gravity that the defendant cannot receive a fair trial and impartial verdict. *See State v. Taylor*, 117 N.C. App. 644, 653-54, 453 S.E.2d 225, 231 (1995). Here, the trial court sustained defendant's objection to the statements by the prosecutor and gave a curative instruction to the jury immediately thereafter. We detect no abuse of discretion by the trial court in denying defendant's motion for a mistrial, and we therefore overrule defendant's final assignment of error.

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

No error.

Judges MARTIN and BRYANT concur.

STATE OF NORTH CAROLINA v. DANIEL COTINO AQUINO

No. COA01-245

(Filed 5 March 2002)

1. **Confessions and Incriminating Statements— foreign national—statement made before detention—no rights under Vienna Convention**

The trial court did not err by denying the motion of a Mexican national to suppress his statement to officers based upon the Vienna Convention (which requires law enforcement authorities to inform detained or arrested foreign nationals that they may have their consulates notified of their status) where any statements received from defendant were obtained prior to detention and prior to his eligibility for any rights under the Convention. Moreover, courts have refused to hold that suppression is a remedy for a violation of the Convention.

2. **Confessions and Incriminating Statements— Spanish-speaking SBI agent—no independent notes or interpretations**

The trial court did not abuse its discretion by allowing a Spanish-speaking SBI agent who had interviewed defendant to testify concerning defendant's statements, even though there were no independent interpretations or notes of the interview. The agent testified to a conversation he had in Spanish with defendant and not as an expert; whether defendant actually understood the agent goes to the weight of the testimony rather than its admissibility.

Appeal by defendant from judgment dated 1 August 2000 by Judge Richard L. Doughton in Wilkes County Superior Court. Heard in the Court of Appeals 22 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General K.D. Sturgis, for the State.

Law Offices of Timothy D. Welborn, by Timothy D. Welborn, for defendant-appellant.

GREENE, Judge.

Daniel Cotino Aquino (Defendant) appeals a judgment dated 1 August 2000 entered consistent with a jury verdict finding him guilty of involuntary manslaughter and misdemeanor child abuse.

On 6 December 1999, Defendant, a Mexican national, was indicted for first-degree murder and felonious child abuse relating to the death of his two-month-old daughter Jasmin Cotino-Benitez (Jasmin). Defendant filed a motion to suppress his statement on 24 April 2000, alleging Defendant was arrested on 24 September 1999 and interrogated on 25 September 1999 without his attorney, or an interpreter, or the benefit of Miranda rights. Defendant also filed a motion to suppress based on violation of the Vienna Convention on Consular Relations (the Vienna Convention).

On 5 June 2000, Defendant filed a motion for change of venue, alleging that the primary newspaper for Wilkes County had published and circulated several newspaper articles surrounding the injury and death of Jasmin. The trial court denied Defendant's motion for a change of venue from Wilkes County.[1]

Defendant also filed an amended motion to suppress on 5 June 2000 and attached an affidavit stating: he was never advised of his Miranda rights; he did not understand what was asked of him as he was nervous, upset, and unable to comprehend the questions presented; he was never allowed to have an interpreter who spoke the same dialect of Spanish to interpret the questions being asked of him, except the one provided by the authorities; he did not knowingly, voluntarily, and willingly make any statement to law-enforcement officers; he was appointed an attorney on 24 September 1999 and questioned on 25 September 1999, without his attorney present; and at all times while being questioned by law-enforcement officers, he did not feel free to leave. In addition, Defendant filed an amended motion to suppress based on an alleged violation of the Vienna Convention.

At the hearing on Defendant's motions to suppress, Special Agent Michael Brown (Brown) of the North Carolina State Bureau of Investigation (the SBI) testified he responded to a telephone call on 19 September 1999 at Defendant's residence relating to the injury of an infant. After interviewing Defendant, Brown contacted Special Agent Robert Ayala (Ayala) of the SBI, who agreed to come to Wilkes County and interview several people, as he often interpreted for the

1. Although Defendant assigned error to the trial court's denial of his motion for change of venue, he has failed to show any abuse of discretion by the trial court as he has not established any prejudice among the jurors due to pretrial publicity. *See State v. King*, 326 N.C. 662, 671, 392 S.E.2d 609, 615 (1990) (a defendant claiming abuse of discretion by the trial court in denying a motion for change of venue must "specifically identify prejudice among the jurors selected").

SBI. Ayala interviewed Defendant on 22 and 23 September 1999 and during these interviews, Defendant arrived at the police station in his own vehicle, he was not arrested or placed in custody, and when the interviews were completed, Defendant left on his own. Defendant was allowed to take restroom and lunch breaks and leave the building unescorted during the interviews. Defendant was not placed under arrest until 24 September 1999, and after that date, he was not interviewed again. On cross-examination, Brown testified Defendant was never read his Miranda rights or asked if he wanted an independent interpreter.

Ayala testified he had worked for the SBI for eleven years, and has spoken Spanish all his life, as both his parents are Puerto Rican. Ayala interviewed Defendant on two separate dates, 22 and 23 September 1999. At the time of the interviews, Ayala was not dressed in a uniform and did not display a weapon or a badge. During the interviews with Defendant, Ayala took notes which he later reduced to a report. At no time did Defendant wear any handcuffs or was he restrained in any manner. At some point during the second interview, Ayala told Defendant that at any time he could "go and do whatever he wanted to." After the second interview ended, Defendant left the police station and Ayala had no further interaction with Defendant. Ayala testified that although his notes stated an interview took place on 25 September 1999, he was mistaken and "misspoke"; the second interview actually took place on 23 September 1999.

On cross-examination, Ayala testified that consistent with the SBI policy, he never made an audio or video recording of the interviews. Prior to starting each interview, Ayala thanked Defendant for coming and told Defendant he did not have to talk to Ayala if he did not want. At no time during the interviews did Ayala tell Defendant he could contact an attorney. Ayala testified that he did not believe there were different dialects of Spanish, but maybe different accents and different idioms. Ayala did not ask Defendant if he needed an interpreter, but he did ask Defendant if he understood him, to which Defendant responded he did.

The trial court found that: Defendant came to the police station by his own transportation; the interviews were conducted in an interview room, with an officer wearing street clothing and not displaying a weapon; Defendant was there voluntarily; Defendant was told he did not have to speak with Ayala and could leave if he wanted; during the interviews, Defendant had restroom privileges, cigarette breaks,

and was allowed to visit with his family at a nearby picnic table; and at the conclusion of each interview, Defendant was allowed to leave by his own transportation. The trial court concluded Defendant was not in custody at the time of the interviews and had been free to leave, thus "he suffered no constitutional depravation in and by the manner in which th[e] statement was given or taken. And, based on that conclusion, the [trial c]ourt DENIES the Motion to Suppress." With respect to the motion to suppress based on the Vienna Convention, the trial court restated the above findings of facts and made additional findings that:

> Defendant was not detained or under arrest at the time that he made the aforementioned statements, that the provisions of the Vienna Convention were not activated and the law[-] enforcement officers involved with the taking of these several statements were under no obligation to contact the Mexican Consular or anyone else, since he was not placed into custody and detained until the following day after which no statement was made by him to any law[-]enforcement officer that the State intends to introduce[.]

The trial court denied Defendant's motion to suppress based on the Vienna Convention.

On 24 July 2000, Defendant filed a motion to suppress based on newly discovered information along with several supporting affidavits from Defendant's family members stating they did not understand Ayala during his questioning of them. At the hearing on the motion, Defendant argued Ayala's transcription of Defendant's statement was not reliable. Although Defendant had received Ayala's transcription on 13 December 1999, he did not have it interpreted until approximately seven months after receiving it. Other than the affidavits, Defendant presented no evidence to show he did not understand Ayala. The trial court found that there had been no newly discovered evidence which Defendant "couldn't have known about prior to the determination of the previous motion" and denied Defendant's motion.[2]

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2. Defendant assigns error to the trial court's denial of his motion to suppress based on newly discovered evidence. We need not address this issue, however, as Defendant has failed to show that the affidavits included additional information that was not available when he made his first motion. *See* N.C.G.S. § 15A-975(c) (1999); *see also State v. Bracey*, 303 N.C. 112, 124, 277 S.E.2d 390, 397 (1981) (evidence which merely corroborates evidence already before the trial court does not meet the standard set out in section 15A-975(c)).

The trial court appointed Jose Agee Ayala (the interpreter) to interpret the testimony of Spanish-speaking witnesses at trial. The interpreter testified that although he speaks the Puerto Rican dialect of Spanish, he was also able to understand and interpret the Mexican dialect. According to the interpreter, the two dialects were "[a] little" different.

Prior to Ayala testifying at trial, Defendant objected to Ayala's qualifications as an expert interpreter. The trial court ruled that Ayala was not testifying as an interpreter, but merely testifying to what Defendant stated to him. The trial court did, however, state that Defendant could cross-examine Ayala concerning whether or not Ayala understood Defendant. Ayala testified that conservatively speaking, he had engaged in approximately 250-300 interviews in Spanish, and the majority of the people he had interviewed were from Mexico or other points in Central America. Ayala testified he interviewed Defendant on 22 and 23 September 1999 regarding the circumstances surrounding Jasmin's death. During both interviews, Ayala and Defendant understood each other. At some points, Ayala would stop to review what Defendant had said and Defendant always said that Ayala's interpretation was correct. Defendant "spoke what [Ayala] underst[oo]d to be normal Spanish usage." During the second interview, when asked if he felt responsible for Jasmin's death, Defendant told Ayala that he thought his "tossing her into the car seat and rocking her" caused her injuries.

On cross-examination, Ayala testified that in accordance with the SBI policy, he did not have any recordings of the interviews conducted with Defendant. Other than a summary that was dictated almost a month after the interview, Ayala had nothing else to substantiate the interview he had with Defendant. Ayala testified he was not aware that Defendant or his family could not understand him during their interviews, as he felt he understood what they were saying to him.

At the close of the State's evidence, Defendant made a motion to dismiss the charges against him claiming the State failed to meet the material elements of the crimes charged. The trial court denied Defendant's motion.

Defendant testified that in his interview with Ayala, he repeatedly told Ayala he did not shake Jasmin. Throughout his interview, Ayala would tell Defendant he did not believe him, would tell Defendant he was lying, and would attempt to tell Defendant how he had placed

Jasmin in the car seat and rocked her. Although Defendant denied Ayala's version of the events, Ayala was adamant about what had happened and continued to tell Defendant he was lying. On cross-examination, Defendant testified he never told Ayala he threw Jasmin into the car seat or he rocked her hard. At times, Defendant did not understand Ayala and felt as if Ayala was misinterpreting what he said. Defendant did not renew his motion to dismiss at the close of all the evidence.[3]

The trial court instructed the jury on second-degree murder, involuntary manslaughter as a lesser-included offense, felonious child abuse, and misdemeanor child abuse. The jury found Defendant guilty of misdemeanor child abuse and involuntary manslaughter.

The issues are whether: (I) Defendant was detained or in custody for purposes of the Vienna Convention; and (II) Ayala was competent to testify to conversations he had in Spanish with Defendant.

I

[1] Defendant argues his statements should be suppressed as the State "violated the Vienna Convention by not informing [him] that as a foreign national he had the right to speak with a consulate from his home country." We disagree.

Article 36 of the Vienna Convention on Consular Relations requires law-enforcement authorities "to inform detained or arrested foreign nationals that they may have their consulates notified of their status." *United States v. Santos*, 235 F.3d 1105, 1107 (8th Cir. 2000). Article 36 specifically provides if any individual is detained in a foreign state and so requests, the foreign authorities are required to "inform the consular post of" his nation that he is "arrested or committed to prison or to custody pending trial or is detained in any other manner." Vienna Convention on Consular Relations, April 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 100-01. As treaties are contracts between or among independent nations, they generally do not "create rights that are enforceable in the courts," but instead are rights of the sovereign and not the individual. *United States v. Jimenez-Nava*, 243 F.3d 192, 195-96 (5th Cir.), *cert. denied*, — U.S. —, 150 L. Ed. 2d 773 (2001).

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3. Defendant waived his motion to dismiss made at the close of the State's evidence as he presented evidence and then failed to make a motion to dismiss at the close of all the evidence. N.C.R. App. P. 10(b)(3). Thus, we need not address Defendant's argument that the State did not present substantial evidence of each essential element of the charged offenses.

Likewise, the purpose of the Vienna Convention "is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 79 [hereinafter, Preamble]; *see also Jimenez-Nava*, 243 F.3d at 196 (quoting Preamble). Thus, courts reviewing the issue have refused to hold "suppression of evidence is . . . a remedy for an Article 36 violation." *Id.* at 198.

In any event, Defendant was not detained for purposes of Article 36. A person is detained if a reasonable person in the suspect's position would feel there has been a "formal arrest or a restraint on the freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (defining custody), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997); *see also Black's Law Dictionary* 449 (6th ed. 1990) (to detain a person is to "arrest, . . . to delay, to hinder, to hold, or keep in custody"). At the time Defendant was questioned, he was free to go at any time and did in fact leave the interview room to smoke cigarettes, converse with his family, and ultimately leave the police station and return to his home. At no time after Defendant's arrest did law-enforcement authorities interrogate him. Accordingly, any statements received from Defendant were obtained prior to him being detained and prior to him being eligible to any rights under Article 36. Therefore, the trial court did not err in denying Defendant's motion to suppress the statement based on the Vienna Convention.[4]

II

[2] Defendant next argues the trial court erred in allowing Ayala to testify "as interpreter and inves[t]igator, when he was the only witness to statements made by . . . Defendant" and there were no independent interpretations or notes of the interview. We disagree.

Generally, "[e]very person is competent to be a witness," N.C.G.S. § 8C-1, Rule 601(a) (1999), except if he is "incapable of expressing himself concerning the matter as to be understood . . . [or] incapable of understanding the duty of a witness to tell the truth," N.C.G.S. § 8C-1, Rule 601(b) (1999). The requirements are that: the witness is able "to understand and relate, under the obligations of an oath, facts which will assist the jury in determining the truth"; and he

4. Likewise, Defendant was not entitled to Miranda warnings as there was no restraint on Defendant's freedom of movement during either interview.

has "personal knowledge of the matter to which he testifies." *State v. Redd*, 144 N.C. App. 248, 255, 549 S.E.2d 875, 880 (2001); *see State v. Riddick*, 315 N.C. 749, 756-57, 340 S.E.2d 55, 59-60 (1986) (personal knowledge of a witness is established by testimony he heard the defendant make the statements in question). Whether a witness is qualified to testify is "a matter which rests in the sound discretion of the trial court in light of its observation of the particular witness." *Redd*, 144 N.C. App. at 255, 549 S.E.2d at 880.

In this case, we first note Ayala did not testify as an expert, but testified to a conversation he had in Spanish with Defendant. Ayala testified he understood Defendant and what he was saying, and felt as if Defendant understood him. While Ayala admitted there were different accents and idioms in the Spanish spoken by Puerto Ricans versus the Spanish spoken by Mexicans, for the most part the two are very similar. Moreover, Ayala had conducted approximately 250-300 interviews with Spanish-speaking individuals, the majority of whom were from Mexico and other Central American countries. While there were no notes or tape recordings taken contemporaneously with the interviews, it was only necessary Ayala heard Defendant make the statements and had the ability to understand Defendant in order to prove he had personal knowledge of the interviews. *See Riddick*, 315 N.C. at 756-57, 340 S.E.2d at 59-60. Furthermore, Defendant was allowed to cross-examine Ayala concerning whether he understood Defendant and whether Defendant understood him. We note the interpreter at trial was also from Puerto Rico and testified there were no real differences between the two dialects. Accordingly, the question of whether Defendant actually understood Ayala is for the jury to decide and goes to the weight to be accorded this testimony, not is admissibility. Therefore, we cannot say the trial court abused its discretion in allowing Ayala to testify concerning Defendant's statements during the interviews.

No error.

Judges HUNTER and TYSON concur.

WILLIAM CUMMINS, EMPLOYEE-PLAINTIFF-APPELLEE v. BCCI CONSTRUCTION ENTERPRISES, EMPLOYER, AND MICHIGAN MUTUAL INSURANCE COMPANY (AMERISURE), CARRIER, DEFENDANTS-APPELLANTS

No. COA00-1385

(Filed 5 March 2002)

1. Workers' Compensation— appeal to full Commission—new evidence received

The Industrial Commission did not err in a workers' compensation action by receiving medical records where plaintiff gave timely notice of appeal from the deputy commissioner's opinion and award and attached proposed exhibits with a note asking that they be filed and associated with the claim. Even if these differed from the records which had been the subject of an earlier Motion for Reconsideration, the Commission in its discretion could consider additional evidence.

2. Workers' Compensation— deposition—requested late—not significant new evidence

The Industrial Commission did not err in a workers' compensation case by denying defendants' request to depose one of the doctors who had operated on plaintiff's back where the evidence in this doctor's report was merely an update of plaintiff's continued problems for the same injury and not significant new evidence. Furthermore, despite having the medical records for over two years, defendants made no motion to depose this doctor until after the Commission entered its award.

3. Workers' Compensation— disability—release—not unrestricted

The Industrial Commission did not abuse its discretion in a workers' compensation action by awarding plaintiff temporary total disability where one of plaintiff's doctors stated that he released plaintiff with no specific work restrictions other than those his symptoms dictated. This is not an unrestricted work release and does not rebut the presumption of disability.

4. Workers' Compensation— finding of no evidence—explanation not required

The Industrial Commission did not abuse its discretion in a workers' compensation case by finding that there was no evidence that an increase in plaintiff's symptoms following his rak-

ing his yard was the result of an independent intervening cause attributable to his own intentional conduct. There is no reason the Commission should be required to unnecessarily explain why it found no evidence of an intervening cause.

Appeal by defendants from Opinion and Award entered 16 June 2000 and Order entered 4 August 2000 by the Full Commission in the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 2001.

Tania L. Leon, P.A., by Tania L. Leon for plaintiff-appellee.

Mark D. Gustafson for defendants-appellants.

BRYANT, Judge.

Plaintiff William Cummins injured his back in August 1995 while setting steel columns for his employer, BCCI Construction. Plaintiff sought treatment and later attempted to return to work on a trial basis. He was unable to do so because of pain. In November 1995, plaintiff hurt his back again while raking leaves. A CT and myelogram revealed a herniated disk. Plaintiff underwent surgery performed by Dr. Samuel Chewning of the Miller Orthopaedic Clinic in January 1996, but continued to have recurrent hip and leg pain. Dr. Chewning released plaintiff to work with restrictions not to lift anything over twenty pounds. Plaintiff continued to experience pain, and sought treatment from several other doctors, including Dr. Brigham of the Miller Orthopaedic Clinic, whom he first saw on 13 March 1997. On 15 April 1997, plaintiff allowed Dr. Brigham to perform the same type of surgical procedure—decompression and microdisectomy—as was performed in January 1996. Thereafter, Dr. Brigham diagnosed plaintiff with a recurrent herniated disk.

Plaintiff requested a hearing before the Industrial Commission after his claim for work-related back injury was denied. A hearing was held on 9 January 1997. At the request of both parties the deputy commissioner extended the time for completing medical depositions and for submission of medical records. The deputy commissioner granted another extension of time at defendants' request. Defendants thereafter deposed Dr. Chewning. When the deputy commissioner ordered that the record be closed on 24 March 1997, plaintiff moved for reconsideration. The motion included a request that two of the previously stipulated exhibits (Exhibits 4 and 5) regarding treatment

records of Doctors Brigham and Metcalf[1] be supplemented with more current records, or, in the alternative, that the two physicians be deposed. Defendants opposed the admission of the records on the ground that the records covered treatment provided after the hearing and opposed the taking of depositions on the ground that they were not timely. The deputy commissioner denied plaintiff's motion for reconsideration. The deputy commissioner filed an Opinion and Award on 31 December 1997, granting plaintiff: 1) temporary total disability compensation at $360 per week beginning 22 August 1995 to 10 November 1995; 2) medical expenses; 3) attorney fees at twenty-five percent of compensation due plaintiff; and 4) an expert witness fee in the amount of $215 to Dr. Chewning.

Plaintiff appealed to the Full Commission [Commission], requesting a review of, inter alia, the deputy commissioner's denial of his motion for reconsideration (to submit the updated medical records evidence). On 16 June 2000, the Commission filed an Opinion and Award. The Order of the Full Commission reversed the deputy commissioner's exclusion of the exhibits, and found that plaintiff was entitled to ongoing total disability compensation from the time of the injury in August 1995 to the time when plaintiff returned to work. Defendants filed a Motion for Reconsideration and to Reopen the Record with the Commission on 19 July 2000. The Commission filed an Order on 4 August 2000 denying in part and granting in part defendants' motion for reconsideration. Defendants filed Notice of Appeal from the Commission's 16 June 2000 Opinion and Award and its 4 August 2000 Order.

Defendants present four arguments stating the Commission erred in: 1) considering plaintiff's "Proposed Exhibits 4 and 5," attached to plaintiff's Contentions to the deputy commissioner and plaintiff's Brief to the Full Commission; 2) denying defendants' request in its 19 July 2000 motion for reconsideration to depose Dr. Brigham; 3) awarding plaintiff temporary total disability compensation through the filing date of the Full Commission's Opinion and Award and continuing until he returns to work or until further order of the Commission; and 4) its interpretation and application of the principles set forth in *Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 459 S.E.2d 797 (1995).

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1. Dr. Michael Metcalf (Carolina Health Care Group) treated plaintiff from December 1996 to March 1997.

The Workers' Compensation Act is to be liberally construed to achieve its purpose, namely, to provide compensation to employees injured during the course and within the scope of their employment. *Lynch v. M. B. Kahn Constr. Co.*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238 (1979). When reviewing decisions by the Industrial Commission, the Court of Appeals is limited to determining whether there is *any* competent evidence to support the Commission's findings, and whether the findings support the Commission's legal conclusions. *Watson v. Winston-Salem Transit Auth.*, 92 N.C. App. 473, 374 S.E.2d 483 (1988). Findings of fact are conclusive on appeal when supported by competent evidence. *Keel v. H & V Inc.*, 107 N.C. App. 536, 421 S.E.2d 362 (1992). The Commission may receive additional evidence on appeal

> [i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]

N.C. Gen. Stat. § 97-85 (1999). The Commission has plenary power to receive additional evidence, and may do so at its sound discretion. *Keel*, 107 N.C. App. at 542, 421 S.E.2d at 366. Furthermore, "[w]hether such good ground has been shown is discretionary and 'will not be reviewed on appeal absent a showing of manifest abuse of discretion.' " *Id.* at 542, 421 S.E.2d at 367 (quoting *Lynch v. M. B. Kahn Constr. Co.*, 41 N.C. App. 127, 131, 254 S.E.2d 236, 238 (1979)). The Commission, when reviewing an award by a deputy commissioner, may receive additional evidence, even if it was not newly discovered evidence. *Id.* Finally, the Commission may waive its own rules in the interest of justice. Workers' Comp. R. of N.C. Indus. Comm'n 801, 2000 Ann. R. (N.C.).

I.

[1] Defendants first argue that the Full Commission erred in holding plaintiff's Proposed Exhibits 4 and 5 admissible because: 1) the medical records plaintiff labeled "Proposed Exhibits 4 and 5" and attached to his 2 April 1997 Motion for Reconsideration of the 24 March 1997 Order were not the same medical records that were labeled "Plaintiff's Proposed Exhibit 4 and 5" and attached to his 31 August 1997 Contentions; and 2) plaintiff failed to file a Motion to

Supplement when he filed his Contentions with the deputy commissioner. We disagree.

Plaintiff was required to give notice of appeal to the Commission within fifteen days of the date of notice of the award. N.C. Gen. Stat. § 97-85. If properly given, the Full Commission could review the evidence or receive further evidence. *Id.* Here, the deputy commissioner issued an Opinion and Award on 31 December 1997. Plaintiff gave notice of appeal on 6 January 1998. This was properly within the fifteen-day filing period. Plaintiff attached Proposed Exhibits 4 and 5 to the Notice of Appeal, and included a notation to "[p]lease file and associate this document with the above claim." Therefore, even if the medical records in plaintiff's Motion for Reconsideration differed from those in his Contentions, the Commission in its discretion could properly consider additional evidence. The record on appeal before this Court indicates that the proposed exhibits were submitted to the deputy commissioner "for submission into the record." Furthermore, the Commission stated in its Evidentiary Rulings that the "plaintiff filed a Motion to Supplement the stipulated medical records with Plaintiff's Exhibit (4), consisting of eight pages of records from the Miller Orthopedic Clinic and Plaintiff's Exhibit (5), consisting of five pages of physical therapy records." We find that this is competent evidence properly received and sufficient to uphold the Commission's findings. Therefore, defendants' first assignment of error is overruled.

II.

[2] Defendants next argue that the Commission erred in denying defendants' request to depose Dr. Brigham. We disagree. Defendants argue that plaintiff's Exhibits 4 and 5 were new evidence; thus, defendants should have been given the opportunity to depose Dr. Brigham. Defendants rely on *Allen v. K-Mart*, 137 N.C. App. 298, 528 S.E.2d 60 (2000). In *Allen*, plaintiff pulled a muscle in her left side while handling a box at work. She went to an urgent care clinic, where she was diagnosed with a left shoulder strain. Plaintiff continued to experience pain, and was referred to an orthopaedic surgeon. The orthopaedic surgeon could not find a physiological basis for plaintiff's continued problems, but conducted tests anyway. All tests were normal. Plaintiff's family physician eventually diagnosed plaintiff with fibromyalgia. Plaintiff sought to admit evidence of independent medical examinations by a psychiatrist and a physician with experience in diagnosing and treating fibromyalgia. Defendants objected at least five times, but the Commission failed to respond. The

Commission finally ruled against defendants after issuing its Opinion and Award in plaintiff's favor. The Court of Appeals reversed, holding that the Commission abused its discretion by allowing significant new evidence, and that the Commission's untimely ruling on the motion effectively denied defendants due process because they did not have the ability to discredit the doctors' testimony.

We do not find *Allen* to be on point. In *Allen*, the employee attempted to submit evidence of independent medical examinations by a psychiatrist and a physician with experience in diagnosing and treating *fibromyalgia*. The employee did not consult a fibromyalgia specialist prior to the hearing before the deputy commissioner. In the case at bar, on the other hand, Dr. Brigham was Dr. Chewning's partner at Miller Orthopaedic Clinic. Dr. Chewning referred plaintiff to Dr. Hartman, also of Miller Orthopaedic Clinic, who in turn referred plaintiff to Dr. Brigham for the same pain he had prior to the January 1996 surgery performed by Dr. Chewning. Evidence of Dr. Brigham's report is merely an update of plaintiff's continued problems for the same injury. Thus, it is not "significant new evidence" as in *Allen*. Further, the record reveals that defendants opposed plaintiffs' offer to depose Dr. Brigham made as early as April 1997. Despite having Dr. Brigham's medical records for over two years, defendants made no motion to depose Dr. Brigham until after the Full Commission entered its Award on 16 June 2000. Thereafter, the Commission promptly and timely ruled on defendants' motion in their Order entered 4 August 2000. For these reasons, we hold *Allen* to be inapposite to the facts in ths case, and further hold that the Commission did not manifestly abuse its discretion by denying defendants' Motion for Reconsideration.

III.

[3] Defendants next argue that the Commission erred as a matter of law in awarding plaintiff temporary total disability compensation through the filing date of the Full Commission's Opinion and Award and continuing. Again, we disagree. The plaintiff has the initial burden of proving the extent and degree of a disability. *Simmons v. Kroger Co.*, 117 N.C. App. 440, 441, 451 S.E.2d 12, 13 (1994). Once the plaintiff has met this burden, the burden shifts to the defendants to show that the plaintiff is employable. *Id.* at 444, 451 S.E.2d at 15. To meet this burden, the defendants must produce evidence that: 1) there are suitable and available jobs; and 2) the plaintiff is capable of performing these jobs, considering the plaintiff's physical and voca-

tional limitations. *Id.* " '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), (alteration in original) (quoting *Watkins v. Central Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971)).

In this case, defendants argue that a release by a doctor is sufficient to rebut the presumption of a disability. Defendants cite to the dissent in *Harrington v. Adams-Robinson Enters.*, 128 N.C. App. 496, 500, 495 S.E.2d 377, 380 (1998). In *Harrington*, three doctors released the plaintiff to return to work without restriction. This Court held that a release is insufficient to rebut the presumption of a disability. Our Supreme Court reversed for the reasons stated in the Court of Appeals's dissenting opinion. *Harrington v. Adams-Robinson Enters.*, 349 N.C. 218, 504 S.E.2d 786, *rev'g Harrington v. Adams-Robinson Enters.*, 128 N.C. App. 496, 495 S.E.2d 377 (1998). In his dissent, Judge Walker stated that the defendants rebutted the presumption through medical *and other evidence*, which included findings by the Commission that the plaintiff had been released to return to unrestricted work, that the plaintiff did not apply for work, and that the defendants filed for and were granted a Form 24 Application. Further, the dissent acknowledged the deputy commissioner's finding that "plaintiff's testimony as to continuing pain was not credible." *Harrington v. Adams-Robinson Enters.*, 128 N.C. App. 496, 500, 495 S.E.2d 377, 380 (1998). *Harrington* is distinguishable. In the present case, Dr. Brigham stated that he released plaintiff with "no *specific* work restrictions" (emphasis added), but that plaintiff was discharged "with the only activity restriction being that which [Plaintiff's] symptoms would dictate." This is not an "unrestricted work" release, nor is there other evidence to rebut the presumption of disability. Therefore, *Harrington* does not control and the Commission did not manifestly abuse its discretion in concluding that defendants failed to rebut the presumption of disability.

IV.

[4] In defendants' last assignment of error they argue that the Commission improperly interpreted and applied the principles set forth in *Horne v. Universal Leaf Tobacco Processors*, 119 N.C. App. 682, 459 S.E.2d 797 (1995). We disagree. In *Horne*, the plaintiff injured his back while removing tobacco from a conveyor line. Over a year

later, the plaintiff underwent surgery again to have a recurrent ruptured disk removed. A few months later, the plaintiff was involved in a car accident. A doctor who treated the plaintiff testified that the car accident worsened the plaintiff's abnormal disk. The deputy commissioner found that the car accident was an independent, intervening cause, and the Full Commission affirmed. This Court reversed, holding that the Commission erred in finding that the plaintiff would have reached maximum medical improvement absent the car accident because there was no evidence that the plaintiff completely improved, nor that his condition completely stabilized. *Id.* at 688, 459 S.E.2d at 801.

In the case at bar, the Commission concluded that "[t]here is no evidence that the increase in plaintiff's symptoms following the raking incident on or about 21 November 1995 was the result of an independent intervening cause attributable to plaintiff's own intentional conduct." This finding is sufficient. As we stated above, the Commission's powers to review the award are plenary and are to be exercised at the Commission's sound discretion. The Commission is not required to make specific findings of fact. *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992). The Commission stated that it found no evidence of an intervening cause. We see no reason why the Commission should be required to unnecessarily explain why it found *no* evidence. Thus, the Commission did not manifestly abuse its discretion.

V.

For the reasons stated above, we hold that the Commission did not err in reversing the decision of the deputy commissioner. Accordingly, we affirm.

Affirmed.

Judges WYNN and McCULLOUGH concur.

TINA KELLY, PLAINTIFF v. CARTERET COUNTY BOARD OF EDUCATION, DAVID LENKER, JR., RENEE NEWMAN, JOHN WELMERS, DEFENDANTS

No. COA01-468

(Filed 5 March 2002)

Employer and Employee; Schools— assistant teacher—wrongful discharge—disability discrimination—abandonment of claim—insufficient allegations of public policy violation

The gravamen of plaintiff assistant teacher's complaint against defendant board of education for wrongful termination based on her inability to drive a school bus due to a seizure disorder was an employment discrimination claim under N.C.G.S. § 168-1 et seq., not a claim for wrongful termination in violation of public policy to ensure the safety of persons and property, and the complaint was properly dismissed because plaintiff specifically abandoned her disability discrimination claim, where there were no allegations to support an inference that defendant board wanted plaintiff to drive a school bus after learning of her seizure disorder, plaintiff's allegations show that the board gave plaintiff only the choice to resign or be terminated, and plaintiff's complaint was thus based on her disability condition and not on her refusal to violate public policy.

Judge HUNTER dissenting.

Appeal by plaintiff from order filed 19 January 2001 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 22 January 2002.

Ralph T. Bryant, Jr., P.A., by Ralph T. Bryant, Jr., for plaintiff-appellant.

Kirkman, Whitford & Brady, P.A., by Neil B. Whitford, for defendant-appellees.

GREENE, Judge.

Tina Kelly (Plaintiff) appeals an order filed 19 January 2001 granting a motion to dismiss in favor of Carteret County Board of Education, David Lenker, Jr., Renee Newman, and John Welmers (collectively, Defendants).

Plaintiff filed a complaint on 19 April 2000 alleging she was employed in the Carteret County School System as an assistant

teacher at White Oak Elementary School (the School) from 14 January 1997 until 18 August 1997. On 18 August 1997, Plaintiff submitted to the School a letter from her physician stating that due to a seizure disorder and other medical conditions, Plaintiff should not be driving a school bus. Plaintiff alleged that if she "were to drive a school bus, it would jeopardize the safety of persons and property on or near the public highways." On 19 August 1997, the School informed Plaintiff that "because of her unwillingness and inability to drive a school bus[,] she had one hour to either resign or be terminated." Plaintiff was terminated from her position on 19 August 1997. Plaintiff's complaint also alleges she was wrongfully terminated in violation of the public policy of North Carolina that "all people . . . hold employment without discrimination on the bases of handicap or disability" and "that the safety of persons and property on or near the public highways be protected."[1]

Defendants filed a motion to dismiss Plaintiff's complaint on 7 July 2000, arguing: they were immune from Plaintiff's suit under the doctrine of public official immunity; the gravamen of Plaintiff's complaint falls "within the purview of the North Carolina Persons with Disabilities Protection Act codified at G.S. 168A-1, et[.] seq.[, thus] . . . Plaintiff's claim is time barred by the applicable statute of limitations set forth in [that] Act"; and "no cause of action for wrongful discharge exists when an employee is terminated for failure to perform an act which he may be able to prove was unsafe."

In its order granting Defendants' motion to dismiss Plaintiff's complaint, the trial court concluded:

> all the allegations forming the gravamen of [P]laintiff's complaint fall within the scope of the North Carolina Persons With Disabilities Protection Act codified at G.S. 168A-1 et. seq. and that within this Act at G.S. 168A-12 is a 180[-]day statute of limitation[s] applicable to [P]laintiff's complaint. The [trial] court concludes that [P]laintiff's complaint is barred by this statute of limitations.

The dispositive issue is whether "all the allegations forming the gravamen of Plaintiff's complaint fall" within the scope of a disability discrimination claim.

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1. In her brief to this Court, Plaintiff has expressly abandoned her disability discrimination claim and only appeals the trial court's dismissal of her claim for wrongful termination in violation of the public policy of North Carolina to protect the safety of persons and property.

The "gravamen" of a complaint is its "material part" or "the grievance or injury specially complained of." *Black's Law Dictionary* 701 (6th ed. 1990). The injury complained of in an employment disability discrimination claim is that the employee was terminated "on the basis of a disabling condition." N.C.G.S. § 168A-5(a)(1) (1999). In the context of a claim for wrongful termination in violation of public policy, the injury specially complained of is that an employee was terminated for refusing to perform an act which would violate public policy after being requested to do so. *See Coman v. Thomas Manufg. Co., Inc.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (a cause of action exists for wrongful discharge for refusal to violate public policy).

In this case, Plaintiff's allegations only complain of an injury based on her disabling condition. Although Plaintiff argues her complaint sets forth a claim for relief based on the public policy of North Carolina to ensure the safety of persons and property, there are no allegations to support an inference that Defendants wanted Plaintiff to drive a school bus after learning of her seizure disorder. There is no indication from Plaintiff's complaint that after informing the School of her medical condition, the School either implicitly or explicitly gave her a choice to drive the school bus or be terminated. Indeed, Plaintiff's allegations show that after learning of the disorder, Plaintiff's only choice was to either resign or be terminated. All of Plaintiff's allegations relate to her termination by the School based on her inability to drive a school bus due to her seizure disorder. Accordingly, as the "gravamen" of Plaintiff's complaint is based on her disabling condition, and not on her refusal to violate public policy, Plaintiff's complaint only sets forth an injury based on a discrimination claim. Thus, as we conclude the allegations forming the gravamen of Plaintiff's complaint are within the scope of a discrimination claim and Plaintiff has expressly abandoned her disability discrimination claim, this appeal is dismissed.[2]

Dismissed.

Judge TYSON concurs.

Judge HUNTER dissents.

2. Accordingly, as Plaintiff "does not address the issue of whether a wrongful discharge claim based on disability has a six-month statute of limitations" and she has expressly abandoned her discrimination claim, we need not address the applicable statute of limitations to the discrimination claim as brought by Plaintiff.

HUNTER, Judge, dissenting.

The majority holds that the allegations in plaintiff's complaint are not sufficient to state a claim for wrongful discharge in violation of public policy. Because I disagree, I respectfully dissent.

> The essential question in reviewing the grant of a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1 (1999) Rule 12(b)(6) is whether, "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." A motion to dismiss pursuant to Rule 12(b)(6) should not be granted " '*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' "

Considine v. Compass Grp. USA, Inc., 145 N.C. App. 314, 316-17, 551 S.E.2d 179, 181, *affirmed*, 354 N.C. 568, 557 S.E.2d 528 (2001) (citations omitted). Furthermore,

> [i]n reviewing a dismissal of a complaint for failure to state a claim, the appellate court must determine whether the complaint alleges the substantive elements of a legally recognized claim and whether it gives sufficient notice of the events which produced the claim to enable the adverse party to prepare for trial.

Peoples Security Life Ins. Co. v. Hooks, 322 N.C. 216, 218, 367 S.E.2d 647, 648-49 (1988).

The Courts of this state have recognized an exception to the employment at will doctrine by identifying a cause of action for wrongful discharge in violation of public policy. *See Considine*, 145 N.C. App. at 317, 551 S.E.2d at 181. The public policy exception to the employment at will doctrine is "designed to vindicate the rights of employees fired for reasons offensive to the public policy of this State." *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 356, 416 S.E.2d 166, 171 (1992). In order to state a claim for wrongful discharge in violation of public policy, an employee has the burden of pleading that her "dismissal occurred for a reason that violates public policy." *Considine*, 145 N.C. App. at 317, 551 S.E.2d at 181. The following allegations have been held to be sufficient to state a claim for wrongful discharge in violation of public policy: (1) that the employee was wrongfully discharged in retaliation for refusing to testify falsely in a medical malpractice case, *see Sides v. Duke University*, 74 N.C. App. 331, 335, 328 S.E.2d 818, 822, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985), *overruled in part on other grounds*, *Kurtzman v.*

Applied Analytical Industries, Inc., 347 N.C. 329, 493 S.E.2d 420 (1997); (2) that the employee was discharged for refusing to comply with his employer's demand that he continue to operate a commercial vehicle for periods of time that violated federal regulations, *see Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 173, 381 S.E.2d 445, 446 (1989); and (3) that the employee was discharged for refusing to work for less than the statutory minimum wage, *see Amos*, 331 N.C. at 350, 416 S.E.2d at 168.

Here, plaintiff's complaint sets forth the following factual allegations: that plaintiff was employed by defendant as an assistant teacher; that plaintiff suffers from a seizure disorder; that plaintiff informed defendant "that she would not be a school bus driver due to a seizure disorder and other medical related conditions that impair her ability to safely operate a school bus"; and that one day later, defendant terminated plaintiff and told her that it was because of her "unwillingness" to drive a school bus. Plaintiff's complaint also sets forth the following claim for relief:

> 19. The termination of the plaintiff contravenes and violates the public policy of the state of North Carolina that the safety of persons and property on or near the public highways be protected. . . .
>
> 20. Plaintiff was faced with the dilemma of violating that public policy, i.e., driving a school bus and endangering the lives of the students and traveling public, or complying with the public policy and being fired from her employment. Her termination therefore constitutes wrongful discharge in violation of this public policy.

Without citing any authority, the majority holds that plaintiff's complaint fails to state a claim for wrongful discharge in violation of public policy because "[t]here is no indication from Plaintiff's complaint that after informing the School of her medical condition, the School either implicitly or explicitly gave her a choice to drive the school bus or be terminated." I disagree. I would hold that the allegations in plaintiff's complaint, treated as true, are sufficient to state a claim for wrongful discharge in violation of public policy.

A Rule 12(b)(6) motion to dismiss for failure to state a claim is the modern equivalent of a demurrer. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). "A demurrer tests the sufficiency of a pleading, admitting, for that purpose, the truth of factual averments well stated

and such relevant inferences of fact as may be deduced therefrom. When pleadings are thus challenged *they are to be liberally construed with a view to substantial justice between the parties.*" *Machine Co. v. Newman*, 275 N.C. 189, 194, 166 S.E.2d 63, 66 (1969) (emphasis added). Considering plaintiff's allegations and the logical inferences arising therefrom, and construing the complaint liberally, I simply cannot agree with the majority that plaintiff has failed to state a claim for wrongful discharge in violation of public policy.

The case law does not support the proposition that in order to state a claim for wrongful discharge in violation of public policy, the employee must allege that the employer, first, demanded that the employee engage in the conduct in question, and that, only after such demand, the employee expressly refused to comply and was therefore fired. In the real world, such a blueprint of neatly severable events unfolding in a particular order is simply unrealistic. For example, it is not difficult to imagine that plaintiff may have *simultaneously* (1) informed defendant about her seizure disorder and (2) made it known that she would not be willing to drive a school bus because of her disorder. Perhaps plaintiff was confident that her employer would demand that she drive a school bus despite her seizure disorder, and she wanted to make her position on the matter immediately clear. Under such perfectly plausible circumstances, there would have been no reason for the employer to then demand that she drive the school bus, as plaintiff had already made it clear that she would not do so.

I believe that where an employee is forced to choose between being terminated or engaging in conduct which would violate public policy, and where the employer, in fact, discharges the employee for refusing to engage in the conduct in question, that employer has committed the tort of wrongful discharge in violation of public policy. I further believe that plaintiff's complaint alleges all of the substantive elements of a claim for wrongful discharge in violation of public policy, and gives sufficient notice of the events which produced the claim to enable defendant to present any defense and to prepare for trial. Because we must liberally construe plaintiff's complaint with a view to substantial justice between the parties, I cannot concur that plaintiff has failed to state a claim for wrongful discharge in violation of public policy.

Moreover, I would reverse the trial court's order because I do not believe that the claim in question is subject to the 180-day statute of limitations in the North Carolina Persons With Disabilities Protection

Act (the "NCPDPA"). The claim in question is a common law wrongful discharge claim and is subject to a three-year statute of limitations pursuant to N.C. Gen. Stat. § 1-52(5) (1999). *See Renegar v. R.J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 79, 549 S.E.2d 227, 229, *disc. review denied*, 354 N.C. 220, 554 S.E.2d 344 (2001). Plaintiff's claim was filed within three years of the date of her termination. It would be both contrary to established law, and ultimately ironic, to hold that plaintiff's wrongful discharge claim is barred by the statute of limitations in the NCPDPA because, unfortunately for her, her claim happens to involve the fact that she suffers from a disorder that would qualify as a "disabling condition" under the NCPDPA. *See Simmons v. Chemol Corp.*, 137 N.C. App. 319, 323, 528 S.E.2d 368, 371 (2000) (holding provisions of NCHPPA—now retitled NCPDPA—not applicable to wrongful discharge in violation of public policy claim, even where claim is based upon allegation that plaintiff was terminated because of disability); N.C. Gen. Stat. § 168A-2 (1999) (stating that the NCPDPA seeks to protect disabled individuals from discrimination based upon their disability).

I would reverse the trial court's order granting defendant's motion to dismiss because (1) I believe the allegations in the complaint are sufficient to state a claim for wrongful discharge in violation of public policy, and because (2) I believe that the trial court erred in ruling that plaintiff's claim is barred by the statute of limitations in the NCPDPA.

For the reasons set forth herein, I dissent.

DAVID CHARLES GAGNON, PLAINTIFF v. CECELIA ROTHWELL GAGNON, DEFENDANT

No. COA01-119

(Filed 5 March 2002)

1. Divorce— equitable distribution—military retirement benefits

The trial court did not abuse its discretion in an equitable distribution case by awarding defendant wife twenty-six percent of plaintiff husband's military retirement benefits, because: (1) plaintiff's retirement benefits vested approximately five months before the parties separated; and (2) the trial court correctly

determined that plaintiff served in the army for approximately ten years while he was married and compared this length of time to plaintiff's total number of years in the military.

2. Appeal and Error— preservation of issues—failure to file notice of appeal

Although defendant wife contends the trial court erred in an equitable distribution case by considering plaintiff husband's postseparation payment of defendant's college expenses as a factor in the equitable distribution calculations, defendant failed to file a notice of appeal concerning this alleged error as required by N.C. R. App. P. 3(a).

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff from order entered 24 October 2000 by Judge Karen Alexander in Carteret County District Court. Heard in the Court of Appeals 28 November 2001.

Andrew A. Lassiter for plaintiff appellant.

James Q. Wallace, III, for defendant appellee.

TIMMONS-GOODSON, Judge.

David Charles Gagnon ("plaintiff") appeals from the equitable distribution order by the trial court granting plaintiff's former wife, Cecelia Rothwell Gagnon ("defendant"), a twenty-six percent share of plaintiff's military retirement benefits. For the reasons stated herein, we affirm the trial court.

The facts pertinent to the instant appeal are as follows: On 18 November 1997, plaintiff filed a complaint in Carteret County District Court seeking a divorce from bed and board and equitable distribution of the marital assets. On 9 May 2000, the trial court entered a consent order distributing a portion of the marital assets. The consent order reserved for further consideration two contested issues between the parties, one of which was the division of plaintiff's military retirement benefits. These outstanding issues subsequently came before the trial court, which made the following relevant factual findings:

11. The parties were married to each other on October 5, 1975.

12. The parties separated from each other on February 1, 1997.

. . . .

15. The Plaintiff testified concerning the dates and activity of his military career. He first enlisted in the United States Army on December 27, 1965 and served nine (9) years, nine (9) months and four (4) days until September 30, 1975 when he was discharged at a rank of Captain.

. . . .

17. On July 19, 1976, the Plaintiff reenlisted in the United States Army at a rank of E-5 (Sergeant) and he served ten (10) years, three (3) months and twelve (12) days until he was discharged on October 31, 1986 at a rank of Sergeant 1st Class.

18. In November of 1986, the Plaintiff began receiving his military retirement money on a monthly basis. This retirement was based on a rank of Sergeant and not as Captain because his earlier enlistment was less than ten (10) years.

19. On September 30, 1996, the Plaintiff received an increase in his retirement pay which was an increase based on the fact that he had twenty (20) years of service plus ten (10) years of retirement. This increased pay raised the Plaintiff's retirement benefit up to a sum equaling a Captain's retirement pay.

Based on the above-stated dates, the trial court further found that "the Defendant was married to the Plaintiff 51.25 percent of the time in which he was in the military service accruing his military retirement pay." The trial court therefore concluded, *inter alia*, that "the Defendant is entitled to a Twenty-Six Percent (26%) share of the Plaintiff's military retirement." The trial court thereafter entered an order awarding defendant a twenty-six percent share of plaintiff's military retirement benefits, from which order plaintiff now appeals.

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[1] The sole issue on appeal is whether the trial court erred by awarding defendant a twenty-six percent share of plaintiff's military retirement benefits. For the reasons stated herein, we affirm the trial court.

Plaintiff argues that the trial court improperly awarded defendant a portion of the benefits he earned prior to entering the marriage. Plaintiff asserts that benefits attributable to his first period of military

service were not built upon a foundation of marital effort by defendant. Thus, plaintiff argues, the 30 September 1996 retirement pay increase to the rank of Captain was a statutory increase due to the passage of years based on a period of time during which plaintiff was not married. Plaintiff acknowledges that these benefits vested during the marriage, but contends that it is unjust to allow defendant to share in this portion of plaintiff's retirement benefits, and that her share should be confined to benefits earned by plaintiff during his second period of active service in which the marriage overlapped.

The division of marital property is a matter within the sound discretion of the trial court. *See Johnson v. Johnson*, 78 N.C. App. 787, 790, 338 S.E.2d 567, 569-70 (1986). Accordingly, a trial court's ruling in an equitable distribution award is entitled to great deference upon appellate review, and will be disturbed only if it is "so arbitrary that [it] could not have been the result of a reasoned decision." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986).

Section 50-20 of the General Statutes of North Carolina governs the distribution of marital and divisible property upon divorce. "Marital property includes **all** vested and nonvested pension, retirement, and other deferred compensation rights, and **vested and nonvested military pensions** eligible under the federal Uniformed Services Former Spouses' Protection Act." N.C. Gen. Stat. § 50-20(b)(1) (1999) (emphasis added). A pension "vests" when " 'an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future.' " *George v. George*, 115 N.C. App. 387, 389, 444 S.E.2d 449, 450 (1994) (quoting *Milam v. Milam*, 92 N.C. App. 105, 107, 373 S.E.2d 459, 460 (1988), *disc. review denied*, 324 N.C. 247, 377 S.E.2d 755 (1989)), *cert. denied*, 342 N.C. 192, 463 S.E.2d 236 (1995). In the case at bar, there is no dispute that plaintiff's retirement benefits vested on 30 September 1996, approximately five months before the parties separated. Moreover, according to section 50-20.1 of the North Carolina General Statutes, an award of retirement benefits is

> determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. The award shall be based on the vested and nonvested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include con-

> tributions, years of service, or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation.

N.C. Gen. Stat. § 50-20.1 (d) (1999). Such retirement benefits include "vested and nonvested military pensions." N.C. Gen. Stat. § 50-20.1 (h) (1999). The valuation method prescribed by section 50-20.1(d), known as the "fixed percentage method," can be expressed as a fraction, the numerator of which "is the total period of time the marriage existed (up to the date of separation) simultaneously with the employment which earned the vested pension or retirement rights[,]" with the denominator being "the total amount of time the employee spouse is employed in the job which earned the vested pension or retirement rights." *Lewis v. Lewis*, 83 N.C. App. 438, 442-43, 350 S.E.2d 587, 589 (1986); *see also Seifert v. Seifert*, 82 N.C. App. 329, 337, 346 S.E.2d 504, 508 (1986) (approving the fixed percentage method for distribution of military retirement benefits), *affirmed*, 319 N.C. 367, 354 S.E.2d 506 (1987).

Following the statutory provisions, the trial court in the instant case correctly determined that plaintiff served in the Army for approximately ten years while he was married. Comparing this length of time to plaintiff's total number of years in the military (twenty), the trial court valued the percentage of time during the marriage in which plaintiff was accruing military retirement benefits as 51.25 percent. As plaintiff's benefits vested before the date of separation, the trial court did not err in including such benefits in the above-stated calculations. *See Atkinson v. Chandler*, 130 N.C. App. 561, 563-65, 504 S.E.2d 94, 95-97 (1998) (approving the trial court's utilization of the fixed percentage method for equitable distribution of plaintiff-wife's military retirement benefits that vested during the marriage, although the majority of the benefits were earned prior to the parties' marriage). We therefore hold that the trial court properly awarded defendant a twenty-six percent share of plaintiff's retirement benefits.[1]

[2] Defendant also argues the trial court erred in considering plaintiff's post-separation payment of defendant's college expenses as a factor in the equitable distribution calculations. Defendant filed no

1. We acknowledge that the precisely equal division of 51.25 is 25.625 percent, rather than 26 percent as found by the trial court, but we conclude that it was within the trial court's discretion to mathematically "round up" the uneven figure of 25.625 percent to an even 26 percent.

notice of appeal concerning this alleged error, however, and has therefore failed to comply with Rule 3(a) of the Rules of Appellate Procedure. *See* N.C.R. App. P. 3(a) (2001) (requiring a party to file a notice of appeal with the clerk of the superior court). We therefore do not address defendant's assignment of error.

We hold that the trial court did not err in its equitable distribution award. We therefore affirm the trial court's order awarding defendant twenty-six percent of plaintiff's military retirement benefits.

Affirmed.

Judge HUDSON concurs.

Judge TYSON concurs in part and dissents in part.

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

I concur with the majority's opinion that defendant is entitled to a percentage of plaintiff's entire military pension. The parties were married at the time the pension vested. N.C. Gen. Stat. § 50-20.1(d) (1997) ("The award shall include gains and losses on the prorated portion of benefit vested at the date of separation"). I do not agree with the majority's holding "that the trial court properly awarded defendant a twenty-six percent share of plaintiff's retirement benefits," nor do I concur with footnote 1 in the opinion giving the trial court authority to "round-up" numbers.

The trial court found as fact that plaintiff and defendant were married for 51.25 percent of the time plaintiff served in the military. The trial court's conclusion of law awarding defendant 26% is not supported by its finding of fact that defendant was married to plaintiff for 51.25% of his military service. G.S. § 20(c) requires "an equal distribution . . . unless the court determines an equal distribution is not equitable." N.C. Gen. Stat. § 20(c) (1995); *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1995). The trial court must make findings of fact to support an unequal distribution. *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 775-76 (1984). The trial court made none.

I would remand to the trial court to amend and conform its order and judgment to its findings of fact. The majority cites no authority under G.S. § 50-20 granting the trial court discretion to round up frac-

tional numbers. Defendant was entitled to a 25.625% distribution, not 26%. I respectfully dissent.

STATE OF NORTH CAROLINA v. JERMAINE CHADWICK

No. COA01-4

(Filed 5 March 2002)

Search and Seizure— tip—crime in progress—probable cause to arrest

The trial court improperly granted a motion to suppress narcotics where an officer received detailed information from a known and reliable informant indicating that defendant would be delivering a large amount of cocaine to a specific location; surveillance was set up; and officers independently corroborated the information given by the known informant with particularity. The circumstances established sufficient indicia of reliability that defendant was engaged in criminal activity to give officers probable cause to seize and arrest defendant. An officer may conduct a warrantless search incident to a lawful arrest; the large quantity of cocaine found on defendant was unnecessary to establish probable cause to arrest.

Appeal by the State from order entered 9 October 2000 by Judge W. Allen Cobb, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 29 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General William P. Hart and Assistant Attorney General Christopher W. Brooks, for the State.

John W. Ceruzzi, for defendant-appellee.

TYSON, Judge.

The State of North Carolina appeals the trial court's order granting defendant's motion to suppress evidence. We reverse the trial court's order.

I. Facts

Deputy Kirk Newkirk ("Deputy Newkirk") received a page from a known informant at 12:30 a.m. on 16 December 1999 and returned the call. The informant advised Deputy Newkirk that someone known as "Breeze," later identified as Jermaine Chadwick ("defendant"), would deliver large amounts of cocaine to the parking lot of a Texaco gas station located at the corner of Highway 17 North and Piney Green Road to conduct a drug transaction. Deputy Newkirk testified at the hearing that he knew defendant "from around town." Moments after the call, Deputy Newkirk set up surveillance in the area near the Texaco station with other officers from Onslow County and the Jacksonville police department. At approximately 1:18 a.m. Deputy Newkirk and the other officers observed a black Nissan Sentra automobile, driven by a black woman with an unidentified black man siting in the passenger seat, turn into the Texaco parking lot and park next to a telephone booth.

The "take down" signal was given. Deputy Charles Carnes approached the passenger side of the car, his gun drawn, ordered defendant to exit the car, opened the door, pulled defendant to the ground, and handcuffed him. Deputy Carnes noticed a large lump in defendant's front pockets, conducted a pat-down search, and pulled the bulge out of defendant's pockets. The white powder was later identified as 112.4 grams of powdered cocaine. Defendant was detained while officers questioned the driver, Ms. Hatchell. Ms. Hatchell requested that she be allowed to return home to check on her child. Officers escorted Ms. Hatchell to her house where she consented to a search.

At the scene defendant made numerous incriminating statements to police. Deputies told defendant that Ms. Hatchell was escorting police to her house, and defendant told the deputies that he had placed marijuana in the closet and cocaine between the mattresses. Officers recovered three pounds of marijuana and one-half ounce of cocaine from that location. Defendant admitted that he owned those drugs. The deputies placed defendant into the patrol car. Defendant asked the deputies how they knew he was selling drugs because no one knew. Defendant was driven to the Onslow County Sheriff's Office where he was advised of his Miranda rights. The defendant then signed a waiver of his rights and communicated a statement admitting ownership of all the drugs. Defendant was released and no formal charges were filed at that time.

On 26 January 2000, Deputy Newkirk obtained a warrant, arrested defendant, and charged him with (1) trafficking cocaine by manufacturing, (2) trafficking cocaine by possession, (3) trafficking cocaine by delivery, (4) trafficking cocaine by transporting, (5) possession with intent to sell and deliver marijuana, and (6) manufacturing marijuana. The Onslow County Grand Jury indicted defendant on all offenses except trafficking in cocaine by delivery.

Defendant filed a motion to suppress on 4 August 2000. At the hearing defendant offered no evidence. The trial court took the matter under advisement, and granted defendant's motion to suppress on 19 September 2000. The State appeals.

II. Issue

The only issue on appeal is whether the officers and deputies had probable cause to arrest defendant.

Orders of the superior court granting motions to suppress evidence are appealable to the appellate division prior to trial provided that the prosecutor certifies that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. N.C. Gen. Stat. § 15A-979 (1979); *State v. Dobson*, 51 N.C. App. 445, 446, 276 S.E.2d 480, 482 (1981). The State filed a certificate on 27 September 1999 complying with all of the requirements of G.S. § 15A-979, and the appeal is properly before us.

Our review of a trial court's conclusions of law on a motion to suppress is *de novo*. *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994).

A. Probable Cause Based On Informant's Tips

The State argues that the trial court erred by concluding that defendant's arrest was "illegal, unlawful and in violation of Defendant's rights," and that the officers lacked probable cause to believe that defendant had committed or was committing a crime. We agree.

"An arrest is *constitutionally* valid whenever there exists probable cause to make it." *State v. Wooten*, 34 N.C. App. 85, 88, 237 S.E.2d 301, 304 (1977) (emphasis in original).

" '[P]robable cause requires only *a probability or substantial chance* of criminal activity, not an actual showing of such activity.' "

State v. Riggs, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (emphasis in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 76 L. Ed. 2d 527, 552 n.13 (1983)). "Probable cause exists when there is 'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.' " *State v. Joyner*, 301 N.C. 18, 21, 269 S.E.2d 125, 128 (1980) (quoting *State v. Streeter*, 283 N.C. 203, 195 S.E.2d 502 (1973) (citation omitted)).

Probable cause can be established through the use of informants. *Gates*, 462 U.S. 213, 76 L. Ed. 2d 527. " 'In utilizing an informant's tip, probable cause is determined using a 'totality-of-the circumstances' analysis which 'permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip.' " *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (quoting *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999)). A known informant's information may establish probable cause based on a reliable track record, or an anonymous informant's information may provide probable cause if the caller's information can be independently verified. *Alabama v. White*, 496 U.S. 325, 332, 110 L. Ed. 2d 301, 310 (1990); *Gates*, 462 U.S. at 245-46, 76 L. Ed. 2d at 553; *State v. Trap*, 110 N.C. App. 584, 589-90, 430 S.E.2d 484, 488 (1993); *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433.

At bar the trial court concluded that the officers had "a reasonable and articulate suspicion" that defendant was transporting narcotics. It also concluded that the circumstances "reasonably justified a warrantless intrusion to stop and search the Defendant's person and property." The trial court then concluded, however, that defendant's arrest was unlawful and illegal because the officers did not have probable cause to believe that defendant "had committed or was committing a crime." This ruling was error.

Deputy Newkirk returned a known and reliable informant's page at 12:30 a.m. The informant furnished Deputy Newkirk detailed information including that defendant would be delivering a large amount of cocaine to a specific location in about fifty minutes. The informant told Deputy Newkirk that defendant was about to (1) deliver a large amount of cocaine to a specific location, (2) be driven by a black female in an older model four-door black Nissan Sentra, because defendant did not have a driver's license, (3) be taken to a Texaco station at the corner of Highway 17 North and Piney Green Road, (4) be traveling from a certain direction, (5) park next to a telephone booth

in the parking lot, (6) act like he was there to use the telephone, and (7) conduct a drug transaction there.

Based on information that a crime was in progress, Deputy Newkirk set up surveillance near the location provided by the known informant. Deputy Newkirk and other officers independently corroborated all the information given by the known informant with minute particularity. Deputy Newkirk testified that "this wasn't the first time that we—we had set a deal up with—with the defendant." Deputy Newkirk observed the older model four-door black Nissan Sentra pass by his surveillance location. Deputy Newkirk testified that at that moment he recognized defendant in the passenger seat. All of the officers observed the Nissan drive into the Texaco parking lot and drive toward the earlier described telephone booth. Deputy Newkirk testified that the confidential informant was known to him and had proven reliable on prior occasions.

Deputy Newkirk and the other officers verified all of the informant's information which proved to be reliable to the smallest detail. All of these factors establish that Deputy Newkirk and the other officers had probable cause to seize, arrest and search defendant. " '[P]robable cause to arrest and search defendant existed on the basis of the minute particularity with which the informant described defendant and the physical and independent verification of this description' by the officer." *State v. Ellis*, 50 N.C. App. 181, 184, 272 S.E.2d 774, 776 (1980) (quoting *State v. Ketchie*, 286 N.C. 387, 393, 211 S.E.2d 207, 211 (1975)). "Once he corroborated the description of the defendant and his presence at the named location, [Deputy Newkirk] had reasonable grounds to believe a felony was being committed in his presence which in turn created probable cause to arrest and search defendant." *Wooten*, 34 N.C. App. at 88, 237 S.E.2d at 304. We hold that these facts and circumstances sufficiently established an indicia of reliability that defendant was engaged in criminal activity to provide the officers with probable cause to seize and arrest defendant based on a known reliable informant's tip independently corroborated and verified by the officers in minute detail.

B. Warrantless Arrest and Search

"Police officers may arrest without a warrant any person who they have probable cause to believe has committed a felony." *State v. Hunter*, 299 N.C. 29, 34, 261 S.E.2d 189, 193 (1980) (citing G.S. § 15A-401(b)(2)a; *United States v. Watson*, 423 U.S. 411, 46 L. Ed.2d

598 (1976)). "A warrantless arrest is lawful if based upon probable cause, *Brinegar v. United States*, 338 U.S. 160, 93 L. Ed. 1879 (1949); *State v. Phillips*, 300 N.C. 678, 683-84, 268 S.E.2d 452, 456 (1980), and permitted by state law." *State v. Mills*, 104 N.C. App. 724, 728, 411 S.E.2d 193, 195 (1991) (citing *Wooten*, 34 N.C. App. at 88, 237 S.E.2d at 304).

Transporting large amounts of cocaine is felonious criminal activity. N.C. Gen. Stat. § 90-95 (2001). The deputies and officers had probable cause to believe that defendant was transporting large quantities of cocaine. We hold that the officers and deputies had probable cause to believe that defendant was engaged in criminal activity sufficient to justify a warrantless arrest. N.C. Gen. Stat. § 15A-401(b) (1999).

"An officer may conduct a warrantless search incident to a lawful arrest." *Mills*, 104 N.C. App. at 728, 411 S.E.2d at 195 (citing *State v. Hardy*, 299 N.C. 445, 455, 263 S.E.2d 711, 718 (1980)). "A search is considered incident to arrest even if conducted prior to formal arrest if probable cause to arrest exists prior to the search and the evidence seized is not necessary to establish that probable cause." *Id.* (citing *Wooten*, 34 N.C. App. at 89, 237 S.E.2d at 305).

Probable cause to arrest defendant existed prior to the defendant being searched. The large quantity of cocaine found on defendant was unnecessary to establish probable cause to arrest. We hold that the search of defendant was incident to a lawful arrest.

The trial court improperly granted defendant's motion to suppress the evidence. All evidence seized and statements made as a result of the lawful seizure, arrest and search of defendant were properly and legally obtained. We reverse the trial court's order to suppress.

Reversed.

Judges GREENE and HUNTER concur.

STATE OF NORTH CAROLINA v. CHARLES RANDALL FOSTER

No. COA01-594

(Filed 5 March 2002)

1. **Sentencing— presumptive range—written findings not required**

The trial court did not abuse its discretion in a felonious breaking and entering, felonious larceny, and felonious possession of stolen goods case by allegedly sentencing defendant in excess of the amount allowed by law, because: (1) the trial court imposed the minimum sentence of 116 months found within the presumptive range and properly imposed the corresponding maximum term of imprisonment of 149 months as set forth under N.C.G.S. § 15A-1340.17(e); and (2) the trial court is not required to make written findings when sentencing within the presumptive range.

2. **Criminal Law— jury instruction—doctrine of recent possession**

The trial court did not err in a felonious breaking and entering, felonious larceny, and felonious possession of stolen goods case by failing to additionally instruct the jury on the doctrine of recent possession that the goods must be found in defendant's possession to the exclusion of others, because: (1) the evidence does not suggest that anyone other than defendant or the two passengers in his truck possessed or controlled the stolen items seen in the back of the truck defendant was driving; and (2) defendant's request for an additional instruction came after the jury charge, and requests for special instructions must be in writing and submitted before the beginning of the charge by the court.

3. **Evidence— hearsay—larceny—issue of consent to taking and carrying away of property**

The trial court did not err in a felonious breaking and entering, felonious larceny, and felonious possession of stolen goods case by admitting alleged hearsay statements of a detective that the victim owner of the stolen property stated that the tires and rims were definitely his when defense counsel attempted to point out during cross-examination of the detective that the tires and rims were not sufficiently identifiable as the property stolen for

determining whether the victim consented to the taking and carrying away of the property, because: (1) the fruits of the crime must be firmly established before the presumption of recent possession will apply, and it is not necessary that stolen property be unique to be identifiable; and (2) there was sufficient evidence that the victim owner did not consent to the taking and carrying away of the property, including the facts that the owner called the sheriff's department to report the stolen property and defendant told the detective he did break into the owner's business.

Appeal by defendant from judgments entered 30 November 2000 by Judge Zoro J. Guice, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 13 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Ann Stone, for the State.

Wade Hall, for defendant-appellant.

TYSON, Judge.

I. Facts

On 10 December 1999, Charles Wilkie ("Wilkie") closed up Jake's Driving Range, his place of employment. The next morning, 11 December 1999, Wilkie returned to work and observed the garage door standing open and windows in the garage door broken. Wilkie called Mike Justice ("Justice"), the owner of the driving range. Justice came to the driving range and called the sheriff's department. A John Deere riding mower, Lawn Boy push mower, truck tires and rims, a four-wheeler, an eight foot trailer, a pressure washer, and a welder had been stolen.

In the early morning hours on 11 December 1999, Charles Randall Foster ("defendant") was found in the driver's seat of a white truck containing a set of tires and rims, and a Lawn Boy push mower. Officer Larry Pearson noticed the truck sitting in the parking lot of Hill's Body Shop. Officer Johnny Duncan responded as back up. The officers asked defendant why they were sitting in the parking lot of a closed business. Defendant and two passengers were not detained.

Defendant was eventually charged with felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. Defendant did not testify or offer evidence at trial. The jury found defendant guilty of all charges.

Defendant was sentenced to a minimum of 116 months and maximum of 149 months for felonious breaking and entering. Defendant was also sentenced to a minimum of 116 months and maximum of 149 months for felonious larceny and possession of stolen goods, to run consecutively. Defendant appeals. We find no error.

II. Issues

The issues presented are whether: (1) the sentence imposed by the trial court is in excess of that allowed by law and is not supported by competent evidence, (2) the trial court erred in its instruction to the jury on the doctrine of recent possession, and (3) the trial court erred in admitting hearsay statements.

Defendant's assignment of error regarding the submission of felonious larceny on the basis that there was no competent evidence that the value exceeded $1,000 was not argued in his brief and is abandoned. N.C.R. App. P. 28 (b)(5) (1999). Defendant also argues in his brief that the trial court erred in denying his motion to dismiss at the close of all the evidence. Defendant did not raise this as an assignment of error in the record on appeal. Accordingly, this question is not before us for review. N.C.R. App. P. 10(a) (1999).

III. Sentencing

[1] Defendant first argues that the sentence is in excess of that allowed under the law. First, defendant contends that the sentence exceeds the maximum aggravated range for a class C, level III felony listed in N.C.G.S. § 15A-1340.17 (c) without any finding of aggravating or mitigating factors. Second, defendant argues that the departure from the presumptive range is not supported by competent evidence and written findings. These arguments are without merit.

Here, the trial court did not find any aggravating or mitigating factors and did not make any written findings. N.C.G.S. § 15A-1340.17 provides the punishment limits for each class of offense and prior record level. N.C.G.S. § 15A-1340.17(c)(2) expressly states that the ranges listed are minimum durations:

> (2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G.S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate.

N.C. Gen. Stat. § 15A-1340.17(c)(2) (1999).

The trial court, within its discretion, imposed the minimum sentence of 116 months found within the presumptive range. *State v. Parker*, 143 N.C. App. 680, 685-86, 550 S.E.2d 174, 177 (2001) (citing *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997)). N.C.G.S. § 15A-1340.17(e) lists the corresponding maximum term for each minimum term found in section c. The trial court properly imposed the corresponding maximum term of imprisonment of 149 months. *See* N.C. Gen. Stat. § 15A-1340.17(e) (1999). The trial court is not required to make written findings when sentencing within the presumptive range. *See* N.C. Gen. Stat. § 15A-1340.16(c) (1999); *State v. Brown*, 146 N.C. App. 590, 594, 553 S.E.2d 428, 431 (2001). This assignment of error is rejected.

IV. Jury Instruction

[2] Defendant contends that the trial court erroneously instructed the jury under the doctrine of recent possession when it failed to instruct that the goods must be found in defendant's possession "to the exclusion of others."

The doctrine of recent possession of stolen property "allows the jury to presume that the possessor of stolen property is guilty of larceny." *State v. Callahan*, 83 N.C. App. 323, 325, 350 S.E.2d 128, 130 (1986) (citing *State v. Williamson*, 74 N.C. App. 114, 327 S.E.2d 319 (1985)). The State is required to prove: "(1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others . . . and (3) the possession was discovered recently after the larceny . . . ." *State v. Maines*, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981).

Exclusive possession does not necessarily mean sole possession. Exclusive possession means possession "to the exclusion of all persons not party to the crime." *Id.* at 675, 273 S.E.2d at 294. The evidence here tends to meet that test. Defendant and the two other passengers in the truck were all a party to the crime. The evidence does not suggest that anyone other than defendant or the other passengers possessed or controlled the tires, rims, and Lawn Boy seen in the back of the truck defendant was driving.

The trial court properly instructed the jury that for the doctrine of recent possession to apply, the State must prove: (1) that the property was stolen, (2) that defendant had possession of the property and that "a person possess property when he is aware of its presence and

has either by himself, or together with others both the power and intent to control its disposition or use," and (3) that defendant had possession of the property soon after it was stolen, "under such circumstances as to make it unlikely that he obtained possession honestly." Defendant does not argue that the evidence did not support an instruction to the jury on the doctrine of recent possession. Defendant's request for an additional instruction that he had possession of the stolen property "to the exclusion of others" came after the jury charge and was properly denied. *See State v. Harris*, 47 N.C. App. 121, 123, 266 S.E.2d 735, 737 (1980) (requests for special instructions must be in writing and must be submitted before the beginning of the charge by the court). This assignment of error is overruled.

V. Hearsay Statements

[3] Defendant objects to a statement made by Detective Becky Poole that Justice said the tires and rims recovered "were definitely his" as inadmissible hearsay being asserted for the truth of the matter.

Defendant on cross-examination attempted to point out that the tires and rims were not sufficiently identifiable as the property stolen:

> Defendant's Counsel: Well, you can't say these are exactly the same wheels, there's no exact markings—no markings given to you; were there?
>
> Poole: That's when we call on the victim. We rely on the victim to I.D. his property, which he did. He said those were definitely his tires.

It has been recognized that the fruits of the crime must be firmly established before the presumption of recent possession will apply. *State v. Jones*, 227 N.C. 47, 49, 40 S.E.2d 458, 460 (1946). However, "[i]t is not necessary that stolen property be unique to be identifiable. Often stolen property consists of items which are almost devoid of identifying features, such as coins and goods which are mass produced and nationally distributed under a brand name." *State v. Crawford*, 27 N.C. App. 414, 415, 219 S.E.2d 248, 249 (1975). Other evidence presented at trial may be used to establish the identity of the stolen items. *Id.*

Here, Wilkie testified that a John Deere tractor, a Lawn Boy, some truck tires and rims, a new pressure washer, a welder, and several

other items which belonged to Justice were stolen. Detective Poole testified that she returned the tires and rims to Justice after photographing the property in his presence.

Defendant argues that the hearsay statement invaded the province of the jury in determining an element of larceny: whether the victim, Justice, consented to the taking and carrying away of the property. We disagree.

Justice, after receiving a call from Wilkie, went to the driving range and called the sheriff's department. Additionally, Detective Poole testified that in questioning defendant about the breaking and entering at Jake's Driving Range, defendant told her that "he did break into Jake's." We conclude that there was sufficient evidence that the victim, Justice, did not consent to the taking and carrying away of the property. This assignment of error is overruled.

No error.

Judges WYNN and TIMMONS-GOODSON concur.

DEEP RIVER CITIZENS' COALITION, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, RESPONDENT, CITY OF GREENSBORO AND PIEDMONT TRIAD REGIONAL WATER AUTHORITY, RESPONDENT-INTERVENORS

DEEP RIVER COALITION, INC., ET AL., PETITIONERS v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, RESPONDENT, CITY OF GREENSBORO AND PIEDMONT TRIAD REGIONAL WATER AUTHORITY, RESPONDENT-INTERVENORS

No. COA01-935

(Filed 5 March 2002)

Administrative Law— judicial review—standard—not sufficiently identified

A trial court order reviewing an Environmental Management Commission decision was remanded where the order stated only that the court used the standard set out in N.C.G.S. § 150B-51, which includes both de novo and whole record reviews, but did not state which standard it used for the separate issues.

Appeal by petitioners from judgment entered 9 May 2001 and 30 May 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 30 January 2002.

Cunningham, Dedmond, Petersen & Smith, LLP, by Marsh Smith and Terris, Pravlik, & Millian, LLP, by Bruce J. Terris and Demian A. Schane for petitioner-appellants.

Roy Cooper, Attorney General, by Kathryn Jones Cooper, Special Deputy Attorney General and Francis W. Crawley, Special Deputy Attorney General, for respondent-appellees.

Hunton & Williams, by Charles D. Case and Julie Beddingfield for intervenor-appellee Piedmont Triad Regional Water Authority.

Linda A. Miles and Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by George W. House, for intervenor-appellee City of Greensboro.

THOMAS, Judge.

Petitioners, the Deep River Citizens Coalition (DRCC), the Deep River Coalition, Inc. (DRCI), and the American Canoe Association, Inc., appeal an order affirming a final agency decision of the Environmental Management Commission (EMC). The order granted summary judgment against them in a suit involving the construction of a dam on the Deep River in Randleman, North Carolina. Petitioners also appeal a supplemental order delineating the scope of review. For the reasons discussed herein, we reverse and remand.

The facts are as follows: Several North Carolina counties formed the Piedmont Triad Regional Water Authority (Water Authority) in 1986 to manage the region's water supply needs. In 1988, the Water Authority petitioned the EMC to purchase land and divert 28.5 million gallons of water per day (mgd) from the Deep River Basin to the Haw River Basin pursuant to the power of eminent domain. The EMC approved the inter-basin transfers in 1992 and authorized the Water Authority to use eminent domain to purchase the land needed to construct the dam.

In March 1992, petitioners and other individuals challenged the EMC's decision. The trial court overturned the EMC's decision on the basis that the EMC had not resolved water-quality problems and because all impacts and reasonable alternatives had not been ana-

lyzed. However, in 1995, this Court reversed the trial court, stating the trial court did not have jurisdiction because petitioners failed to exhaust their administrative remedies before the Office of Administrative Hearings. *See Deep River Citizens' Coalition v. DEHNR*, 119 N.C. App. 232, 457 S.E.2d 772 (1995).

The Water Authority sought to reclassify the portion of the Deep River where the reservoir will be built from Class-C waters to WS-IV waters so that it could be used as a water supply. The EMC eventually reclassified portions of Deep River to WS-IV and after applicable certifications were completed, the U.S. Army Corps of Engineers issued a permit for the dam project.

Petitioners filed for a contested case hearing before an administrative law judge (ALJ) challenging the water certification. The ALJ dismissed petitioner DRCC from the case on the basis that it was not a "person" under the North Carolina Administrative Procedure Act. DRCC then filed a petition for judicial review, but it was stayed pending the determination of the merits of the underlying action. The two cases were consolidated.

In the underlying case, the EMC granted summary judgment to respondents on all issues. Petitioners filed a petition for judicial review. The trial court affirmed the EMC's decision. Petitioners appealed. On 30 May 2001, the trial court filed a supplemental order concerning the scope of its review. Petitioners also timely appealed from the supplemental order.

By their first assignment of error, petitioners argue the trial court erred in failing to review the EMC's decision *de novo*. In examining the trial court's order for an error of law, this Court will: (1) determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) decide whether the court did so properly. *Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 597, 446 S.E.2d 383, 388 (1994).

The proper standard of review by the trial court depends upon the particular issues presented by the appeal. *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); *Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 580, 281 S.E.2d 24, 28 (1981). If appellant argues the agency's decision was based on an error of law, then *de novo* review is required. *In re McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (citations omitted). If appellant questions whether the agency's decision was

supported by the evidence or whether it was arbitrary or capricious, then the reviewing court must apply the whole record test.

In the instant case, petitioners challenged whether the EMC's conclusions were supported by the record and if DENR's refusal to conduct a public hearing was an abuse of discretion. These issues focus on whether the EMC's decision was arbitrary and capricious and whether its decision was supported by substantial evidence. Thus, a whole record review was proper.

In *Starco, Inc. v. AMG Bonding & Ins. Services, Inc.*, 124 N.C. App. 332, 477 S.E.2d 211 (1996), this Court held that it is not improper for a trial court to incorporate documents by reference in its order. The trial court here stated that "in reaching its decision reflected in its Order, the Court adopted and used, in addressing each issue raised by Petitioners, the scope of review under G.S. 150B-51 as urged by Respondent and Respondent-Intervenors in their Brief[.]" However, in their brief, respondent and respondent-intervenors request both methods of review. For example, the brief states that

> To the extent that the chlorophyll *a* argument claims that DENR and the EMC misinterpreted their own chlorophyll *a* rule, it is [sic] should be judged under the *de novo* review standard, as should Petitioners' other arguments alleging violations of the North Carolina Environmental Policy Act ("NCEPA") or DENR's rules governing the 401 Certification. . . . To the extent that [the argument] is a claim that the Decision is arbitrary and capricious or not supported by substantial evidence, [a whole record review should be used.]

This is only a recitation of the general rule. The brief does not address which standard is used for consideration of each specific issue, leaving the trial court room to decide "the extent." The trial court simply stated it used the scope of review set forth in respondent and respondent-intervenors' brief without deciding "the extent" it was using each standard. The trial court then concluded the EMC did not err in its decision.

In *Hedgepeth v. North Carolina Division of Services for the Blind*, 142 N.C. App. 338, 543 S.E.2d 169 (2001), this Court held that

> the trial court in the case *sub judice* stated the proper standards of review sought by petitioner. However, it . . . failed to delineate which standard the court utilized in resolving each separate issue

> raised. Furthermore, it is difficult to discern whether the trial court actually conducted both a "whole record" and *de novo* review . . . . We are left to question whether [the trial court] referred to only a "whole record" review, *de novo* review, or both . . . . Given the nature of the trial court's order, we find ourselves unable to conduct our necessary threshold review. And . . . "we decline to speculate in that regard."

Id. at 349, 543 S.E.2d at 176 (citations omitted). Likewise, in the instant case, the trial court's supplemental order only states that it used the standard of review set out in section 150B-51, which includes both *de novo* and whole record reviews. It omits whether it specifically used a *de novo* or whole record test, and to what extent, for the separate issues raised by petitioners.

Accordingly, we reverse the trial court's order and remand this matter for a new order in accordance with this opinion. We direct the trial court to: (1) advance its own characterization of the issues presented by petitioners; and (2) clearly delineate the standards of review, detailing the standards used to resolve each distinct issue raised.

REVERSED AND REMANDED.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. MICHAEL D. GRAHAM

No. COA01-338

(Filed 5 March 2002)

1. Searches and Seizures— consent—nonverbal gesture

The trial court properly concluded in a cocaine prosecution that defendant had voluntarily consented to a search of his person where an officer asked defendant if he could check his pocket, and defendant stood up and raised his hands away from his body accompanied by a gesture which the officer took to mean consent. The use of nonverbal conduct intended to connote an assertion is sufficient to constitute a statement wihin the meaning of consent under N.C.G.S. § 15A-221(b).

2. Searches and Seizures— folded bill containing crack cocaine—totality of circumstances—search justified

The trial court correctly concluded in a cocaine prosecution that the facts were sufficient for officers to search defendant's pants pocket and unfold a twenty-dollar bill found therein where the officers responded to a tip reporting drug activity at an apartment; it was routine for officers to pat down people for weapons in cases involving drug activity; an officer found a hand gun and the residue of cocaine in the apartment; officers saw defendant fidgeting with his pocket; an officer searched defendant's pocket for a weapon and found a folded twenty-dollar bill with a lump in it; and there was crack cocaine inside the bill.

3. Sentencing— record points—prayer for judgment continued

The trial court did not err when sentencing defendant for cocaine possession by assessing prior record points for a district court prayer for judgment continued. A formal entry of judgment is not required in order to have a conviction. N.C.G.S. § 15A-1331(b).

Appeal by defendant from judgment entered 11 October 2000 by Judge William H. Freeman in Superior Court, Forsyth County. Heard in the Court of Appeals on 23 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Neil Dalton, for the State.

Stowers & James, P.A., by Paul M. James, III, for the defendant-appellant.

WYNN, Judge.

Defendant Michael D. Graham conditionally pled guilty to the charge of possession of cocaine reserving for this Court the issue of whether the trial court properly denied his motion to suppress the evidence of cocaine seized from his person. He also contends that the trial court erred by considering a prior district court prayer for judgment as a countable prior conviction for felony sentencing. We affirm the trial court's decisions.

On 21 December 1999 at about 2:30 a.m., three Winston-Salem Police Officers—James, Dew, and Best—responded to an anonymous tip reporting drug activity at an apartment in Winston-Salem.

Pertinent to this appeal, the officers entered the apartment with the consent of a person in apparent control, stated their intentions to search for drugs and conducted a pat-down of the occupants for weapons. The officers testified that during their search, they noticed that defendant continuously reached into his pants' pocket. Officer James asked defendant whether he had anything in his pocket and he replied, no. Thereafter, Officer James asked defendant for permission to search his pocket. The trial court found that the defendant stood up and gestured in a manner so as to indicate consent for Officer James to search him. Upon checking his pocket, Officer James found a folded twenty dollar bill which she unraveled and discovered crack cocaine inside.

In denying defendant's motion to suppress, the trial court orally made the following findings:

> The Court will find that on or about December 21st, 1999, at approximately 2:30 a.m., Officer James of the Winston-Salem Police Department, a veteran of seven years at that time with the police department, accompanied by two other officers including Officer Dew for whom Officer James was the training coach at that time, received a call concerning drug activities in an apartment at 1325 Oak Street. They were dispatched to answer that call. That they proceeded to that location. That they arrived at that location, saw the door open and several people inside and lights on.
>
> That they approached and knocked and a female [Ms. Aiken] came to the door and indicated that she didn't leave [sic] there and the apartment was not hers and she didn't reside there and had control of the apartment. They asked consent to come in and search and look for drugs. That she allowed them to do so. That once inside, they saw several people and that Officer James informed them that they would each be searched for drugs.
>
> They were patted down for weapons. None were found. That they did a cursory search of the residence. Found a hand gun that had not been used in any illegal activity and that Officer James found some small residue of cocaine and Ms. Aiken indicated that it was not hers.
>
> They did not tell anybody they could not leave. They were in uniforms wearing weapons, which were not drawn and remained in their holsters. That nobody attempted to leave. That Officer

> James noted continuously while Officer Dew [sic] was doing his search that the defendant was fidgeting with his lower pants pocket. That she was concerned about a weapon and that she approached him and asked him if she could search his pocket or look in his pocket. That the defendant stood up and raised his arms and gestured in a way that Officer James took to mean consent. That he did not orally consent but he stood up and raised his arms and gestured in such a manner.
>
> That she checked in his pocket and found a twenty dollar bill folded up with a lump in it and that because of her training and experience as an officer, that was consistent with the way drugs are at times concealed or packaged and she unfolded the twenty dollar bill, without the consent of the defendant, and field tested it and treated it positive for cocaine. That she arrested the defendant.
>
> The Court will find as fact that the officers were extremely courteous and professional as were the suspects and occupants.

Based on the findings of fact, the trial court concluded as a matter of law

> that none of the defendant's constitutional rights under the United States Constitution or the federal constitution or the state constitution were violated by the search and seizure. The Court will conclude that the defendant consented to the search of his pocket. That none of his statutory rights were violated. That the search was knowingly and willfully and voluntarily consented to and the court will deny the motion to suppress.

[1] On appeal, defendant contends that the trial court erred by denying his motion to suppress the crack cocaine evidence seized from his person because it was obtained without his consent and without any of the court-recognized exigent circumstances that would have allowed him to be searched without a warrant. He argues that the officers did not obtain consent from him to search his person because he did not affirmatively and clearly indicate his permission, as required by N.C. Gen. Stat. § 15A-221.

Consent searches have long been recognized as a "special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Smith*, 346 N.C. App. 794, 799, 488 S.E.2d 210, 214 (1997). "Consent to search, freely and

intelligently given, renders competent the evidence thus obtained." *State v. Frank*, 284 N.C. 137, 143, 200 S.E.2d 169, 174 (1973) (citations omitted). "[T]he question whether consent to a search was in fact 'voluntary' or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973).

N.C. Gen. Stat. § 15A-221(b) (1999) provides the statutory definition of consent:

> Definition of "Consent".—As used in this Article, "consent" means a statement to the officer, made voluntarily and in accordance with the requirements of G.S. 15A-222, giving the officer permission to make a search.

(Emphasis supplied). In determining whether under the totality of the circumstances defendant's nonverbal response in this case constituted a statement within the meaning of consent under N.C. Gen. Stat. § 15A-221(b), we are guided by *Black's Law Dictionary* definition of the word "statement" as "a verbal assertion or nonverbal conduct intended as an assertion." *Black's Law Dictionary*, 1416 (7th ed. 1999). Thus, a statement need not be in writing nor orally made. Rather, the use of nonverbal conduct intended to connote an assertion is sufficient to constitute a statement.

In the case *sub judice*, the trial court conducted an extensive *voir dire* and heard testimony concerning the events surrounding whether defendant voluntarily consented to the search. The record reveals that defendant's consent to the search of his person was acquired by Officer James. According to the record, when Officer James asked defendant if she could check his pocket, he "stood up and raised his hands away from his body accompanied by a gesture which Officer James took to mean consent." Shortly thereafter, defendant allowed Officer James to search his pants' pocket. Viewing this evidence under the totality of the circumstances, we hold that the trial court properly determined that defendant voluntarily consented to a search of his person.

[2] Secondly, defendant argues that he did not consent to Officer James unfolding the twenty dollar bill she retrieved from his pants pocket. To determine whether the incriminating nature of the crack cocaine that was found in the twenty dollar bill was immediately apparent and therefore, probable cause existed to seize it, we must

again consider the totality of the circumstances. *See State v. Briggs*, 140 N.C. App. 484, 493, 536 S.E.2d 858, 863 (2000). "When the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that the item may be contraband, probable cause exists." *Id.* (Emphasis omitted).

In the present case, the police officers were responding to a tip that reported drug activity at the apartment. It was routine for the officers to pat down people for weapons in cases involving drug activity. In the apartment, they found a hand gun and residue of cocaine. Both officers observed defendant acting unusual by continuously fidgeting with his pocket. Officer James, concerned that defendant might have a weapon, searched defendant's pants pocket. While conducting the search of defendant's pocket, the officer found a twenty dollar bill that was folded and had a lump in it. Based on the officer's training, experience and the circumstances, we affirm the trial court's determination that it was reasonable for the officer to believe that the twenty dollar bill contained a controlled substance. Accordingly, we uphold the trial court's conclusion that under the totality of the circumstances, the facts were sufficient to justify a search of defendant's pants pocket, seizure of the twenty dollar bill, and unraveling the bill.

[3] In his final argument, defendant contends that it was error for the trial court to count his district court prayer for judgment continued in a prior case as a countable prior conviction for felony sentencing under Level 2. We disagree.

N.C. Gen. Stat. § 15A-1340.11(7) (1999) provides that "[a] person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime." N.C. Gen. Stat. § 15A-1331(b) (1999) provides that "[f]or the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest."

In *State v. Hatcher*, 136 N.C. App. 524, 524 S.E.2d 815 (2000), our Court held that the defendant was convicted of a prior offense when he entered a plea of no contest and for which prayer for judgment was continued, even though no final judgment had been entered, for purposes of assignment of a prior record level for sentencing. Since our Court has "interpreted N.C. Gen. Stat. § 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction," we hold that the trial court did not err in its assessment of prior

record points in determining the prior record level for sentencing defendant. *Id.*, 136 N.C. App. at 527, 524 S.E.2d at 817.

No error.

Judges HUDSON and THOMAS concur.

FRANK L. SCHRIMSHER, ADMINISTRATOR OF THE ESTATE OF EUGENE A. GRIFFIN, PLAINTIFF v. RED ROOF INNS, INC., DEFENDANT

No. COA01-282

(Filed 5 March 2002)

Negligence— independent contractor killed while providing security services for motel—directed verdict

The trial court properly granted directed verdict under N.C.G.S. § 1A-1, Rule 50 in a negligence case in favor of defendant company arising out of decedent getting shot and killed in a motel lobby while performing his work as an independent contractor providing security services at the motel owned by defendant even though plaintiff contends defendant violated its own security regulations by failing to secure the front door through which the assailant gained access to the motel lobby, because: (1) plaintiff produced no evidence that defendant's employee left the motel lobby door open on the night of decedent's death; (2) all the evidence in the case tended to show that decedent was an experienced law enforcement officer skilled in the area of security services, and there was no evidence to suggest that the unsecured door was a hidden danger of which decedent had no knowledge; and (3) decedent was hired by defendant to prevent the very kinds of criminal acts from which decedent died.

Appeal by plaintiff from judgment entered 27 October 2000 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 January 2002.

Joseph L. Ledford for plaintiff appellant.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for defendant appellee.

TIMMONS-GOODSON, Judge.

Frank Schrimsher ("plaintiff"), the administrator of the estate of Eugene Griffin ("decedent"), appeals from judgment granting directed verdict in favor of decedent's former employer, Red Roof Inns, Inc. ("defendant"). The facts pertinent to the present appeal are as follows: Decedent was shot and killed while performing his work as an independent contractor providing security services at a motel ("the motel") owned by defendant and located in Charlotte, North Carolina. At the time of his death, decedent was a Mecklenburg County police officer with twenty-one years of experience, but he worked at the motel in an off-duty capacity. On the evening of 21 November 1991, decedent confronted several men who were creating a disturbance in the motel parking lot and ordered them to leave the premises. One of the men, Allen Gaines ("Gaines"), subsequently returned to the motel and shot and killed decedent, who at the time was sitting in the motel lobby. Gaines entered the lobby through an unlocked door.

Plaintiff subsequently filed suit against defendant, alleging that defendant violated its own security regulations by failing to secure the front door through which Gaines gained access to the motel lobby. The case came before a jury on 23 October 2000. At the close of plaintiff's evidence, defendant moved for directed verdict, which the trial court granted. Plaintiff now appeals to this Court.

The issue on appeal is whether the trial court erred in granting directed verdict in favor of defendant. For the reasons stated herein, we affirm the trial court.

On a motion by a defendant for directed verdict pursuant to section 1A-1, Rule 50, of our General Statutes, the trial court must consider all of the evidence in the light most favorable to the plaintiff, who is "entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence." *Mann v. Transportation Co. and Tillett v. Transportation Co.*, 283 N.C. 734, 746, 198 S.E.2d 558, 566 (1973). In the absence of any direct or circumstantial evidence of the defendant's negligence, however, directed verdict is proper. *See Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 444, 186 S.E.2d 198, 203 (1972). Directed verdict is also appropriate where a defendant establishes an affirmative defense as a matter of law. *See Goodwin v. Investors Life Insurance Co. of North America*, 332 N.C. 326, 329, 419 S.E.2d 766, 768 (1992). In such

instances, "there are no issues to submit to a jury and a plaintiff has no right to recover." *Id.*

"Ordinarily an employer of an independent contractor may not be held liable for injuries which have been sustained in the performance of the contract by the contractor himself." *Deaton v. Elon College*, 226 N.C. 433, 438, 38 S.E.2d 561, 564 (1946). Where the independent contractor is a specialist in his field, the employer has a duty to warn of hidden dangers known to the employer but unknown to the independent contractor. *See Henry v. White*, 259 N.C. 283, 284, 130 S.E.2d 412, 413 (1963) (per curiam). An employer is not liable, however, for injuries arising from dangerous conditions that are open and obvious to the independent contractor. *See Deaton*, 226 N.C. at 438, 38 S.E.2d at 565.

In the instant case, plaintiff argues the trial court erred in granting directed verdict for defendant. Plaintiff asserts that there was sufficient evidence from which a jury could find that defendant was negligent in that its employee "increase[d] the risk to which [decedent] was exposed by the manner in which [defendant] conducted [its] business and how [defendant] exercised [its] responsibility for those matters exclusively within [its] control." Specifically, plaintiff contends defendant was negligent in that, on the night of decedent's death, one of its employees may have left open the door to the motel lobby, thereby allowing Gaines to enter the building and shoot decedent. We reject plaintiff's argument on two grounds.

First, plaintiff produced no evidence that defendant's employee left the motel lobby door open on the night of decedent's death. Although there was evidence that the employee had left the door open on previous occasions, there was no evidence that he had done so the night of decedent's death. " '[E]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury.' " *Sharpe v. Pugh*, 21 N.C. App. 110, 116, 203 S.E.2d 330, 334 (quoting *Lee v. Stevens*, 251 N.C. 429, 434, 111 S.E.2d 623, 627 (1959)), *affirmed per curiam*, 286 N.C. 209, 209 S.E.2d 456 (1974).

Second, all of the evidence in the case tended to show that decedent was an experienced law enforcement officer, skilled in the area of security services. Decedent's knowledge of appropriate security measures, including the effect of allowing the lobby door to be unlocked at nighttime, was equal to or superior than the knowledge

of defendant. There was no evidence to suggest that the unsecured door was a "hidden danger" of which decedent had no knowledge. Indeed, decedent was hired by defendant to prevent the very kinds of criminal acts from which decedent died.

We hold, therefore, that the trial court properly granted directed verdict in favor of defendant. Accordingly, the trial court is hereby

Affirmed.

Judges BRYANT and SMITH concur.

RICHARD BARGER AND MARGARET BARGER, PLAINTIFFS v. KRISTI LARAE BARGER AND EDWARD MCCLOUGH AND CATAWBA COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS

No. COA00-1477

(Filed 5 March 2002)

Child Support, Custody, and Visitation— custody—natural parent—grandparents—best interests standard

The trial court did not err in a child custody case by granting defendant father custody of his natural child and by denying plaintiff maternal grandparents' motion for sole custody, because: (1) as between a parent and a non-parent, North Carolina courts cannot perform a best interests of the child analysis to determine child custody until after the natural parents are judicially determined to be unfit; and (2) the trial court made extensive findings of fact that the child's father is a fit and proper person to have the care, custody, and control of the minor child.

Appeal by plaintiffs from order entered 6 August 2000 by Judge Nancy Einstein in Catawba County District Court. Heard in the Court of Appeals 29 January 2002.

Crowe & Davis, P.A., by H. Kent Crowe, for plaintiff-appellants.

Sigmon, Sigmon and Isenhower, by C. Randall Isenhower, for defendant-appellees.

TYSON, Judge.

Richard Barger and Margaret Barger ("plaintiffs") appeal from an order granting defendant, Edward McClough ("Edward"), custody of his natural child, Darrious Adam Barger ("Adam"), visitation to plaintiffs, and denying plaintiffs' motion for sole custody. We affirm the trial court's order.

I. Facts

Kristi LeRae Barger ("Kristi") and Edward began a sexual relationship that resulted in Kristi becoming pregnant. Kristi and Edward never married. Adam was born on 27 February 1999 while his mother Kristi served an activated sentence in prison for a probation violation. Plaintiffs, Kristi's parents, obtained Adam from the prison hospital two days later.

A "consolidated order of adjudication and disposition" was entered 21 September 1999 awarding custody of Adam to the Catawba County Department of Social Services ("Catawba DSS"). The order granted Catawba DSS placement discretion, approved the current grandparents custody, required Kristi to obtain substance abuse treatment, required Edward to submit to a paternity test, granted Kristi and Edward supervised visitation, and sought reunification of Adam with Kristi and Edward, if it was later determined that he was the father.

On 20 December 1999, plaintiffs filed a complaint seeking custody of their grandchild. Edward filed an answer on 28 February 2000 and a counterclaim and cross claim on 9 March 2000, in which he requested "care, custody and control" of Adam. Plaintiffs replied requesting Edward recover nothing. Neither Kristi nor Catawba DSS participated in the custody action.

The trial court conducted a hearing on 10 May 2000 and granted Edward "care, custody and control" of Adam and granted plaintiffs visitation rights on 9 August 2000. Plaintiffs appeal.

II. Issues

Plaintiffs assign error to the trial court's (1) refusing to resolve evidentiary conflicts regarding the fitness of the parties and the best interests of the child and (2) failing to properly find facts rather than recite the evidence presented.

III. Fitness of the Parties and Best Interest of Child

Plaintiffs argue that the "custody order is fatally defective because it fails to make the detailed findings of fact from which [to] determine that [the trial court's] order is *in the best interest of Darrious Adam Barger,*" (emphasis suppled) and that "it contains no findings of fact on why Ed McClough could be considered fit and proper." These arguments misunderstand the constitutionally required analysis required to resolve a custody dispute between a natural parent and a non-parent.

Our Supreme Court has recently reaffirmed that *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994) and *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), "when read together, protect a natural parent's paramount constitutional right to custody and control of his or her children." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001).

"[T]he government may take a child away from his or her natural parent *only* upon a showing that the parent is unfit to have custody . . . ." *Id.* (citing *Jolly v. Queen*, 264 N.C. 711, 715-16, 142 S.E.2d 592, 596 (1965) (emphasis supplied)). A parent's child should not be placed "in the hands of a third person except upon convincing proof that the parent is an unfit person to have custody of the child or for some other extraordinary fact or circumstance." *Id.* (citing 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 224 at 22:32 (5th ed. 2000)). "If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent would offend the Due Process Clause." *Price*, 346 N.C. at 79, 484 S.E.2d at 534 (citing *Petersen*, 337 N.C. 397, 445 S.E.2d 901; *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed.2d 511, 520; *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63, 53 L. Ed. 2d 14, 46-47 (1977)).

As between a parent and a non-parent, North Carolina courts cannot perform a "best interest of the child" analysis to determine child custody until after the natural parents are judicially determined to be unfit. The trial court made extensive findings of fact that Edward "is a fit and proper person to have the care, custody and control of the minor child," and awarded "the care, custody and control" of Adam to Edward. The trial court erred by impermissibly stating that "[t]he Court believes that the best interests of the minor child would best be served by leaving custody [of Adam] with the Plaintiffs" after it had

found that Edward was not an unfit parent. Edward did not cross appeal that portion of the trial court's order granting plaintiffs visitation with Adam, and thus that issue is not properly before us. N.C. R. App. P. 10(a) (1999).

IV. Sufficiency of the Findings

Plaintiffs contend that the trial court's findings of fact are mere recitations of the evidence presented. We disagree.

The trial court made detailed findings of fact in which it concluded that Edward was a fit and proper person to have custody of Adam. Plaintiffs have failed to produce any evidence that would rebut the finding of fact that Edward is fit to raise his child. After carefully reviewing the entire record, we believe that those findings support the trial court's conclusion and that the findings are supported by competent evidence. *Sain v. Sain*, 134 N.C. App. 460, 464, 517 S.E.2d 921, 925 (1999) (if the trial court's findings of fact are supported by competent evidence, and they support its conclusion, they are binding on appeal). This assignment of error is overruled.

Affirmed.

Judges GREENE and HUNTER concur.

DUQUESNE ENERGY, INC., PLAINTIFF v. SHILOH INDUSTRIAL CONTRACTORS, INC. AND PROCESS PLANT CONSULTANTS, INC., DEFENDANTS

No. COA01-443

(Filed 5 March 2002)

Appeal and Error— appealability—partial summary judgment—avoidance of trial—not a substantial right

An appeal from a partial summary judgment was dismissed as interlocutory where plaintiff pursued the appeal under the "substantial right doctrine," but avoiding trial on the merits is not a substantial right.

Appeal by plaintiff from judgment entered 18 October 2000 by Judge Cy A. Grant, Sr., in Halifax County Superior Court. Heard in the Court of Appeals 31 January 2002.

Hux, Livermon & Armstrong, L.L.P., by H. Lawrence Armstrong, Jr., and James S. Livermon, Jr., for plaintiff-appellant.

Pepper Hamilton L.L.P., by George M. Medved and Kim M. Watterson, for plaintiff-appellant.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr., for defendant-appellee Shiloh Industrial Contractors, Inc.

Poyner & Spruill, L.L.P., by J. Nicholas Ellis and Timothy W. Wilson, for defendant-appellee Process Plant Consultants, Inc.

SMITH, Judge.

Plaintiff appeals from the judgment entered 18 October 2000, where the trial court granted partial summary judgment in favor of defendant Shiloh Industrial Contractors, Inc. ("Shiloh"), and defendant Process Plant Consultants, Inc. ("PPC") on all claims of plaintiff, as well as summary judgment in favor of both defendants regarding their respective counterclaims for breach of contract against plaintiff.

The pleadings before the Court allege, in substance, that plaintiff entered into a contract with Shiloh and PPC to design and build a facility to manufacture an alternative fuel product. A disagreement arose over when the contract required completion of the facility, and plaintiff filed suit for, among other things, breach of contract. Defendants, respectively, filed answers and counterclaims against plaintiff. Plaintiff thereafter filed a motion for partial summary judgment; PPC filed a motion for summary judgment and Shiloh filed a motion for partial summary judgment. The trial court granted partial summary judgment in favor of defendants on all claims of plaintiff and on defendants' respective claims for breach of contract. Damages for plaintiff's breach were to be determined in a subsequent trial. In addition, Shiloh's claims against plaintiff for intentional fraud and unfair and deceptive practice, and PPC's claims for injury to business reputation and unfair and deceptive practice, remained to be adjudicated. The judgment was not certified for immediate review by the trial court pursuant to G.S. § 1A-1, Rule 54(b), even though plaintiff made a specific request to certify the judgment for appeal. Nevertheless, plaintiff filed notice of appeal of the trial court's judgment to this Court. Defendants thereafter filed motions to dismiss plaintiff's appeal as interlocutory.

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 party 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 is "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). This Court "must determine whether denial of immediate review exposes a party to multiple trials with the possibility of inconsistent verdicts." *Creek Pointe Homeowner's Ass'n., Inc. v. Happ*, 146 N.C. App. 159, 162, 552 S.E.2d 220, 223 (2001) (citing *Murphy v. Coastal Physician Grp., Inc.*, 139 N.C. App. 290, 533 S.E.2d 817 (2000); *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 444 S.E.2d 694 (1994)).

In plaintiff's brief in opposition to Shiloh's motion to dismiss plaintiff's appeal as interlocutory, plaintiff admitted the appeal was interlocutory but nevertheless argued that it was pursuing the present appeal under the "substantial right doctrine." However, no substantial right is involved in the present case which would require this Court to review plaintiff's appeal prior to a full determination of the entire controversy among the parties. The trial court's grant of summary judgment dismissing all of plaintiff's claims and entering judgment in favor of both defendants as to their respective breach of contract claims resolves, for now, the question of which party breached the contract. Plaintiff, for now, will be held accountable in a trial determining damages for its breach; plaintiff will also be required to stand trial for the separate claims brought by defendants. This Court has repeatedly held that avoiding trial on the merits is not a substantial right. *Leake v. Sunbelt Ltd. of* Raleigh, 93 N.C. App. 199, 377 S.E.2d 285, *disc. review denied*, 324 N.C. 578, 381 S.E.2d 774 (1989) (citing *Horne v. Nobility Homes, Inc.*, 88 N.C. App. 476, 363 S.E.2d 642 (1988)). Plaintiff has not identified a substantial right which would be irremediably adversely affected by this Court's refusal to hear this interlocutory appeal. *Blackwelder*, 60 N.C. App. 331, 299 S.E.2d 777.

Plaintiff's appeal in the present case is interlocutory, does not affect a substantial right, and is therefore dismissed.

Dismissed.

Judges TIMMONS-GOODSON and BRYANT concur.

GARY F. YORDY AND KIMBERLY YORDY, PLAINTIFFS V. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA01-138

(Filed 5 March 2002)

Appeal and Error— appealability—interlocutory order

Defendant insurance company's appeal in a declaratory judgment action from an order granting partial summary judgment in favor of plaintiffs and denying defendant's motion for summary judgment is dismissed as an appeal from an interlocutory order, because: (1) the trial court's order merely disposes of one of the various defenses raised by defendant in its answer to the complaint, and a defense raised by a defendant in answer to a plaintiff's complaint is not a claim for purposes of N.C.G.S. § 1A-1, Rule 54(b); and (2) although the trial court purported to certify the case for immediate appeal, this act alone is insufficient where the other requirements of Rule 54(b) are not satisfied.

Appeal by defendant from judgment entered 7 November 2000 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 January 2002.

Thomas E. Dudley, III for plaintiff-appellees.

Harold C. Spears and C. Grainger Pierce, Jr., for defendant-appellant.

HUNTER, Judge.

North Carolina Farm Bureau Mutual Insurance Company ("defendant") purports to appeal an order (1) granting partial summary judgment in favor of Gary F. Yordy and Kimberly Yordy ("plaintiffs") on a defense raised by defendant in its response to the complaint, and (2) denying defendant's motion for summary judgment. Neither party has argued the threshold question of whether this appeal is interlocutory. However, "[i]t is well established in this juris-

diction that 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." *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). For the reasons set forth below, we dismiss this appeal as interlocutory.

"A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). However, an interlocutory order may nonetheless be appealed pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure if: (1) the action involves multiple claims or multiple parties, (2) the order is "a final judgment as to one or more but fewer than all of the claims or parties," and (3) the trial court certifies that "there is no just reason for delay." N.C. Gen. Stat. § 1A-1, Rule 54(b) (1999).

In the present action, plaintiffs seek a declaratory judgment as to whether they are entitled to recover from defendant for plaintiff Gary Yordy's injuries resulting from a car accident. The trial court's order merely disposes of one of the various defenses raised by defendant in its answer to the complaint (namely, that plaintiffs are barred from recovering against defendant by a covenant not to execute). A defense raised by a defendant in answer to a plaintiff's complaint is not a "claim" for purposes of Rule 54(b). *See Schuch v. Hoke*, 82 N.C. App. 445, 346 S.E.2d 313 (1986) (holding that trial court's order, granting plaintiff's motion for partial summary judgment on defenses of contributory negligence and assumption of risk, not final judgment as to any claim or party under Rule 54(b)). Thus, the trial court's order, disposing of this defense as a matter of law, is not "a final judgment as to one or more but fewer than all of the claims or parties." N.C. Gen. Stat. § 1A-1, Rule 54(b). We note that, although the trial court purported to certify the case for immediate appeal under Rule 54(b), this act alone is insufficient where the other requirements of Rule 54(b) are not satisfied. *See, e.g., CBP Resources, Inc. v. Mountaire Farms of N.C., Inc.*, 134 N.C. App. 169, 171, 517 S.E.2d 151, 153-54 (1999). For the reasons stated herein, we dismiss this appeal as interlocutory.

Dismissed.

Judges GREENE and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 MARCH 2002

CRANDALL v. KNECHTEL No. 01-317	Wake (98CVD8237)	Affirmed
DICKINSON v. PASTOR No. 01-372	Mecklenburg (99CVD18835)	Reversed and remanded
FINN v. FRANKLIN CTY. No. 00-1240-2	Ind. Comm. (I.C. 840232)	Affirmed
IN RE BEER No. 01-218	Lincoln (96J74)	Affirmed
IN RE HYATT No. 01-753	Buncombe (00J1-3)	Affirmed
IN RE KOPACH No. 01-547	Wake (00J657)	Affirmed
IN RE MONROE No. 01-731	Buncombe (99J94)	Dismissed
IN RE SMITH No. 01-93	Harnett (98J135) (98J136)	Affirmed
LEBEL v. BLADEN CTY. HOSP. No. 01-410	Bladen (00CVS127)	Affirmed
LOGAN v. ROGER'S CONCRETE CO. No. 01-588	Ind. Comm. (I.C. 819188)	Affirmed
LOW v. WOLFE CONSTR., INC. No. 01-261	Guilford (99CVS10199)	Affirmed
McDOWELL CTY. DSS ex rel. CLINE v. CLINE No. 00-1495	Mecklenburg (98CVD729)	Affirmed
NEWTON v. NICHOLSON No. 01-300	Mecklenburg (99CVS6883)	Affirmed
PARKER v. HIGGINS No. 01-266	Wilkes (99CVD962)	Affirmed
STATE v. BARBER No. 01-377	Cabarrus (00CRS6637) (00CRS6638)	No error in the trial; motion for appropriate relief is remanded
STATE v. BRYANT No. 01-208	Currituck (99CRS257)	No error

STATE v. BURRUS No. 01-944	Beaufort (00CRS3538)	Affirmed
STATE v. DURHAM No. 01-694	Wake (00CRS1981) (00CRS1982) (00CRS1983) (00CRS1984)	No error
STATE v. EIDSON No. 01-475	Cabarrus (99CRS20551) (99CRS20552)	No error
STATE v. HARDY No. 01-625	New Hanover (00CRS16209) (01CRS48) (01CRS49)	No error
STATE v. HOLMES No. 01-850	Cumberland (99CRS73560)	No error
STATE v. JACKSON No. 01-587	Durham (96CRS10719) (96CRS17286)	No error
STATE v. MILLER No. 00-1373	Union (99CRS3975)	No error
STATE v. MOSES No. 00-1439	Forsyth (99CRS46224)	Affirmed
STATE v. OWENS No. 01-757	Gaston (98CRS21674)	Affirmed
STATE v. ROBINSON No. 01-367	Union (99CRS9760)	No error
STATE v. SNYDER No. 01-417	Wayne (99CRS1786)	Affirmed
STATE v. SPEAS No. 01-822	Forsyth (93CRS13344) (93CRS28086)	Affirmed
STATE v. WALL No. 01-1323	Craven (98CRS3472)	No error
STATE v. WILLIAMS No. 01-213	Wayne (99CRS50028) (99CRS8262) (99CRS8263)	No error
STATE v. WILSON No. 01-156	Moore (98CRS5873) (98CRS10482)	No error

SWISHER v. BOARD OF ADJUST. OF GREENSBORO No. 01-40	Guilford (00CVS4496)	Dismissed
WACHOVIA BANK OF N.C. v. WEEKS No. 01-124	New Hanover (96CVS2391)	Affirmed
WILKINSON v. WILKINSON No. 01-269	Buncombe (98CVD2851)	Reversed

STATE OF NORTH CAROLINA v. TOMMY LEE OSBORNE

No. COA01-271

(Filed 19 March 2002)

1. Larceny— felonious—jury instruction—doctrine of recent possession

The trial court did not err in a felonious larceny case by instructing the jury on the doctrine of recent possession, because: (1) the evidence on the element of possession, viewed in the totality of the circumstances, was sufficient to warrant the trial court's instruction; (2) defendant and the owner of the apartment where the items were taken were the only two people who had access to the apartment during the relevant times, the owner did not change his apartment locks during the relevant times and only did so after his property was missing, defendant had a key and access to the apartment during the times the items were taken, and the possessions were recovered from defendant's bags in the apartment; (3) the fact that defendant was thwarted in returning to actually make off with the goods does not affect the completion of the larceny, and the evidence revealed that defendant had the intent to control the goods and the capability to control the property; and (4) the evidence taken in the light most favorable to the State reveals that defendant's possession of the stolen goods was to the exclusion of all persons not a party to the crime.

2. Larceny— felonious—jury instruction—constructive possession

Even though there was no evidence that defendant had a coconspirator, the trial court did not commit plain error in a felonious larceny case by its instruction to the jury on constructive possession that a person could have constructive possession where, although the property is not on his person, he is aware of its presence and has either by himself "or together with others" both the power and intent to control its disposition or use.

3. Larceny— felonious—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felonious larceny under N.C.G.S. §14-72(a), because: (1) the evidence established that the owner of the property and defendant were the only two people with access to the owner's apartment during the relevant period; (2) the owner's

missing property was discovered in defendant's bags, among his possessions, and in the room where defendant had recently been staying; (3) the owner testified that he never opened defendant's bags and did not place his belongings in defendant's bags; (4) the evidence that the owner's property was discovered mixed in with defendant's possessions in his bags constitutes substantial evidence of the necessary asportation and the necessary intent to permanently deprive the owner of this property; (5) the evidence shows the owner did not consent to defendant's taking the items and placing them in defendant's own bags.; and (6) there was sufficient evidence that defendant took property valued at $1,000 or more.

4. Larceny— felonious—sufficiency of indictment

An indictment was sufficient to charge felonious larceny where it alleged that defendant "unlawfully, willfully and feloniously did steal, take, and carry away (see attached list), the personal property of [a named person], such property having a value of $3,700.00. This is in violation of N.C.G.S. 14-72(a)." It was not necessary for the indictment to allege specifically that defendant did not have consent to take the property or that defendant had the intent to permanently deprive the owner of his property.

5. Larceny— motion to dismiss—variance between dates

The trial court did not err by denying defendant's motion to dismiss a felonious larceny charge based on an alleged fatal variance between the date alleged in the indictment and the evidence presented at trial, because: (1) defendant has failed to demonstrate how any variance deprived him of an opportunity to present his defense; and (2) although defendant argues the variance was prejudicial in that he relied on an alibi defense, a review of the evidence reveals that defendant did not rely on an alibi defense at trial.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 18 August 2000 by Judge James U. Downs in Watauga County Superior Court. Heard in the Court of Appeals 22 January 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General T. Lane Mallonee, for the State.

Marjorie S. Canaday, for defendant-appellant.

HUNTER, Judge.

Tommy Lee Osborne ("defendant") appeals a conviction for felonious larceny. We hold defendant has failed to show prejudicial error.

The evidence presented at trial tended to establish that in late April 1999, the victim, Thomas Klostermeyer, received a telephone call from his minister asking him to provide defendant a place to stay. Klostermeyer agreed, and defendant moved into Klostermeyer's one bedroom apartment on Tuesday, 27 April 1999. Klostermeyer provided defendant with a key to the apartment, and testified defendant had "the run of the apartment." Klostermeyer allowed defendant to sleep in the living room area. Defendant brought with him several garbage bags full of things and a duffel bag which he stored behind a chair in the living room. No one other than defendant and Klostermeyer had access to the apartment.

Klostermeyer testified he last saw defendant at approximately 1:00 p.m. Friday afternoon, 30 April 1999, when Klostermeyer left the apartment. When Klostermeyer returned home that evening, he began to discover that several of his possessions were missing. He notified the police, and on Saturday, 1 May 1999, he went to the police station to file a report. Upon returning home, Klostermeyer discovered more items missing.

On Sunday morning, 2 May 1999, Klostermeyer changed the locks to his apartment. Defendant's bags were still behind a chair in the living room. Later that day, defendant attempted to enter the apartment, but found that his key no longer worked. Klostermeyer informed defendant that several of his possessions were missing, and that the police had instructed him to notify them when defendant returned to the apartment. Defendant, who appeared to be intoxicated, left the apartment. Klostermeyer notified the police.

On Monday, 3 May 1999, the police located defendant at the Hospitality House, a homeless shelter in Boone, North Carolina. Defendant told the police that if any of Klostermeyer's possessions were in his bags, it was because Klostermeyer put them there. The police brought defendant to Klostermeyer's apartment and instructed him to open his bags. Klostermeyer's missing possessions were in defendant's bags. Defendant testified on his own behalf, maintaining that Klostermeyer placed the items in his bags in an effort to frame him because Klostermeyer did not believe defendant had served enough prison time for a previous sexual abuse conviction.

Over defendant's motion to dismiss the larceny indictment, the trial court submitted to the jury possible verdicts of felonious larceny, non-felonious larceny, and not guilty. On 18 August 2000, the jury returned a verdict of guilty of felonious larceny. The trial court entered judgment thereon, and sentenced defendant as an habitual felon to a minimum of 100 and a maximum of 129 months in prison.

Defendant appeals his conviction for felonious larceny, arguing that the trial court erred in (1) instructing the jury on the doctrine of recent possession; (2) instructing the jury on constructive possession; (3) denying his motion to dismiss the larceny charge for lack of substantial evidence; (4) denying his motion to quash the larceny indictment for failure to set forth the essential elements of larceny; and (5) denying his motion to dismiss the indictment due to a fatal variance between the date alleged on the indictment and the evidence presented at trial.

I.

[1] Defendant first argues the trial court erred in instructing the jury on the doctrine of recent possession because the evidence was insufficient to support the instruction. We disagree.

The trial court's jury instructions on possible theories of conviction must be supported by the evidence. *State v. Carter*, 122 N.C. App. 332, 339, 470 S.E.2d 74, 79 (1996). "The doctrine of recent possession allows the jury to infer that the possessor of certain stolen property is guilty of larceny." *State v. Pickard*, 143 N.C. App. 485, 487, 547 S.E.2d 102, 104, *disc. review denied*, 354 N.C. 73, 553 S.E.2d 210 (2001). Under this doctrine, the State must show three things: (1) that the property was stolen; (2) that defendant had possession of this same property; and (3) that defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly. *Id.*

In this case, defendant argues that the trial court should not have instructed the jury as to recent possession because the evidence failed to establish the element of possession. He contends the evidence failed to show that he had the requisite intent and capability to control the property in Klostermeyer's apartment.

In order to prove the element of possession under this doctrine, the State need not prove actual physical possession of the property. *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). Rather, "[p]roof of nonexclusive, constructive possession is sufficient. . . .

Constructive possession exists when the defendant, 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the [property]." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (citation omitted). "Where sufficient incriminating circumstances exist, constructive possession of the [property] may be inferred even where possession of the premises is nonexclusive." *State v. Kraus*, 147 N.C. App. 766, 770, 557 S.E.2d 144, 147 (2001). Moreover, this Court has previously emphasized that " 'constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury.' " *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001) (citation omitted) (emphasis omitted).

Here, the trial court instructed the jury on the theory of constructive possession as a means to satisfy the element of possession. We hold that the evidence on the element of possession, viewed in the totality of the circumstances, was sufficient to warrant the trial court's instruction on the doctrine of recent possession. Klostermeyer's testimony established that defendant moved into his apartment, where he lived alone, on a Tuesday evening. He testified he gave defendant a key to the apartment on that Tuesday, and that defendant was given "the run of the apartment." Klostermeyer testified that defendant was not working at the time. He stated defendant remained in the apartment for four days, until he "disappeared" on Friday evening. Klostermeyer last saw defendant when Klostermeyer left his apartment on Friday at approximately 1:00 p.m. He returned home around 5:30 p.m. and began to discover that various items of his personal property were missing later Friday evening. He stated that the last time he saw some of his possessions was on Monday night, some he last saw on Wednesday night, and some he last saw on Thursday night. He further stated that he also noticed some items were missing on Saturday afternoon. Some of the stolen items Klostermeyer did not realize were missing until they were recovered from defendant's bags. Police Officer Keith Ward testified that Klostermeyer said he and defendant were the only two people who had access to the apartment during the relevant time.

Klostermeyer further testified that he did not change his apartment locks until Sunday morning. Thus, defendant had a key and access to Klostermeyer's apartment from Tuesday until the following Sunday morning. Klostermeyer testified he was away from his apartment on Saturday afternoon, having gone to speak with the police. Klostermeyer's possessions were recovered from defendant's bags in

Klostermeyer's apartment on Monday when the police brought defendant back to the apartment.

We reject defendant's argument that he did not have the capability to control the property, and therefore did not have constructive possession, because he did not have a working key to the apartment at the very moment the goods were discovered. This analysis ignores the totality of the circumstances in that for several days, during which time Klostermeyer's possessions disappeared, defendant had the power and capability to maintain control over the stolen goods. The fact that defendant was thwarted in returning to actually make off with the goods does not affect the completion of the larceny and the evidence that defendant had (1) the intent to control the goods, given that the property was among his possessions in closed bags in the room where he had been staying, and (2) the capability to control the property, given that during the time the items disappeared, defendant and Klostermeyer were the only two people with access to the apartment, and Klostermeyer testified that he did not place any of his property in the bags, nor did he ever open defendant's bags.

The fact that defendant's capability to maintain control over the goods eventually ended just prior to their discovery does not affect the evidence of defendant's constructive possession of the stolen property, particularly where there was no evidence that anyone but the victim had access to the apartment and the stolen goods between the time the locks were changed on Sunday and when the goods were discovered on Monday. *See State v. Lilly*, 25 N.C. App. 453, 455, 213 S.E.2d 418, 419 (1975) (constructive possession satisfied where the stolen property is " '. . . "in any place where it is manifest it must have been put by the act of the [defendant]" ' " (citations omitted)). The trial court did not err in instructing the jury as to the doctrine of recent possession based upon evidence of defendant's constructive possession of the property. *See Butler*, 147 N.C. App. at 11, 556 S.E.2d at 311 (whether totality of circumstances amounts to evidence of constructive possession is jury question).

The dissent argues that it was improper to use the theory of constructive possession because the evidence failed to show that he had exclusive control over the stolen goods. However, as our Supreme Court has noted, "[w]hat amounts to exclusive possession of stolen goods to support an inference of a felonious taking most often turns on the circumstances of the possession." *State v. Maines*, 301 N.C. 669, 675, 273 S.E.2d 289, 294 (1981). The Court noted that "[t]he 'exclusive' possession required to support an inference or presump-

tion of guilt need not be a sole possession but may be joint." *Id.* (citation omitted). The Court further explained that for the inference of guilt based on recent possession to arise where someone other than the defendant has access to the stolen goods, "the evidence must show the person accused of the theft had complete dominion, which might be shared with others [such as with co-conspirators], over the property *or other evidence which sufficiently connects the accused person to the crime.*" *Id.* (emphasis added). "Stated differently, for the inference to arise, the possession in defendant must be to the exclusion of all persons not party to the crime." *Id.* Thus, where the defendant in *Maines* was apprehended in a car containing the stolen goods along with three other people, and the State had failed to show any criminal conspiracy between the four, the State failed to show that defendant had the necessary personal control over the stolen goods. *Id.* at 675-76, 273 S.E.2d at 294.

However, in this case, the evidence, taken in the light most favorable to the State, shows that defendant's possession of the stolen goods was to the exclusion of all persons not a party to the crime. The only other person with access to the apartment was Klostermeyer, who testified that he never touched defendant's bags, never opened defendant's bags, and never placed any of his possessions in defendant's bags. Such evidence, giving the State the benefit of all reasonable inferences, is sufficient evidence to connect defendant to the crime and to establish that he had complete dominion over the stolen goods in his bags. The evidence clearly establishes that no one other than defendant exercised any control over, or possession of, his bags which contained the stolen goods.[1]

[2] Defendant further argues the trial court erred in giving its instruction on constructive possession because it stated that a person could have constructive possession where, although the property is not on his person, he is aware of its presence "and has either by himself or together with others both the power and intent to control it's [sic] disposition or use." Defendant argues the language "or together with others" should not have been included because there was no evidence showing defendant had a co-conspirator. Defendant failed to object to

1. Although the dissent states that the principles of constructive possession are not available to support the recent possession doctrine, this Court has held otherwise. *See State v. Carter*, 122 N.C. App. 332, 339, 470 S.E.2d 74, 79 (1996) (trial court did not err in instructing on doctrine of recent possession and constructive possession); *State v. Hardy*, 67 N.C. App. 122, 127, 312 S.E.2d 699, 703 (1984) (evidence was sufficient to support submission of doctrine of recent possession based upon circumstantial evidence of defendant's constructive possession of stolen property).

this instruction following the trial court's charge or when the court specifically asked for any objections or requests.

Defendant has failed to carry his burden of establishing plain error, that being 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). Even if the trial court's instruction "or together with others" was not supported by any evidence of a co-conspirator, defendant has failed to show that, absent this error, the jury would not have convicted him of larceny. These arguments are overruled.

II.

By his second argument, defendant contends the trial court erred in instructing the jury on the theory of constructive possession where it was unsupported by the evidence. Although defendant objected to the trial court's instructing the jury as to recent possession, he failed to specially object to the instruction on constructive possession. In any event, for the reasons discussed above, the evidence was sufficient to warrant the instruction on constructive possession, and any error in the trial court's use of the "or together with others" language does not rise to the level of plain error.

III.

[3] Defendant next argues the trial court erred in denying his motion to dismiss the larceny charge because the State failed to present substantial evidence of each element of the charge. ". . . '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. Isenberg*, 148 N.C. App. 29, 41, 557 S.E.2d 568, 576 (2001) (citations omitted). In reviewing the trial court's denial of defendant's motion, we must consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference to be drawn from the evidence. *Matias*, 354 N.C. at 551, 556 S.E.2d at 270.

In this case, the State presented substantial evidence of each essential element of felonious larceny. "The essential elements of larceny are that the defendant: 1) took the property of another; 2) car-

ried it away; 3) without the owner's consent; and 4) with the intent to deprive the owner of the property permanently." *Pickard*, 143 N.C. App. at 490-91, 547 S.E.2d at 106. First, the State presented sufficient evidence that defendant took the property of another. The evidence established that Klostermeyer and defendant were the only two people with access to Klostermeyer's apartment during the relevant period. Klostermeyer's missing property was discovered in defendant's bags, among his possessions, and in the room where defendant had recently been staying. Moreover, Klostermeyer testified that he never opened defendant's bags and did not place his belongings in defendant's bags.

Second, the State presented sufficient evidence that there was a carrying away of Klostermeyer's property, however slight. As our Supreme Court noted in *State v. Barnes*, 345 N.C. 146, 478 S.E.2d 188 (1996), ". . . 'the element of taking is complete in the sense of being satisfied at the moment a thief first exercises dominion over the property." *Id.* at 149, 478 S.E.2d at 191 (holding act of larceny complete as soon as defendant removed bag of money from below cash register). " 'A bare removal from the place in which [the defendant] found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away.' " *State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978) (citation omitted). The evidence that Klostermeyer's property was discovered mixed in with defendant's possessions in his bags constitutes substantial evidence of the necessary asportation.

The State also presented substantial evidence of the third and fourth elements of larceny. The evidence shows Klostermeyer did not consent to defendant's taking the items and placing them in his own bags. Moreover, the fact that the items were discovered in defendant's bags and among his own possessions is sufficient evidence from which a reasonable jury could conclude defendant had the necessary intent to permanently deprive Klostermeyer of this property.

In addition, the State's evidence met the requirement for felonious larceny of establishing that defendant took property valued at $1,000.00 or more. *See* N.C. Gen. Stat. § 14-72(a) (1999) (larceny is felonious where value of stolen goods is at least $1,000.00). We disagree with defendant's contention that there was no evidence defendant took property valued at $1,000.00 at any single time. Klostermeyer testified that one of the missing items was a set of three coins. Klostermeyer stated that in his opinion, the fair market value of the coins was $800.00 to $1,000.00 a piece, for a total fair market value of

$2,400.00 to $3,000.00. We conclude, viewing the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference, that it is reasonable to infer that the coins were taken at one time. This amount is sufficient to meet the value requirement for felonious larceny.

Moreover, Klostermeyer's testimony as to the fair market value of the coin set is sufficient proof of the value amount for felonious larceny. *See State v. Revelle*, 301 N.C. 153, 160, 270 S.E.2d 476, 480 (1980) (victim's opinion testimony as to fair market value of stolen goods sufficient evidence upon which to submit charge of felonious larceny to jury), *overruled on other grounds*, *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988); *see also State v. Jacobs*, 105 N.C. App. 83, 87, 411 S.E.2d 630, 632 (1992); *State v. Haire*, 96 N.C. App. 209, 214, 385 S.E.2d 178, 181 (1989), *cert. denied*, 326 N.C. 265, 389 S.E.2d 117 (1990); *State v. Simpson*, 14 N.C. App. 456, 459, 188 S.E.2d 535, 536 (1972).

The State presented substantial evidence as to all elements of larceny, as well as the value amount required for felonious larceny. The trial court did not err in denying defendant's motion to dismiss the charge. This assignment of error is overruled.

IV.

[4] By his fourth argument, defendant maintains the trial court erred in denying his motion to quash the indictment for its failure to set forth each element of larceny as required by N.C. Gen. Stat. § 15A-924(a)(5) (1999). The indictment alleged in pertinent part that defendant "unlawfully, willfully and feloniously did [s]teal, take, and carry away (see attached list), the personal property of Thomas Richard Klostermeyer, such property having a value of $3,700.00. This is in violation of N.C.G.S. 14-72(a)." Defendant argues that the indictment was insufficient in that it failed to specifically allege that defendant did not have consent to take the property, nor that defendant had the intent to permanently deprive Klostermeyer of his property.

However, the issue of the sufficiency of the language used to charge larceny by the indictment in this case has previously been determined by our Courts. In *State v. Mandina*, 91 N.C. App. 686, 373 S.E.2d 155 (1988), this Court, citing to N.C. Gen. Stat. § 15A-924(a)(5), held the following language in the indictment sufficient to charge larceny: that the defendant ". . . 'unlawfully and wilfully did feloniously steal, take and carry away . . . the personal property of (name of

owner-victim) pursuant to a violation of Section 14-51 of the General Statutes of North Carolina. This larceny was in violation of the following law: N.C.G.S. 14-72(b)(2).' " *Id.* at 690, 373 S.E.2d at 158; *see also State v. White*, 85 N.C. App. 81, 89, 354 S.E.2d 324, 330 (1987) (indictment sufficient to charge larceny where it contained language that the defendant " 'did unlawfully, wilfully, and feloniously steal, take, and carry away another's personal property' "), *affirmed*, 322 N.C. 506, 369 S.E.2d 813 (1988).

Thus, the specific language used in the indictment here has previously been held to be sufficient to charge the offense of larceny. Moreover, we find the indictment sufficient to meet the underlying purpose of an indictment, which is "to ensure that a defendant may adequately prepare his defense and be able to plead double jeopardy if he is again tried for the same offense." *State v. Madry*, 140 N.C. App. 600, 601, 537 S.E.2d 827, 828 (2000).

Although defendant also raises constitutional arguments, contending that the indictment violates his Sixth and Fourteenth Amendment rights, he failed to present these arguments to the trial court. We decline to address these arguments for the first time on appeal. *See State v. Deese*, 136 N.C. App. 413, 420, 524 S.E.2d 381, 386 (appellate court will not consider constitutional arguments neither asserted nor determined in the trial court), *appeal dismissed and disc. review denied*, 351 N.C. 476, 543 S.E.2d 499 (2000). Defendant's assignment of error in overruled.

V.

[5] In his final argument, defendant maintains the trial court erred in denying his motion to dismiss the larceny charge due to a fatal variance between the date of the offense alleged on the indictment, and the proof which was offered at trial. The indictment alleged that the offense occurred "on or about May 3, 1999", which was the Monday on which the stolen property was discovered in defendant's bags. Defendant argues the evidence did not show that he committed the larceny on 3 May 1999.

"An indictment must include a designated date or period of time within which the alleged offense occurred." *State v. Stewart*, 353 N.C. 516, 517, 546 S.E.2d 568, 569 (2001). Our Supreme Court has recognized that the time listed in an indictment is not generally an essential element of the crime charged, and thus, "a judgment should not be reversed when the indictment lists an incorrect date or time ' "if

time was not of the essence" ' of the offense, and ' "the error or omission did not mislead the defendant to his prejudice." ' " *Id.* at 517, 546 S.E.2d at 569 (citations omitted). The Supreme Court has determined that a variance as to time is ". . . 'material and of the essence' . . ." where it ". . . 'deprives a defendant of an opportunity to adequately present his defense.' " *Id.* at 518, 546 S.E.2d at 569 (citation omitted). Moreover, we require "that a defendant demonstrate that he or she was misled by a variance, or hampered in his/her defense before this Court will consider the variance error." *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371, *disc. review denied and cert. denied*, 344 N.C. 636, 477 S.E.2d 53 (1996).

Applying these principles here, we hold that any variance in the date alleged on the indictment and the evidence offered at trial does not require reversal of defendant's conviction, as he has failed to demonstrate how any variance deprived him of an opportunity to present his defense. Defendant argues the variance was prejudicial in that he relied on "an alibi defense" which established that on 3 May 1999 he was "out riding his bicycle looking for loose change." However, a review of the evidence reveals defendant did not rely on an alibi defense at trial; rather, defendant asserted throughout trial that the items were placed in his bags by Klostermeyer in an effort to frame him. Defendant never requested that the trial court instruct the jury as to alibi. Therefore, any variance in dates did not hamper the presentation of defendant's defense.

Defendant has failed to establish the presence of prejudicial error.

No error.

Judge TYSON concurs.

Judge GREENE dissents in a separate opinion.

GREENE, Judge, dissenting.

I believe the State failed to present substantial evidence of defendant's recent possession of the stolen goods at issue, and thus, the trial court erred in submitting the felonious larceny charge to the jury.[2] I therefore dissent.

2. The State does not argue in its brief to this Court that evidence exists defendant took the property at issue, except under the recent possession doctrine.

In order to invoke the doctrine of recent possession and survive a motion to dismiss a larceny charge, the State must present substantial evidence that:

> (1) the property described in the indictment was stolen; (2) the stolen goods were found in [the] defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in [the] defendant's hands or on his person so long as he had the power and intent to control the goods; and (3) the possession was [discovered] recently after the larceny[.]

State v. Maines, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981) (citations omitted). Although it is not necessary the stolen property be found either in the hands or on the person of the defendant, the property must be under the defendant's "exclusive personal control."[3] *State v. Foster*, 268 N.C. 480, 487, 151 S.E.2d 62, 67 (1966); *State v. Lewis*, 281 N.C. 564, 567, 189 S.E.2d 216, 219, *cert. denied*, 409 U.S. 1046, 34 L. Ed. 2d 498 (1972). It is not enough that recently stolen items are found in a container belonging to the defendant without some indication the defendant was either in possession of the container or exercised exclusive control over the container at the time the stolen items were found in the container. *State v. English*, 214 N.C. 564, 566, 199 S.E. 920, 921 (1938) (recent possession did not apply when there was no evidence the defendant was in possession of his truck at the time the stolen items were found or at the time the items were placed there); *see State v. McFalls*, 221 N.C. 22, 23-24, 18 S.E.2d 700, 701-02 (1942) (trial court erred in instructing the jury on recent possession where the goods were found in the defendant's cedar chest in an apartment she shared with two other individuals and there was no evidence the defendant placed the goods there or knew of them). Thus, the principles of constructive possession (where possession can be inferred even though it is nonexclusive) are not available to support the recent possession doctrine. 52A C.J.S. *Larceny* § 107, at 595 (1968).

In this case, it is not disputed the property was stolen and its possession discovered recently after the larceny. The question is whether there is substantial evidence the property was found in defendant's "custody and subject to his control and disposition to the exclusion of others." In this case, in viewing the evidence in the light most favorable to the State, the stolen items were not found on defendant's

3. I note "exclusive possession may be joint possession if persons are shown to have acted in concert" or as an accomplice. *State v. Solomon*, 24 N.C. App. 527, 529, 211 S.E.2d 478, 480 (1975). In this case, however, there is no evidence of an accomplice.

person but were found in garbage bags containing defendant's personal items. Those bags were located in an apartment, leased by Klostermeyer, in which Defendant had stayed for several days prior to 30 April 1999. At no time during defendant's stay with Klostermeyer did he have exclusive access or control over the apartment.[4] Indeed, after 1 May 1999, defendant had no access to the apartment as the locks were changed on the door on 2 May 1999. Moreover, the State presented no evidence whatsoever that defendant was present in the apartment after 30 April or that the garbage bags were removed from the apartment during the period between 30 April and 3 May 1999, the latter date being the date on which the property was found. In addition, the arresting police officer testified at trial that to the best of his knowledge, defendant had not been in the apartment after 30 April 1999 until taken there on 3 May 1999. Thus, there is no evidence giving rise to the presumption defendant stole the property in question. Accordingly, I would reverse the trial court's denial of defendant's motion to dismiss and reverse the conviction.

STATE OF NORTH CAROLINA v. GERARD PAUL HOLADIA AND DEMETRIUS MONTEL COOPER

No. COA00-1162

(Filed 19 March 2002)

1. Evidence— prior crime or bad acts—drug activity—motive—context and circumstances of crime

The trial court did not err in an armed robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by allowing one of the victims to testify under N.C.G.S. § 8C-1, Rule 404(b) regarding defendant's prior drug activity, because: (1) the evidence was relevant to show defendant's possible motive in the robbery; (2) the evidence establishes the immediate context and circumstances of the crime; and (3) the fact that the drug transaction occurred four years before this crime did not preclude the admissibility of the evidence, but rather affected the weight to be given that evidence.

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4. The fact that the possession of the apartment (in which the bags containing the stolen goods were found) was shared with the victim of the larceny in this case is not material; the possession remained nonexclusive.

2. Evidence— testimony—vendetta by defendant against victim

Even assuming that the trial court erred in an armed robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by allowing one of the victims to testify under N.C.G.S. § 8C-1, Rule 602 regarding a vendetta by defendant against one of the other victims, the error was harmless because: (1) the testimony merely corroborated the testimony of another witness; and (2) defendant failed to object when similar testimony was presented.

3. Discovery— recanted testimony of coparticipant's identification—motion for mistrial—failure to show prejudice

The trial court did not err in an armed robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by denying defendant's motion for a mistrial based on the State's failure to disclose alleged exculpatory evidence favorable to the codefendant regarding a witness's recanting his earlier identification of the second man present during the robbery, because: (1) defendant ultimately received the requested information at trial; (2) defendant's identity was not in dispute; and (3) defendant failed to show how he was prejudiced by the nondisclosure prior to trial.

4. Assault— deadly weapon inflicting serious injury—acting in concert—motion to dismiss—sufficiency of evidence

The trial court did not commit plain error by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury based on the trial court's instructions on acting in concert, because: (1) the trial court properly instructed on acting in concert; and (2) the evidence revealed that defendant acted in concert with another to commit the robbery, and the shooting of the victim by the other person was part of a course of conduct by the two assailants to gain control over the occupants to rob them.

5. Constitutional Law— right to unanimous verdict—right to have jury polled

The trial court erred in an armed robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by failing to correctly poll the individual jurors as required by N.C.G.S. § 15A-1238 and N.C. Const. Art. I, Sec. 24, because: (1) defendant was entitled as a matter of right to insist that a specific

question be addressed to and answered by each juror in open court as to whether he or she assented to the verdict; and (2) the questioning of the jury collectively and having all the jurors respond collectively by raising their hands failed to meet the statutory mandate that the jury be polled individually.

Appeals by both defendants from judgments entered 28 April 2000 by Judge William C. Griffin, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 12 September 2001.

Attorney General Michael F. Easley, by Special Deputy Attorney General Lorinzo L. Joyner and Assistant Attorney General E. Clementine Peterson, for the State.

McCotter, McAfee & Ashton, P.L.L.C., by Rudolph A. Ashton, III and Terri W. Sharp, for defendant-appellant, Holadia.

Everett & Hite, L.L.P., by Kimberly A. Swank, for defendant-appellant, Cooper.

TYSON, Judge.

Gerard Paul Holadia ("Holadia") and Demetrius Montel Cooper ("Cooper") appeal the entry of judgments following a jury verdict finding both guilty of two counts of armed robbery with a dangerous weapon and one count of assault with a deadly weapon inflicting serious injury. We hold there is no error as to defendant Holadia. We reverse and remand for a new trial as to defendant Cooper.

I. Facts

Evidence presented at trial tended to establish that on 14 June 1999 two men with guns entered a trailer and robbed the occupants, Eddie Spencer ("Eddie"), Fabian Spencer ("Fabian"), Clinton Spencer ("Clinton"), and Michelle Davis ("Michelle"), in Hyde County, North Carolina.

Eddie and Fabian testified that they heard a knock on the door. Fabian asked who was at the door. The response was "G", the nickname of Holadia. Both also testified that after Fabian opened the door two men entered the trailer with guns. Eddie testified that he saw Holadia with a sawed-off shotgun and that he grabbed the gun. Holadia responded "you don't see my man standing to the door with the gun to your head?"

Eddie informed Holadia that Clinton was in the bedroom and walked back to the bedroom with Holadia. Holadia ordered Clinton, Michelle, and Eddie to go to the front room and lay down on the floor. Holadia told them to empty their pockets. Eddie testified that Holadia asked "where's the money" and "where's the AK-47."

Fabian remained on the bed in the living room. Fabian testified that Cooper remained standing at the door, threatening them, pointing a silver gun back and forth. Cooper then shot Fabian in the leg. Fabian testified that Holadia had taken a glass door from the stereo cabinet and tried to break it on Clinton's back. Fabian told Holadia about the money box located in the stereo. Holadia threw the box at Fabian, who opened the combination lock and gave the money to Holadia.

Eddie testified that before they left Holadia and Cooper kicked him and pistol-whipped him. Eddie further testified that Holadia said to him "why did you bring that undercover to my house," referring to a previous drug deal with an undercover police officer.

When the investigating officers arrived, all four victims immediately identified Holadia and stated that they had known Holadia for at least ten years prior to the robbery. Eddie, Fabian, and Clinton testified at trial that Holadia was the person in the trailer with the sawed-off shotgun. Michelle testified that it was too dark for her to identify either of the two men.

All four victims testified that they did not know the identity of Cooper on the night of the robbery. Eddie and Fabian testified that Cooper had come to the trailer twice before. Both picked out Cooper's picture during photo identification. In a third statement to the investigating officers, Fabian recanted his identification of Cooper stating "[w]ell, I now feel like he didn't do it because I really [had] time to think about it. When it happened, different people were telling me Mr. Cooper had done it, had did it. But I really felt in my heart that he didn't do it."

Eddie and Fabian testified that Cooper was the other man in the trailer on the night of the robbery. Fabian testified that the reason he recanted his identification was because he had found religion and did not want Cooper to be away from his baby. Clinton testified that because of his view and eyesight he could not identify the other man. Michelle testified that it was dark, and that she could not identify either of the two men in the trailer on the night of the robbery. She

further testified that during the photo identification she picked out photographs of Cooper and another man. Michelle also stated that she identified Cooper's photograph as a result of pressure from the police and district attorney.

Cooper and his girlfriend, Constance Intaya Betts ("Betts"), testified that on the night of the robbery Betts picked up Cooper at the house of Tammy Shelton. Cooper and Holadia were both at Shelton's house. Cooper testified that he did not speak with anyone while there and did not know Holadia. Betts testified that upon arriving at Shelton's house, Holadia opened the door and she asked him where Cooper was. Holadia asked her "who" and she responded "a dark skinned guy" and Holadia said "oh yeah, he's sittin' in the living room." Betts further testified that Holadia acted as if he did not know Cooper.

The jury returned with the verdicts and the court confirmed that the jury had unanimously found Holadia guilty on all charges. As the court was reading the guilty verdict for Cooper, Holadia spoke out stating "Your Honor, in fact, he is not guilty; I am guilty. He is not guilty. I know for a fact. I did, I did commit these robberies, and he is not guilty." The court confirmed that the jury had unanimously found Cooper guilty on all charges.

Defendants' counsel requested polling of the jury. Again Holadia spoke out and requested to approach the bench. The court denied his request and instructed Holadia to sit down. The jury was individually polled with respect to Holadia and all confirmed a verdict of guilty on all charges. The court began to individually poll the jurors with respect to Cooper when Holadia continued to state that he committed the robberies as a vendetta and that Cooper was innocent.

Juror No. 12, the Foreman, asked the court about Holadia's post-trial statements. The court instructed the jury "your verdict is supposed to be based upon the evidence that was presented from the witness stand and the law." Juror No. 12 and Juror No. 10 asked to reconvene with respect to Cooper. The trial court allowed the jury to continue their deliberations stating "keeping in mind what I just told you that what's been said here is not evidence." During the recess, Holadia declined to name the other individual who participated in the robbery.

The court brought the jury back into the courtroom after three minutes. After Holadia was removed for further disruptions, the court

polled each juror. The court asked each juror "whether [they] assented to [the verdict] at the time that the unanimous verdict was reached in the jury room." All twelve jurors assented to the guilty verdict with respect to Cooper.

II. Issues

Holadia argues on appeal that the trial court erred in (1) allowing Eddie Spencer to testify regarding prior drug activity, (2) allowing Fabian Spencer to testify regarding a vendetta by defendant against Eddie Spencer, (3) denying his motion for a mistrial based on the State's failure to disclose exculpatory evidence favorable to Cooper, and (4) denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury.

Cooper argues on appeal that the trial court erred in: (1) failing to correctly poll the individual jurors and entering judgment after one juror did not assent, (2) denying his motion for a mistrial based on the State's failure to disclose exculpatory evidence, and (3) denying his motion for a new trial based on newly discovered evidence.

III. Defendant Holadia's Appeal

A. Prior Drug Activity

[1] Defendant Holadia argues that the admission of testimony by Eddie Spencer that he was kicked, pistol-whipped, and asked by Holadia "why did you bring the undercover to my house" violated Rule 404(b) and Rule 403 of the North Carolina Rules of Evidence.

> Rule 404 (b) of the North Carolina Rules of Evidence provides:
>
> 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. Gen. Stat. § 8C-1, Rule 404(b) (1999). "Our Supreme Court has held that Rule 404(b) states a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to 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. Barnett*, 141 N.C. App. 378, 389, 540 S.E.2d 423, 431 (2000) (citing *State v.*

Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)), *appeal dismissed and review denied*, 353 N.C. 527, 549 S.E.2d 552 (2001) (emphasis in original omitted). "Accordingly, although 'evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried.' " *State v. Blackwell*, 133 N.C. App. 31, 34-35, 514 S.E.2d 116, 119 (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)), *cert. denied*, 350 N.C. 595, 537 S.E.2d 483 (1999).

The State argues that the prior drug transaction in which Eddie Spencer brought in an undercover officer was relevant to Holadia's possible motive in the robbery. *See State v. Emery*, 91 N.C. App. 24, 370 S.E.2d 456 (1988) (defendant's sale of marijuana had some probative value concerning defendant's motive in the shooting); *State v. Lundy*, 135 N.C. App. 13, 519 S.E.2d 73 (1999) (defendant's drug dealing activities were relevant to show defendant's motive for murdering the victim), *disc. review denied*, 351 N.C. 365, 542 S.E.2d 651 (2000).

The State further argues that Holadia's prior drug activity with Eddie Spencer establishes the immediate context and circumstances of the crime. *See State v. Agee*, 326 N.C. 542, 546, 391 S.E.2d 171, 173 (1990) (defendant's alleged wrongful conduct was admissible to establish the "chain of circumstances" of the crime charged). Under this principle, when evidence leading up to a crime is part of the scenario which helps explain the setting, there is no error in permitting the jury to view the criminal episode in the context in which it happened. *Id.* at 549, 391 S.E.2d at 175 (holding evidence of "other wrongs" is admissible for the purpose of " 'complet[ing] the story of a crime by proving the immediate context of events near in time and place' ") (quoting *United States v. Currier*, 821 F.2d 52, 55 (1st Cir. 1987)).

Holadia argues that should the testimony be admissible within Rule 404(b) it should have been excluded pursuant to Rule 403 because it was prejudicial and remote in time.

Rule 403 of the North Carolina Rules of Evidence provides:

> 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 con-

siderations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, Rule 403 (1999). The exclusion of the evidence under Rule 403 is a matter generally left to the sound discretion of the trial court. *State v. Lemons*, 348 N.C. 335, 353, 501 S.E.2d 309, 320 (1998) (citing *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 127 L. Ed. 2d 341 (1993)), *vacated*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999). Abuse will be found only where the trial court's ruling is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *Id.*

Our Supreme Court held that " '[r]emoteness in time is less significant when the prior conduct is used to show . . . motive . . . remoteness in time generally affects only the weight to be given such evidence, not its admissibility.' " *State v. White*, 349 N.C. 535, 553, 508 S.E.2d 253, 265 (1998) (quoting *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991)). The fact that Holadia's drug transaction with Eddie occurred four years before this crime did not preclude the admissibility of the evidence, but rather affected the weight to be given that evidence. *Barnett*, 141 N.C. App. at 390-91, 540 S.E.2d at 431 (fact that defendant's conviction for forgery occurred several years before did not preclude the admissibility of the evidence; instead the passage of time affected the weight to be given that evidence) (citations omitted). We hold that the trial court did not commit error in admitting this testimony into evidence.

B. Vendetta Testimony

[2] Fabian Spencer testified that while defendant Holadia was kicking and pistol-whipping his brother, Eddie, Holadia said that he ought to kill Eddie because he "did four months behind him." Fabian stated "I guess it was a vendetta." Upon objection by defendant, the court instructed the witness not to guess. The prosecutor asked Fabian "do you know what he meant by that, that he has done four months behind him?" Fabian responded "yes sir, because [there] were some charges that were passed out, and everybody thought Eddie had did it."

Holadia argues that the admission of this testimony by Fabian violated Rule 602 because the statements were not based on his own knowledge but on "pure speculation and conjecture." Rule 602 of the North Carolina Rules of Evidence provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.

N.C. Gen. Stat. § 8C-1, Rule 602 (1999).

The State argues that the trial court instructed the witness not to guess; therefore, Fabian was testifying to matters within his own personal knowledge. We hold that even if the trial court erred in admitting this testimony, the error was harmless. "Where improperly admitted evidence merely corroborates testimony from other witnesses, we have found the error harmless." *State v. Wynne*, 329 N.C. 507, 519, 406 S.E.2d 812, 818 (1991). Eddie previously testified that during the robbery Holadia asked him "why did you bring the undercover to my house", referring to a prior drug deal the two had with an undercover officer in 1995. The testimony of Fabian merely corroborates the testimony from Eddie.

We point out that Holadia failed to object when Clinton similarly testified that while Holadia and the other fellow stomped and pistol-whipped his brother, Eddie, Holadia "was talking about somethin' in the past or whatever." Clinton further testified that Holadia's statement was "about [the fact] he did eight months because of my brother or something." The benefit of an objection is lost when the same or similar evidence is later admitted without objection. *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). We overrule this assignment of error.

C. Motion for Mistrial

[3] Holadia contends that because the State withheld exculpatory evidence favorable to defendant Cooper, he was entitled to a mistrial. The exculpatory evidence referred to is a third written statement made by Fabian recanting his earlier identification of Cooper as the second man present during the robbery. "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt, or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963).

The duty to disclose such evidence is applicable even though there has been no request by the accused. *United States v. Agurs*, 427 U.S. 97, 107, 49 L. Ed. 2d 342, 351 (1976). The duty to disclose encompasses impeachment evidence as well as exculpatory evidence.

United States v. Bagley, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 490 (1985). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682, 87 L. Ed. 2d at 494.

" 'In determining whether the suppression of certain information was violative of the defendant's right to due process, the focus should not be on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, but rather should be on the effect of the nondisclosure on the outcome of the trial.' " *State v. Smith*, 337 N.C. 658, 662, 447 S.E.2d 376, 378 (1994) (quoting *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983)).

Defendants ultimately received the requested information at trial. The record reflects that defendant Cooper's attorney called Fabian as an adverse witness and questioned Fabian regarding his statement recanting his identification. Defendant Holadia's attorney was provided the same opportunity and declined to question the witness.

Holadia fails to argue how he was prejudiced and merely incorporates, by reference, the argument made by defendant Cooper in his brief. The State argues that there was no dispute as to Holadia's identity. All of the victims knew Holadia for some time and three of the four victims identified Holadia at trial. None of these victims wavered in their identifications of Holadia. Holadia admitted, in open court, his involvement in the robbery and assault after the verdict of guilty was read. The burden is on the defendant to show that the evidence not disclosed was material and affected the outcome of the trial. *Id.* We hold that Holadia failed to show he was prejudiced by the nondisclosure prior to trial, or the trial court's denial of his motion for a mistrial. This assignment of error is overruled.

D. Motion to Dismiss

[4] Holadia assigns that the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury based on the insufficiency of the evidence. The jury convicted Holadia of assault with a deadly weapon inflicting serious injury. Holadia contends his conviction must be reversed, arguing that no substantial evidence demonstrates that he, individually or in concert with another, shot or intended to shoot Fabian Spencer. We conclude the evidence was sufficient for the jury's consideration and verdict.

The law concerning motions to dismiss is well settled. "If there is substantial evidence—whether direct, circumstantial, or both—to

support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991).

Holadia concedes that he failed to object to the trial court's instructions on acting in concert. Holadia has preserved the issue for plain error review by "specifically and distinctly" contending that the instruction amounted to plain error as required by N.C.R. App. P. 10(c)(4).

Our review of the evidence and instructions reveals no error and certainly no plain error. The theory of acting in concert, as properly defined by the trial court, requires a common purpose to commit a crime. *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). Before the jury could apply the law of acting in concert and convict Holadia of assault with a deadly weapon inflicting serious injury, it had to find that Holadia and another had a common purpose to commit a crime. It is not strictly necessary that Holadia share the intent or purpose to commit the particular crime actually committed. *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991). The correct statement of the law is found in the trial court's instructions:

> [I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty of that crime, that is armed robbery, if the other commits the crime, but is also guilty of any other crime committed by the other person, such as assault with a deadly weapon inflicting serious injury in pursuance of the common purpose to commit armed robbery, or, as a natural or probable consequence thereof.

See id. (citing *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971)).

The record reveals that Holadia acted in concert with another to commit the robbery. Both assailants entered the trailer with guns and threatened the occupants. Both assailants kicked, stomped, or pistol-whipped the victims. We conclude the evidence shows that the shooting of Fabian was part of a course of conduct by the two assailants to gain control over the occupants and rob them. We hold that the trial court did not error in submitting the charge, or denying defendant's motion to dismiss.

IV. Defendant Cooper's Appeal

Cooper assigned as error the failure of the trial court to grant a new trial based upon Holadia's statements after the verdict, asserting Cooper was innocent. As a result of additional evidence from Holadia, defendant Cooper subsequently filed with this Court a motion for appropriate relief on 9 July 2001, arguing and extending arguments made in his brief. The State acknowledged that an evidentiary hearing was appropriate. On 21 September 2001, we remanded the case of defendant Cooper to the trial court for an evidentiary hearing. The evidentiary hearing was held on 22 January 2002 and the order was entered 14 February 2002. We now address those other assignments of error raised by defendant Cooper in his appeal.

A. Jury Polling

[5] Cooper argues that the trial court committed reversible error in the polling of the jury in violation of N.C.G.S. § 15A-1238 and his constitutional right to a unanimous verdict guaranteed by Article I, Section 24 of the North Carolina Constitution. Cooper did not object to the manner in which the jurors were polled and has failed to raise plain error in his appeal. We, therefore, exercise our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to determine whether defendant Cooper was denied his right to a unanimous verdict.

The North Carolina Constitution insures to each criminal defendant the right to a unanimous jury verdict: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. Art. I, 24. Since 1877, our Courts have recognized that a defendant has a constitutional right, upon timely request, to have the jury polled as a corollary to his right to a unanimous verdict. *State v. Young*, 77 N.C. 498 (1877).

N.C.G.S. § 15A-1238 states that:

> Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. The judge may also upon his own motion require the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not a unanimous concurrence, the jury must be directed to retire for further deliberations.

N.C. Gen. Stat. § 15A-1238 (1999). The purpose of polling the jury is:

> to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented.

Davis v. State, 273 N.C. 533, 541, 160 S.E.2d 697, 703 (1968) (emphasis in original omitted).

In this case, the transcript reflects that the jury returned and announced its unanimous verdict of guilty as to defendant Holadia and then announced its unanimous verdict of guilty as to defendant Cooper. As the guilty verdicts pertaining to Cooper were read, Holadia stated in the presence of the jury: "Your Honor, he is not guilty; I am guilty. He is not guilty. I know for a fact. I did—I did commit these robberies, and he is not guilty." Defendant Cooper then timely requested a polling of the jury.

During the initial poll of the jury the following appears of record:

THE COURT: [Juror No. 12], as to Demetrius Cooper, you returned as the jury's unanimous verdict . . . the Defendant was guilty as charged . . . . Was that the verdict of the jury . . . ?

JUROR NO. 12: That was the verdict of the jury, yes.

THE COURT: Was it your verdict?

JUROR NO. 12: No.

THE COURT: It was not your verdict?

. . . .

JUROR NO. 12: How are we as the jury supposed to react to what has happened? I mean, how would you direct us as the judge to what we are supposed to do?

. . . .

THE COURT: Your verdict is supposed to be based upon the evidence that was presented from the witness stand and the law.

JUROR NO. 12: What we are hearing in court is not to be considered as evidence?

THE COURT: That's correct. You disregard that. Now, does the jury want to retire and reconsider its verdict on this? I am prepared to

go forward and ask you whether the verdict that you returned is your verdict.

JUROR NO. 12: Then I would say for me personally I would need to reconvene for the issue with Mr. Cooper.

THE COURT: Keeping in mind what I just told you that what's been said here is not evidence?

JUROR NO. 12: It's not evidence?

THE COURT: No, sir. It's not given under oath at this trial. It's not evidence. You are not to consider it. You all want to retire and discuss the matter, or do you want me to continue taking the poll?

JUROR NO. 10: I think we should retire and discuss the matter.

JUROR NO. 12: I think we should retire and discuss the matter.

. . . .

The jury retires to the jury room at 2:30 p.m. The jury knocks on the jury room door at 2:33 p.m.

THE COURT: Ask them to come out and have a seat.

BAILIFF: They want to continue to deliberate.

THE COURT: Ask them to come out and have a seat, Sheriff.

. . . .

THE COURT: Now, I'm going to ask you for the verdict that you unanimously reached in the jury room and whether at the time that you assented to that and reached that unanimous verdict that you assented to it. That's what I'm going to ask you. Do you understand my question . . . .

JUROR NO. 12: Uh-huh.

THE COURT: With regard to Demetrius Cooper, you returned as the jury's unanimous verdict . . . guilty . . . . Was that the jury's unanimous verdict?

JUROR NO. 12: Yes, it was.

THE COURT: At the time it was reached, did you assent thereto?

JUROR NO. 12: Yes, I did.

The trial court proceeded to ask Jurors Nos. 1-6 substantially the same questions and each of them answered in the affirmative. Beginning with Juror No. 7, the court asked the following questions:

> THE COURT: . . . you've returned as the jury's unanimous verdict that the Defendant, with regard to the Demetrius Cooper, that the Defendant was guilty . . . . Was that your verdict?
>
> JUROR NO. 7: Yes.
>
> THE COURT: Do you still assent thereto?
>
> JUROR NO. 7: Yes.

The trial court asked Jurors Nos. 8-11 substantially the same questions as was asked of Juror No. 7, and each of the jurors answered in the affirmative.

> THE COURT: Does the jury still assent to its verdict? All right. Anybody dissent? Raise your hand. Nobody dissents. All right.

Our Supreme Court decided that a criminal defendant's right to have the jury polled is the right to have questions presented to the jurors individually, concerning ". . . whether each juror assented and still assents to the verdict tendered to the court." *State v. Boger*, 202 N.C. 702, 704, 163 S.E. 877, 878 (1932). In assuring the unanimity of the verdict, our Courts are concerned with each juror's assent to the verdict at two different time periods. *State v. Asbury*, 291 N.C. 164, 170, 229 S.E.2d 175, 178 (1976). "Because of the possibility of improper influence and coercion in the jury room, the questions must be designed to find out if the juror assented in the jury room and still assents in open court to the jury verdict." *Id.*

Here, the trial court erred in questioning the Foreman and Jurors Nos. 1-6 whether they assented in the jury room and failing to determine whether they still assented to the verdict in open court. The transcript reveals that some of the jurors were uncertain as to whether they still assented to the verdict and thereby requested to further deliberate the matter.

The State contends that the inquiry by the trial court, to the jury as a group, as to whether the jury still assented to its verdicts was sufficient. We disagree. Defendant Cooper was entitled as a matter of right to insist that a specific question be addressed to and answered by each juror in open court, as to whether he assented to the verdict.

Boger, 202 N.C. at 704, 163 S.E. at 878. The questioning of the jury collectively, and having all the jurors respond collectively, by raising their hand, failed to meet the statutory mandate that the jury be polled individually. For error in the denial of this right, defendant Cooper is entitled to a new trial.

No error as to defendant Holadia, docket nos. 99 CRS 386, 387, and 389.

New trial as to defendant Cooper, docket nos. 99 CRS 463, 464, and 465.

Judges WYNN and HUNTER concur.

HARVEY C. TAYLOR, JR., PLAINTIFF v. DON A. ABERNETHY AND JACK C. WEIR, ADMINISTRATOR CTA OF THE ESTATE OF ROMER GRAY TAYLOR, DEFENDANTS

No. COA01-470

(Filed 19 March 2002)

1. Parties— intervention—following dismissal

The trial court did not abuse its discretion in an action for specific performance of a contract to make a will by allowing defendant Abernathy to intervene after being voluntarily dismissed as a party where there was support in the record for the trial court's findings that defendant had an interest in the property, defendant's interest was not being adequately represented by the administrator of the estate, defendant's motion was timely in that he moved to intervene as soon as he discovered he would no longer be a party to the case, and plaintiff had more than one opportunity to cure any prejudice by requesting a mistrial.

2. Discovery— request for admissions—late answer—admission allowed to be withdrawn

The trial court did not abuse its discretion in an action on a contract to make a will by allowing defendant Abernethy to withdraw an admission that the decedent had signed a contract to make a will where Abernethy denied the validity of the signature on the contract in a late answer to a request for admissions. Abernethy's late response was only a few days overdue and came

six months prior to trial, the merits of the action depended upon a determination of the signature's validity, and the court gave plaintiff the opportunity to request a mistrial in order to rectify any prejudice to plaintiff.

3. Evidence— handwriting—expert testimony

The trial court erred in an action on a contract to make a will by refusing to allow a handwriting expert to give his opinion on the validity of the decedent's purported signature on the contract where the court did not consider the methodology of handwriting analysis to be sufficiently scientific. North Carolina requires only that the expert be better qualified than the jury as to the subject at hand with the testimony being helpful to the jury, and there is no requirement that the party offering the testimony produce evidence that it is based in science or has been proven through scientific study. The pertinent question is whether the testimony is sufficiently reliable; here, the testimony met the four indicia of reliability set forth in *State v. Goode*, 341 N.C. 513. The exclusion was prejudicial because the testimony went to the ultimate fact in issue.

4. Statutes of Limitations and Repose— contract to make a will—runs from date of death

The trial court did not err in an action on a contract to make a will by denying defendant's motion to dismiss the complaint as time barred where the argument was based on the assertion that the statute of limitations began to run as soon as the contract was executed, but a cause of action for breach of an agreement to make a will begins to run at the death of the party under Pennsylvania law (applicable here) and, apparently, under North Carolina law.

Appeal by plaintiff from an order and judgment entered 27 September 2000 and from an order entered 9 February 2001 by Judge Raymond Warren in Burke County Superior Court. Heard in the Court of Appeals 22 January 2002.

Wyatt Early Harris Wheeler, by William E. Wheeler, for plaintiff-appellant.

Gaither, Gorham & Crone, by John W. Crone III; Sigmon, Sigmon & Isenhower, by C. Randall Isenhower, for defendant-appellee Don A. Abernethy.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General John H. Watters, amicus curiae.

HUNTER, Judge.

Harvey C. Taylor, Jr. ("plaintiff") appeals the entry of judgment upon a jury verdict that he does not have a valid contract entitling him to the estate of his deceased brother, Romer Gray Taylor ("Romer"), and the trial court's denial of his motion for a new trial. We conclude there was no error in part, and we reverse in part and remand for a new trial.

Plaintiff and Romer were raised in Burke County, North Carolina. Plaintiff later relocated to Pennsylvania where he obtained employment in the steel erection business. Romer, who never married nor had children, attempted to earn a living from his farm in Burke County. Plaintiff loaned money to Romer throughout the years. In 1958, Romer told plaintiff he wished to begin dairy farming, but would need additional land, which plaintiff owned. Romer asked plaintiff to sell him approximately twenty-nine acres of land in Burke County which plaintiff received at his grandfather's death. On 23 March 1958, Romer wrote to plaintiff, stating that in the event he should die, he wanted plaintiff to have everything he owned, and that he "plan[ned] to make a will to that effect very soon." Plaintiff conveyed the land to Romer in April 1958. Romer was not successful in dairy farming, and in the 1970's he moved to Pennsylvania where plaintiff employed him and allowed Romer to live in his home.

In 1978, Romer asked plaintiff to finance the purchase of a backhoe so that he could try again at farming. According to plaintiff, in consideration for the backhoe, Romer agreed to sign a contract to make a will that would leave his entire estate to plaintiff. At trial, plaintiff produced a contract dated 10 July 1978 providing that in consideration for plaintiff's having renounced his interest in his parent's estate in favor of Romer, and having agreed to purchase for Romer's use a backhoe for $38,000.00, Romer "agrees to immediately make a valid will devising to [plaintiff] and his heirs, assigns, and successors [his] entire estate." The contract bore plaintiff's signature, what plaintiff maintained to be Romer's signature, and the acknowledgment of a notary public. The contract was executed in Pennsylvania, and was not recorded in Burke County until 22 October 1997.

Romer died on 18 January 1998. On 23 January 1998, defendant Don A. Abernethy ("Abernethy"), plaintiff's and Romer's nephew,

offered for probate a handwritten document which he claimed to be Romer's holographic will. The document was dated 7 October 1997, and purported to leave Romer's entire estate to Abernethy. Abernethy was originally named executor of Romer's estate, but later withdrew. Defendant Jack C. Weir ("Weir") was thereafter named executor.

On 12 February 1998, plaintiff filed a complaint against Abernethy individually, and Weir as executor (collectively "defendants"), seeking specific performance of the 10 July 1978 contract to make a will, a temporary restraining order and a preliminary injunction requiring, among other things, that Abernethy return any of Romer's property he had taken following Romer's death, and that he be prohibited from taking possession of Romer's property. Defendants answered on 14 April 1998, denying the existence of any contract to make a will in favor of plaintiff. Additionally, Abernethy filed a counterclaim seeking compensation for services he rendered to Romer prior to his death. This counterclaim was dismissed on 28 August 2000 upon plaintiff's motion. Defendants moved to dismiss the complaint, which motion was denied 28 August 2000.

Plaintiff's case came to trial on 29 August 2000. Upon resting his case, plaintiff took a voluntary dismissal of his claims against Abernethy individually. The trial court thereafter allowed Abernethy to intervene in the action. On rebuttal, plaintiff called handwriting expert Charles Perrotta to testify to the validity of Romer's signature on the 10 July 1978 contract. The trial court permitted Perrotta to testify to his observations about similarities between the signature on the contract and exemplars of Romer's signature, but would not allow him to render an opinion on the authenticity of the signature on the 10 July 1978 contract.

Plaintiff moved for directed verdict at the close of all evidence. The trial court denied the motion and submitted a single issue to the jury: whether the signature on the 10 July 1978 contract was the genuine signature of Romer. The jury answered in the negative, whereupon the trial court entered judgment on 27 September 2000 concluding plaintiff is not entitled to recover from defendants. The trial court entered an order denying plaintiff's motion for a new trial on 9 February 2001. Plaintiff appeals.

Plaintiff brings forth eight assignments of error on appeal. However, we need not address all eight arguments, as we hold plaintiff is entitled to a new trial. Defendants bring forth a cross-assignment of error, arguing the trial court should have granted their

motion to dismiss plaintiff's action as barred by the statute of limitations. We hold the trial court did not err in allowing Abernethy to intervene in the action and to set aside an admission that Romer signed the 10 July 1978 contract to make a will. We hold the trial court erred in refusing to permit Perrotta to give an expert opinion as to whether the signature on the 10 July 1978 contract was Romer's, and that plaintiff is entitled to a new trial as a result. We reject defendants' assignment of error that the trial court should have dismissed plaintiff's action as untimely.

[1] By his first assignment of error, plaintiff argues the trial court erred in allowing Abernethy to intervene in the case after plaintiff had presented all of his evidence. Upon resting his case, plaintiff took a voluntary dismissal on his claims against Abernethy individually, thereby removing him as a party to the case. Upon plaintiff's dismissal, the trial court reminded Abernethy that he could move to intervene. Abernethy expressed his desire to do so, and the court permitted him to join as a party.

Motions to intervene are governed by N.C. Gen. Stat. § 1A-1, Rule 24 (1999). That statute provides that a party may intervene as of right where the applicant "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest," provided that it would not be protected by existing parties. N.C. Gen. Stat. § 1A-1, Rule 24(a)(2). A party may also be permitted to intervene where the "applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." N.C. Gen. Stat. § 1A-1, Rule 24(b)(2).

Rule 24 "requires that an application to intervene be 'timely.' " *State ex rel. Easley v. Philip Morris, Inc.*, 144 N.C. App. 329, 332, 548 S.E.2d 781, 783 (citing N.C. Gen. Stat. § 1A-1, Rule 24), *disc. review denied and review dismissed*, 354 N.C. 228, 554 S.E.2d 831 (2001). In determining whether such a motion is timely, the trial court considers the following: " '(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances.' " *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859 (2001) (citation omitted). "A motion to intervene is rarely denied as

untimely prior to the entry of judgment, and may be considered timely even after judgment is rendered if 'extraordinary and unusual circumstances' exist." *Id.* at 201, 554 S.E.2d at 859-60 (citation omitted).

"Whether a motion to intervene is timely is a matter within the sound discretion of the trial court and will be overturned only upon a showing of abuse of discretion." *Id.* at 201, 554 S.E.2d at 859. We therefore review the trial court's decision to allow Abernethy to intervene for abuse of discretion, meaning that the court's ". . . 'actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Easley*, 144 N.C. App. at 332, 548 S.E.2d at 783 (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

In the present case, the trial court found that Abernethy, as the beneficiary of a properly probated will giving him Romer's estate, would originally have been allowed to join the lawsuit as a party having an interest in the property had he not been named a party by plaintiff. The trial court found that the effect of plaintiff's voluntary dismissal was to deprive Abernethy of his ability to assert his interest in the property, and that allowing Abernethy to intervene simply placed him in the same position he was prior to plaintiff's voluntary dismissal. The trial court further determined Abernethy had sought affirmative relief in his pleadings, requesting that Romer's estate be distributed according to the holographic will which Abernethy offered for probate on 23 January 1998. The trial court observed that Weir and the estate had taken a "hands-off attitude," and "[h]a[d] not actively sought to represent the interest of [Abernethy]."

The trial court further determined Abernethy had no need to move to intervene prior to when he did because until the time plaintiff took a voluntary dismissal, Abernethy was an active party in the case. The court found that Abernethy timely moved to intervene as soon as he discovered he would not be a party. The trial court concluded there would be no prejudice to plaintiff as a result of the intervention because plaintiff had already conducted discovery with Abernethy's attorney, had received Abernethy's pleadings, and was fully aware of Abernethy's position on the issues. Nevertheless, in order to cure any possible prejudice, the trial court on more than one occasion gave plaintiff the opportunity to request a mistrial so that the parties could start over and conduct any further pretrial proce-

dure plaintiff deemed necessary. Plaintiff declined to request a mistrial, stating that he wished to proceed with the case. Further, the trial court gave plaintiff the opportunity to withdraw his statement that he rested his case so that he could present further evidence. Plaintiff declined to do so, reaffirming that he rested his case.

We hold the trial court did not abuse its discretion in allowing Abernethy to intervene. There is support in the record for the trial court's findings that Abernethy had an interest in the property, was seeking to have Romer's estate distributed according to the holographic will, and that his interest in defeating plaintiff's claim to Romer's estate was not being adequately represented by Weir as administrator of the estate. Further, we agree with the trial court that Abernethy's motion was timely in that he moved to intervene as soon as he discovered he would no longer be a party to the case. Plaintiff had more than one opportunity to cure any prejudice by requesting a mistrial, but declined to do so. This assignment of error is overruled.

[2] By his second assignment of error, plaintiff argues the trial court erred in permitting Abernethy to withdraw an admission that Romer had signed the 10 July 1978 contract to make a will. Plaintiff served requests for admissions on Abernethy on 14 January 2000, including a request that he admit Romer had signed the 10 July 1978 contract. Abernethy failed to respond to the requests within the required thirty days, serving his responses on plaintiff approximately ten days late. Abernethy denied the validity of Romer's signature in his responses. After Abernethy was permitted to intervene, the trial court allowed his motion to withdraw the prior judicial admission.

N.C. Gen. Stat. § 1A-1, Rule 36 (1999), governing requests for admissions, provides that a "matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter." N.C. Gen. Stat. § 1A-1, Rule 36(a). It further provides that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." N.C. Gen. Stat. § 1A-1, Rule 36(b). "[T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or

defense on the merits." N.C. Gen. Stat. § 1A-1, Rule 36(b). "The trial court has discretion to allow a withdrawal of an admission upon a party's motion." *Shwe v. Jaber*, 147 N.C. App. 148, 151, 555 S.E.2d 300, 303 (2001).

In allowing Abernethy's motion to withdraw, the trial court found that he never intended to admit the validity of the signature, that plaintiff received his responses shortly after they were due, and that, in the interest of justice, Abernethy should not be deprived of his right to have a jury determine the issue. We find no abuse of discretion in this ruling. Abernethy's responses to plaintiff's requests for admissions, in which he denied the validity of Romer's signature, were provided to plaintiff only a few days after they were due, and approximately six months prior to trial. Moreover, it is clear that the presentation of the merits of the action, which essentially depended upon a determination of the signature's validity, would have been subserved had the trial court not permitted the withdrawal. Moreover, after the trial court allowed Abernethy's motion to withdraw, it once again gave plaintiff the opportunity to request that the trial court declare a mistrial in order to rectify any prejudice to plaintiff. Plaintiff declined to do so. This assignment of error is overruled.

[3] In his third argument, plaintiff maintains the trial court erred in refusing to permit handwriting expert Charles Perrotta to give his opinion on the validity of Romer's purported signature on the 10 July 1978 contract. We agree with plaintiff that the trial court erred in refusing to admit this evidence, and that the error was prejudicial, thereby warranting the grant of a new trial.

Plaintiff offered Perrotta as an expert in handwriting analysis for the purpose of providing the jury with an expert opinion on the validity of the 10 July 1978 contract. The trial court found Perrotta to be an expert for purposes of testifying to his observations about the characteristics of the signature on the 10 July 1978 contract as compared to genuine exemplars of Romer's signature; however, the trial court refused to allow Perrotta to render an expert opinion as to whether the signature on the 10 July 1978 contract was Romer's valid signature.

It appears from the record that the trial court considered Perrotta an expert in the field of handwriting analysis, but did not consider the methodology underlying handwriting analysis in general to be sufficiently reliable for Perrotta to give his opinion because it was not "scientific." Perrotta testified at length to his qualifications in the

field of handwriting analysis, stating that he had been in the field since 1975. Perrotta was extensively trained in the field by the FBI, for whom he was employed as a document examiner for several years. Perrotta, who holds a Masters Degree in Forensic Science, also worked for several years as a document examiner for the Mecklenburg County Police Department. He stated he has testified in the field of handwriting analysis 132 times, and that each time he has been accepted as an expert in that field. The trial court made clear that, in its opinion, plaintiff had clearly established Perrotta as well-trained and qualified in the field of handwriting analysis.

However, the trial court stated that its "issue and concern is not that [Perrotta] is trained or qualified." Rather, the court did not believe there "is any scientific evidence that [handwriting analysis] works, that it has been proven . . . [and] that there has been any kind of scientific examination of the ability of people using this methodology to arrive at the correct result." The court acknowledged that "handwriting analysis has been used for years," but stated that "I'm not aware of any scientific basis other than the fact that it's been used for years."

Perrotta also testified regarding his methodology, stating that he used a comparative methodology involving a comparison between a disputed document and genuine exemplars, and that this methodology is recognized, accepted, and employed by others in the field. He further testified that an expert with his similar training using the same methodology would come to the same conclusion about the authenticity of a particular document.

However, the trial court made clear that it did not believe Perrotta could give an opinion because handwriting analysis has not been *scientifically* proven to be accurate. The court stated: "the ultimate question about whether or not this is [Romer's] handwriting or not would have to have a scientific basis"; there is no evidence that "handwriting analysis as a science has ever been proven to be accurate or reliable by any kind of scientific study"; "[s]cientifically, I don't have a basis for [Perrotta] to [give his opinion]"; "I don't have a scientific basis for [Perrotta] to draw a conclusion."

The trial court concluded Perrotta could testify as a person who has knowledge of the characteristics of handwriting, but that he could not give an opinion because the court "simply do[es] not have any scientific basis to conclude that [Perrotta] can answer the ultimate question about is this signature Romer Taylor's." The trial court

reasoned that there is no scientific evidence that handwriting analysis "is a valid way to determine anything," and "an expert witness is supposed to testify as to scientific fact."

In fact, ". . . 'North Carolina case law requires only that the expert be better qualified than the jury as to the subject at hand, with the testimony being "helpful" to the jury.' " *State v. Jones*, 147 N.C. App. 527, 544, 556 S.E.2d 644, 654 (2001) (citations omitted); *see also Beam v. Kerlee*, 120 N.C. App. 203, 215, 461 S.E.2d 911, 920 (1995) (under Rules of Evidence, "an expert may testify in the form of an opinion if the testimony will help the trier of fact understand the evidence"), *cert. denied*, 342 N.C. 651, 467 S.E.2d 703 (1996). While it is certainly true that the trial court must act as gatekeeper in determining the reliability of expert testimony being offered, there is simply no requirement that a party offering the testimony must produce evidence that the testimony is based in science or has been proven through scientific study.

Our Rules of Civil Procedure make clear that expert testimony may be based not only on scientific knowledge, but also on technical or other specialized knowledge not necessarily based in science. N.C. Gen. Stat. § 8C-1, Rule 702(a) (1999) ("[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion"). The rules clearly provide that an expert who testifies to any of the matters permitted under Rule 702, including testimony based on specialized knowledge, is entitled to give an opinion based upon that knowledge. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a); N.C. Gen. Stat. § 8C-1, Rule 705 (1999) ("[t]he expert may testify in terms of opinion or inference and give his reasons therefor"). This opinion may be rendered even though it amounts to an expert opinion on the ultimate issue to be determined by the jury. *See* N.C. Gen. Stat. § 8C-1, Rule 704 (1999) ("[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact"); *State v. Teague*, 134 N.C. App. 702, 708, 518 S.E.2d 573, 577 (1999) (experts may render opinion on ultimate issue to be determined by jury), *appeal dismissed and cert. denied*, 351 N.C. 368, 542 S.E.2d 655 (2000).

In its role as gatekeeper, the pertinent question for the trial court is not whether the matters to which the expert will testify are

scientifically proven, but simply whether the testimony is sufficiently reliable. *See Daubert v. Merrell Dow*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993) ("general acceptance" test of admissibility for scientific evidence no longer applicable; test is whether methodology underlying testimony is sufficiently valid and reliable); *see also*, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999) (holding *Daubert's* general "gatekeeping" obligation of determining reliability applies not only to scientific knowledge, but also to technical or other specialized knowledge). Our Supreme Court, citing *Daubert*, has set forth the proper analysis for our courts in determining the admissibility of expert testimony, including technical or other specialized knowledge. *See State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995).

According to *Goode*, when faced with the proffer of expert testimony, the trial court must first "determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to determine a fact in issue." *Id.* at 527, 461 S.E.2d at 639. This requires a preliminary assessment of whether the basis of the expert's testimony is "sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue." *Id.; see also State v. Berry*, 143 N.C. App. 187, 203-04, 546 S.E.2d 145, 156-57, *disc. rev. denied*, 353 N.C. 729, 551 S.E.2d 439 (2001). In making this determination of reliability, our Supreme Court noted that our courts have focused on the following indicia of reliability: ". . . 'the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked "to sacrifice its independence by accepting [the] scientific hypotheses on faith," and independent research conducted by the expert.' " *Id.* at 528, 461 S.E.2d at 640 (citations omitted).

It is clear under *Goode* that the admissibility of expert testimony is not dependent upon its having a scientific basis. Under the *Goode* analysis, expert testimony may be deemed to be reliable notwithstanding that it is not based in science. We therefore conclude the trial court committed an error of law in refusing to permit Perrotta to render an expert opinion on the basis that handwriting analysis is not based in science and has not been scientifically proven. The trial court's proper inquiry must be guided by the factors set forth in *Goode*, which simply require that the expert's testimony be sufficiently reliable.

Moreover, nothing in *Daubert* or *Goode* requires that the trial court re-determine in every case the reliability of a particular field of specialized knowledge consistently accepted as reliable by our courts, absent some new evidence calling that reliability into question. Our courts have consistently held expert testimony in the field of handwriting analysis to be admissible. *See, e.g., State v. LeDuc*, 306 N.C. 62, 68-69, 291 S.E.2d 607, 611-12 (1982) (noting our courts have repeatedly allowed experts "to testify on the authenticity of a given handwritten document if he qualified because of his skill in handwriting analysis," and stating expert witness may "compare[] the handwriting on the contested document with a genuine standard. Based on this comparison he gives his opinion on the authenticity of the contested document"), *overruled on other grounds, State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987); *State v. Horton*, 73 N.C. App. 107, 111-12, 326 S.E.2d 54, 56 (1985) (expert witness in handwriting analysis permitted to give opinion on validity of disputed document); *In re Ray*, 35 N.C. App. 646, 647-48, 242 S.E.2d 194, 195 (1978) (expert witness in field of handwriting analysis permitted to testify to observations concerning handwriting on contested will and exemplars of decedent's writing and to render opinion on the ultimate issue of whether deceased had written will).

Applying the *Goode* factors to the present case, we hold the trial court erred in refusing to allow Perrotta to render an expert opinion. The record sufficiently establishes that Perrotta's testimony meets the four indicia of reliability set forth in *Goode*. Perrotta testified about his comparative methodology, that it is an established, recognized, and accepted technique used by many in the field of handwriting analysis, and that it is reliable in that someone with his qualifications employing the same methodology would come to the same conclusions. Perrotta's professional background in the field, dating back to 1975, is extensive, and the trial court acknowledged that he was well-trained and qualified in the field. Moreover, Perrotta used various visual aids and enlargements of Romer's handwriting and signature in explaining to the jury his observations about the signature on the 10 July 1978 contract as compared to genuine exemplars. He has also had extensive study in the field of handwriting analysis independent of his testimony in this case. We further believe that the trial court's error in determining the admissibility of Perrotta's opinion testimony prejudiced plaintiff to the extent that he is entitled to a new trial. Perrotta was prepared to give an expert opinion on the ultimate fact at issue, whether the signature on the 10

July 1978 contract was Romer's. Given the weight which the jury could have afforded an opinion given by an expert with Perrotta's qualifications, plaintiff is entitled to have the jury consider this testimony.

[4] Finally, we address defendants' cross-assignment of error to the trial court's denial of their motion to dismiss plaintiff's complaint as barred by Pennsylvania's six-year statute of limitations. Defendants argue that the statute of limitations began to run on plaintiff's cause of action as soon as the contract was executed because it provided that Romer would "immediately" make a will leaving his estate to plaintiff, which he did not do. However, under Pennsylvania law, a cause of action for breach of an agreement to make a will begins to run at the death of the party agreeing to devise. *See Zimnisky v. Zimnisky*, 210 Pa. Super. 266, 270, 231 A.2d 904, 906 (1967) (agreement to make a will is not testamentary in nature, but is a contract "with part performance postponed until the death of one of the parties"); *In Re Hofmann's Estate*, 64 Pa. D. & C. 575, 64 Monag. 194 (1948) (measuring damages for breach of contract to make a will from point of death, not execution of contract).[1]

In summary, we hold the trial court did not err in permitting Abernethy to intervene in this action, and to withdraw his judicial admission to the validity of Romer's signature on the 10 July 1978 contract. We hold the trial court erred in assessing the admissibility of Perrotta's expert opinion as to the validity of the signature on the 10 July 1978 contract, and in refusing to permit Perrotta to render an expert opinion, which errors require the grant of a new trial. We reject defendants' argument that plaintiff's action was time-barred, and we need not address plaintiff's remaining five assignments of error.

No error in part; reversed in part and remanded for new trial.

Judges GREENE and TYSON concur.

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1. Even though Pennsylvania law applies to this issue, we note the law in this State appears to be the same. *See Rape v. Lyerly*, 287 N.C. 601, 620, 215 S.E.2d 737, 749 (1975) (three-year statute of limitations on breach of contract to devise property does not run until death of party who agreed to devise).

STATE OF NORTH CAROLINA v. MICHAEL CHRISTOPHER THOMPSON

No. COA00-1509

(Filed 19 March 2002)

1. **Appeal and Error— record on appeal—tapes, transcripts of statements, and photographs missing—trial transcript sufficient**

The transcript of an armed robbery trial was sufficient for appellate review of questions concerning defendant's confession, an accomplice's confession, and photographs alleged to be prejudicial where the Clerk of Superior Court could not locate the audiotapes and transcripts of the confessions or the photographs.

2. **Confessions and Incriminating Statements— Miranda warnings—not required—interrogation not custodial**

Miranda warnings were not required where an armed robbery suspect voluntarily agreed to speak with a detective, defendant was never searched or handcuffed, he was informed at least 3 times that he was not under arrest and was free to leave, the interview room remained unlocked during the course of his questioning, and he left the station without being arrested.

3. **Confessions and Incriminating Statements— assertion that defendant would not be arrested that day—statement voluntary**

An armed robbery defendant's confession was voluntary despite his assertion that it was induced by promises; a detective's repeated assertions that defendant would not be arrested that day regardless of what he said did not lead defendant to believe that the criminal justice system would treat him more favorably if he confessed to the robbery, especially in light of his familiarity with the criminal justice system.

4. **Confessions and Incriminating Statements— mental condition—totality of circumstances—statement voluntary**

An armed robbery defendant's mental condition did not make his confession involuntary under the totality of the circumstances where he had been diagnosed as a Willie M. child at age 6 and received Social Security benefits as a result of his condition.

5. **Criminal Law— acting in concert—instruction**

The trial court did not err in its acting in concert instruction in an armed robbery prosecution where the instruction made

clear that defendant could only be found guilty of robbery with a firearm if he acted with a common purpose to commit robbery; the instruction focused on a single crime; and, even though the instruction permitted defendant to be convicted without proof that he shared a common purpose to use a firearm, N.C.G.S. § 14-87 merely increases the punishment imposed for common law robbery rather than creating a new crime. Because the instructions complied with *State v. Blankenship*, 337 N.C. 543, it was not necessary to address the ex post facto issue raised by *State v. Barnes*, 345 N.C. 543.

6. Sentencing— mitigating factor—voluntary acknowledgment of wrongdoing

The trial court did not err in an armed robbery prosecution by not finding as a mitigating factor that defendant had voluntarily acknowledged wrongdoing at an early stage where defendant challenged the voluntariness of his statement at trial. The question of whether this impermissibly burdened his constitutional rights was not raised at trial and thus was not considered on appeal.

On writ of certiorari to review judgment and commitment entered 20 February 1997 by Judge Clarence W. Carter in Forsyth County Superior Court. Heard in the Court of Appeals 27 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Clinton C. Hicks, for the State.

Everett & Hite, L.L.P., by Kimberly A. Swank, for defendant-appellant.

CAMPBELL, Judge.

Defendant was indicted for robbery with a firearm in violation of N.C. Gen. Stat. § 14-87. Defendant was tried jointly with co-defendant Michael Tyrone Davis at the 17 February 1997 Criminal Session of Forsyth County Superior Court. On 20 February 1997, Defendant was found guilty and was sentenced to a minimum of 146 months and a maximum of 185 months in prison.

On 13 October 1999, this Court granted Defendant's petition for writ of certiorari in order to allow review of his conviction. On 20 December 2000, the record on appeal was filed, in which Defendant set forth thirteen assignments of error. On 19 February 2001,

Defendant's brief was filed, in which he presented argument in support of seven of his assignments of error. In addition, Defendant filed a motion for appropriate relief in this Court pursuant to N.C. Gen. Stat. § 15A-1418.

I. Motion for Appropriate Relief

[1] We first address those issues raised by Defendant's motion for appropriate relief that are not addressed in Defendant's brief. With his motion for appropriate relief, Defendant submitted an affidavit signed by Julia E. King, Senior Deputy Clerk of Superior Court for Forsyth County, by which King swore that the Forsyth County Clerk of Superior Court "has conducted an exhaustive search to locate the exhibits admitted into evidence at the trial of [Defendant]," "has not been able to locate the exhibits from the trial," and "has no reasonable expectation of locating the exhibits."

Included among the trial exhibits that the Clerk of Superior Court was unable to locate are the original audiotape and transcript of Defendant's confession to Detective D. R. Williams ("Detective Williams"). The audiotape recording of Defendant's confession was played for the jury and the transcript of the confession was published to the jury. However, the substance of Defendant's confession was not recorded by the court reporter and is, therefore, not part of the trial transcript.

Defendant argues in his brief that the trial court committed plain error in admitting into evidence Defendant's confession because (1) Defendant was not advised of his *Miranda* rights prior to being questioned, and (2) Defendant's confession was induced by a promise that he would not be arrested, rendering it involuntary. In his motion for appropriate relief, Defendant contends that effective and meaningful appellate review of the admissibility of Defendant's confession is not possible in the absence of the audiotape recording and transcript that was submitted into evidence. However, the trial transcript adequately sets forth the conditions and details surrounding Defendant's questioning by Detective Williams, as well as sufficient independent evidence tending to establish Defendant's guilt. Therefore, we find the record before us sufficient to allow meaningful appellate review of Defendant's contention that the trial court committed plain error in admitting his confession into evidence. Defendant's arguments related to the admissibility of his confession are addressed later in this opinion.

Defendant further contends in his motion for appropriate relief that he has been precluded from adequately presenting argument in support of two of his assignments of error due to the loss of other exhibits that were admitted into evidence at his trial. In his second assignment of error, Defendant asserts that the trial court erred in admitting over Defendant's objection certain photographs on the ground that the probative value of the photographs was substantially outweighed by their unfair prejudicial effect. These allegedly inadmissible photographs do not appear in the record. However, having reviewed the trial transcript, we conclude that it provides sufficient illustration of the content of these allegedly inadmissible photographs to allow Defendant to present an adequate argument on appeal and to allow this Court to conduct a meaningful appellate review of such argument. Thus, we disagree with Defendant's contention to the contrary.

Defendant also assigned plain error to the trial court's admission of the confession of Sharon Jackson ("Jackson"), who was convicted for her role in the robbery prior to the start of Defendant's trial. Jackson's confession, which implicated Defendant in the robbery, was presented to the jury and admitted into evidence through an audiotape recording and transcript. However, as with Defendant's confession, Jackson's confession was not transcribed by the court reporter, and the audiotape recording and transcript have not been found by the Clerk of Superior Court. Thus, Defendant contends that without the audiotape and transcript this Court cannot effectively review the admissibility of Jackson's confession. However, the trial transcript shows that on direct examination Jackson testified that Defendant was not involved in the robbery. On cross-examination, counsel for the State questioned Jackson about her confession implicating Defendant in the robbery, and thereafter the audiotape and transcript of Jackson's confession were admitted into evidence without objection. Although Jackson's confession does not appear in the record, the trial transcript is sufficient to show that it was offered into evidence as a prior inconsistent statement to impeach the testimony of Jackson. Therefore, we find the record adequate to allow meaningful appellate review of Defendant's assignment of error.

For the foregoing reasons, Defendant's motion for appropriate relief is hereby denied. We turn to the arguments presented in Defendant's brief.

II. Defendant's Appeal

[2] We first note that those assignments of error that Defendant has not supported with argument or authority are deemed abandoned pursuant to N.C. R. App. P. 28(b)(5).

Defendant argues that the trial court committed plain error by admitting his confession into evidence. Specifically, Defendant contends that his confession was the unlawful product of a custodial interrogation conducted without the benefit of *Miranda* warnings and was involuntarily induced by a promise that Defendant would not be arrested. We disagree.

It is well established that *Miranda* warnings are required only when a defendant is subjected to custodial interrogation. *See, e.g., State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404 (1997). In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the United States Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way." *Id.* at 444, 16 L. Ed. 2d at 706. "The United States Supreme Court has recognized that *Miranda* warnings are not required simply because the questioning takes place in the police station or other "coercive environment" or because the questioned person is one whom the police suspect of criminal activity." *State v. Campbell*, 133 N.C. App. 531, 536, 515 S.E.2d 732, 736 (1999) (citing *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (per curiam)). "[T]he appropriate inquiry in determining whether a defendant is "in custody" for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a "formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." " *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) (quotations in original).

In the instant case, the record indicates that Detective Williams called Defendant's residence and left a message for Defendant to come down to the police station. Defendant was escorted to the station on 17 January 1996 by the co-defendant's probation officer. Defendant testified that he went to the station that day for a scheduled appointment with his probation officer. At the station, Defendant agreed to speak with Detective Williams about the robbery. At no time was Defendant searched, handcuffed, or restricted in his movement. Prior to escorting Defendant back to the interview room, Detective Williams informed him and the co-defendant that they were not under

arrest and were free to leave at any time. Detective Williams then walked Defendant back to the interview room. Before entering the interview room, Detective Williams again told Defendant that he was not under arrest, he would not be arrested that day regardless of what he said, and he was free to terminate the interview at any time. Detective Williams also offered Defendant food and water, and asked if Defendant needed to use the restroom. After entering the interview room, Detective Williams again told Defendant that he was not under arrest and was free to leave at any time. The interview room remained unlocked throughout the course of Defendant's interview, and Defendant left the station following the interview without being arrested.

Based on the totality of the circumstances, we conclude that Defendant was not subjected to a formal arrest or a restraint on his freedom of movement of the degree associated with a formal arrest. The record shows that Defendant voluntarily agreed to speak with Detective Williams about the robbery; Defendant was never searched or handcuffed; Defendant was informed at least three times that he was not under arrest and was free to leave; the interview room remained unlocked during the course of Defendant's questioning; and Defendant left the station without being arrested. Based on these circumstances, we conclude that *Miranda* warnings were not required. We now consider whether Defendant's confession was voluntary.

[3] The Fourteenth Amendment requires that a defendant's confession be voluntary and " 'the product of an essentially free and unconstrained choice by its maker[,]' " *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (quoting *Schneckcloth v. Bustamonte*, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 862 (1973) (citation omitted)), in order to be admissible. Factors to be considered in a determination of voluntariness are

> whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id.

In the instant case, the evidence shows that Defendant arrived at the police station for an appointment with his probation officer and agreed to speak with Detective Williams about the robbery. Defendant was not in custody and therefore *Miranda* warnings were not required. Defendant was not held incommunicado, the interrogation did not last an unreasonable length of time, nor were there oral or physical threats or shows of violence made against Defendant. Further, the record indicates that Defendant was extremely familiar with the criminal justice system, having been convicted seven times prior to his questioning on 17 January 1996.

Nonetheless, Defendant contends that his confession to Detective Williams was improperly induced by promises that he would not be arrested regardless of what he said. "Incriminating statements obtained by the influence of hope or fear are involuntary and thus inadmissible." *Campbell*, 133 N.C. App. at 537, 515 S.E.2d at 737. Accordingly, our Supreme Court has found inadmissible a statement induced by an officer's promise to testify that the defendant was cooperative in confessing, *State v. Fuqua*, 269 N.C. 223, 152 S.E.2d 68 (1967), a statement induced by assistance on pending charges and promises of assistance on potential charges arising out of the confession, *State v. Woodruff*, 259 N.C. 333, 130 S.E.2d 641 (1963), a statement influenced by a suggestion that the defendant might be charged with accessory to murder rather than murder if he confessed, *State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968), and a statement given after the defendant was told that any confession he made could not be used against him since he was in custody, and that if he confessed "it would be more to his credit hereafter." *State v. Roberts*, 12 N.C. 259 (1827).

Unlike these earlier cases, we do not find that Detective Williams' repeated assertions that Defendant would not be arrested that day regardless of what he said, led Defendant to believe that the criminal justice system would treat him more favorably if he confessed to the robbery. This is especially true in light of Defendant's familiarity with the criminal justice system and the fact that he had doubtless been questioned by law enforcement officers on numerous occasions.

[4] Defendant also argues that his diminished mental capacity further supports his contention that his confession was involuntary. Defendant's mother testified that he had been diagnosed as a Willie M. child at the age of six and received Social Security disability benefits as a result of his mental condition. While we note that Defendant's

mental condition and limited mental capacity were both found as mitigating factors by the trial court in sentencing, we do not find under the totality of the circumstances that Defendant's mental condition made his confession involuntary. Thus, we conclude that Defendant's confession was "the product of an essentially free and unconstrained choice by its maker." *Schneckcloth v. Bustamonte*, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 862 (1973) (citation omitted). Having concluded that Defendant was not in custody when his confession was given and that his confession was voluntary, we find no error in the trial court's admission of Defendant's confession. Accordingly, defendant has failed to show plain error.

[5] Defendant next argues that the trial court erred in its instructions on the doctrine of acting in concert by instructing the jury in a manner that permitted the jury to convict Defendant of armed robbery without proof that Defendant had the specific intent to commit armed robbery. We disagree with Defendant and conclude that there was no error in the trial court's instructions.

Defendant relies on *State v. Straing*, 342 N.C. 623, 466 S.E.2d 278 (1996), and *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), to support his contention that the acting in concert instructions given by the trial court were reversible error. However, in *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), our Supreme Court overruled *Blankenship* and *Straing* and restored the law of acting in concert to its prior standard, which the Court stated as follows:

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

Id. at 233, 481 S.E.2d at 71 (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (citation omitted)).

Although the standard reaffirmed in *Barnes* lowered the State's burden, the Court noted that no *ex post facto* problem was created because the crimes in *Barnes* were committed and the defendants were sentenced prior to the certification of the *Blankenship* opinion on 29 September 1994. *Id.* at 234, 481 S.E.2d at 72.

Here, the crime at issue was committed on 4 January 1996 and Defendant was convicted and sentenced on 20 February 1997. The

certification date for the *Barnes* decision was 3 March 1997. Thus, unlike the situation in *Barnes*, the law in existence when the crimes were committed and when Defendant was sentenced was the law as applied in *Blankenship*. This scenario raises the issue of whether application of *Barnes* to this case would violate the constitutional prohibition on application of *ex post facto* laws. However, since we find that the jury instructions given by the trial court comport with the law set forth in *Blankenship* and its progeny, it is not necessary to address the *ex post facto* issue. *See State v. Woods*, 126 N.C. App. 581, 586, 486 S.E.2d 255, 258 (1997).

In *Blankenship*, the Court found error in acting in concert instructions which permitted conviction of a defendant for a specific intent crime, premeditated and deliberated murder, without a jury finding that he had specific intent to kill. *Blankenship*, 337 N.C. at 557, 447 S.E.2d at 736. In *Blankenship*, the Court stated the acting in concert doctrine as follows:

> Under this doctrine [acting in concert], where a single crime is involved, one may be found guilty of committing the crime if he is at the scene with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime. . . . [W]here multiple crimes are involved, when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators. . . . [O]ne may not be criminally responsible under the theory of acting in concert for a crime like premeditated and deliberated murder, which requires a specific intent, unless he is shown to have the requisite specific intent. The specific intent may be proved by evidence tending to show that the specific intent crime was a part of the common plan.

Id. at 557-58, 447 S.E.2d at 736 (internal citations omitted).

Applying this formulation of the acting in concert doctrine, the Court in *Blankenship* found error in the following instruction by the trial court:

> For a person to be guilty of a crime, it is not necessary that he, himself, do all the acts necessary to constitute the crime. If a defendant is present, with one or more persons, and acts together with a common purpose to commit murder, *or* to commit kidnapping, each of them is held responsible for the acts of the others,

> done in the commission of that murder *or* kidnapping, as well as any other crime committed by the other in furtherance of that common design.

Id. at 555, 447 S.E.2d at 734-35 (emphasis in original). The Court concluded that this instruction permitted the defendant to be convicted of premeditated and deliberated murder, which requires a specific intent to kill, when the only common purpose shared between the defendant and the person with whom he was acting in concert was to commit kidnapping. *Id.* at 557, 447 S.E.2d at 736. "In other words, the instructions permit defendant to be convicted of premeditated and deliberated murder when he himself did not inflict the fatal wounds, did not share a common purpose to murder with the one who did inflict the fatal wounds and had no specific intent to kill the victims when the fatal wounds were inflicted." *Id.*

In *Straing*, the Supreme Court applied the *Blankenship* acting in concert standard in finding error in the following instruction:

> Now, there's a principle in our law known as acting in concert. For a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit a crime, each of them is not only guilty as a principle [sic] if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose or as a natural or probable consequence of the common purpose.

Straing, 342 N.C. at 625, 466 S.E.2d at 279 (alteration in original). The Court concluded that this jury instruction erroneously allowed the jury to convict the defendant of premeditated and deliberated murder, robbery with a dangerous weapon, and first-degree kidnapping, all of which are specific intent crimes, without requiring the State to establish that the defendant had the specific intent to commit those crimes. *Id.* at 627, 466 S.E.2d at 281.

Applying the law set forth in *Blankenship* and *Straing* to the instructions given in the instant case, we conclude that the trial court did not err in its instructions below. The trial court gave the following general instruction on acting in concert:

> [F]or a person to be guilty of a crime, it is not necessary that he do all the acts necessary to constitute the crime. If two or more persons act together with the common purpose to rob

another, regardless of whether that purpose is to rob with or without a firearm, but robbery does involve—does involve at a minimum . . . the taking of property from another by violence or putting a person in fear with or without a firearm and . . . if they act together with a common purpose to commit a robbery, two or more persons act with that common purpose and these two or more persons are actually present at the time the robbery is committed, then each of them is held responsible for the acts of the others done in the commission of the robbery.

The trial court then summarized what the jury must find to convict Defendant of robbery with a firearm as follows:

Now, members of the jury, I charge that for you to find either defendant on trial here guilty of robbery with a firearm, the State must prove seven things beyond a reasonable doubt.

First, that the particular defendant, *either acting by himself or with others*, took property from the person of another or from the other's presence.

Second, that the defendant himself *or acting together with other persons* carried away the property.

. . .

Fourth, that the defendant knew that the defendant *and those, if any, with whom he was acting in concert* were not entitled to take the property.

Fifth, that the defendant *or someone with whom he was acting in concert* intended to deprive the victim of the property's use permanently.

Sixth, the State must also prove beyond a reasonable doubt that the defendant *or someone acting in concert with him* had the firearm in his possession at the time the property was obtained or that it . . . reasonably appeared to the victim that a firearm was being used in which case you can infer that the instrument was what the defendant *or one acting in concert with* a defendant represented the instrument to be.

. . .

And seventh . . . the State must also prove beyond a reasonable doubt that the defendant, *either by himself or acting together with other persons*, obtained the property by

> endangering or threatening the life of Clifford Hobson with the firearm.

(Emphasis added). In its trial mandate on armed robbery the trial court charged:

> Those, members of the jury, are the seven elements of robbery with a firearm. So . . . I charge that if you find from the evidence beyond a reasonable doubt that on or about . . . January 4th, 1996, the defendant, Michael Christopher Thompson, *acting either by himself or together with other persons*, had in his possession a firearm and took and carried away property from the person or presence of Clifford Hobson without his voluntary consent by endangering or threatening his life with the use or threatened use of the firearm, the defendant Michael Christopher Thompson knowing that he was not entitled to take the property and he, Michael Christopher Thompson, *acting by himself or with other persons*, intended to deprive Clifford Hobson of the property's use permanently, then it would be your duty to return a verdict of guilty of robbery with a firearm.

(Emphasis added).

We first note that the trial court's general instructions on the doctrine of acting in concert make it clear that Defendant could only be found guilty of robbery with a firearm if he acted "with a common purpose to commit a robbery." These instructions comport with the statement in *Blankenship* that "specific intent may be proved by evidence tending to show that the specific intent crime was a part of the common plan." *Blankenship*, 337 N.C. at 558, 447 S.E.2d at 736. Second, the instructions focus on the single crime of robbery and are consistent with the statement in *Blankenship* that "where a single crime is involved, one may be found guilty of committing the crime if he is at the scene with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime . . . ." *Id.* at 557-58, 447 S.E.2d at 736.

Finally, the fact that the trial court's instruction permitted the jury to convict Defendant of robbery with a firearm without proof that Defendant shared a common purpose to use a firearm in the perpetration of the robbery does not result in error in light of the well-established principle that N.C. Gen. Stat. § 14-87 "does not create a new crime, it merely increases the punishment which may be

imposed for common law robbery where the perpetrator employs a weapon." *State v. Gibbons*, 303 N.C. 484, 490, 279 S.E.2d 574, 578 (1981). "The focus of [N.C.G.S. § 14-87] is not the creation of a new crime for commission of an offense with a firearm, but the punishment of a specific person who has committed a robbery which endangers a specific victim." *Id.* For the foregoing reasons, we find no error in the instructions challenged by Defendant.

[6] Defendant further argues that the trial court erred by failing to find as a statutory mitigating factor that

> [p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

N.C. Gen. Stat. § 15A-1340.16(e)(11) (1999). Defendant cites his confession to Detective Williams as an acknowledgment of wrongdoing at an early stage of the criminal process. However, Defendant concedes "that under existing caselaw [sic] the defendant may not have been entitled to a finding of this mitigating factor because the defendant at trial challenged the voluntariness of this statement." In *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985), the Supreme Court held "that if a defendant repudiates his inculpatory statement, he is not entitled to a finding of this mitigating circumstance." *Id.* at 474, 334 S.E.2d at 749. Here, the record indicates, and Defendant concedes, that he repudiated his confession at trial by attacking its voluntariness. Therefore, the trial court did not commit error in refusing to find as a mitigating factor that prior to arrest or at an early stage of the criminal process, Defendant voluntarily acknowledged wrongdoing in connection with the crime.

Nonetheless, Defendant argues that denying him the benefit of this mitigating factor simply because he asserted his constitutional right to challenge the voluntariness of his confession impermissibly burdens his constitutional rights to present a defense, to testify on his own behalf, and to due process of law. However, the transcript reveals that Defendant's trial counsel did not raise this constitutional issue in the court below. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Accordingly, Defendant's final assignment of error is overruled.

For the foregoing reasons, we conclude that Defendant received a trial and sentencing free from prejudicial error.

No error.

Judges GREENE and McCULLOUGH concur.

BUNN LAKE PROPERTY OWNER'S ASSOCIATION, INC., PLAINTIFF v. S. CHRIS SETZER, DEFENDANT

No. COA01-23

(Filed 19 March 2002)

1. Real Property— restrictive covenants—encroachment—location of lake property line—summary judgment

The trial court did not err in an action to enforce a subdivision's restrictive covenants by granting partial summary judgment in favor of plaintiff homeowner's association regarding defendant's encroachment on the pertinent lake even though defendant alleges the location of the property line is still at issue, because: (1) defendant has structures on the lake that are not in compliance with plaintiff's restrictive covenants and bylaws, and there is no dispute that these structures extend over the waters of the lake; and (2) the trial court's determination is unaffected by the exact location of the waterline.

2. Real Property— restrictive covenants—encroachment—equitable estoppel

The trial court did not err in an action to enforce a subdivision's restrictive covenants by granting partial summary judgment in favor of plaintiff homeowner's association on the issue of encroachment on the pertinent lake even though defendant presented the affirmative defense of equitable estoppel based on his reliance upon false representations by his neighbors, including some members of plaintiff's board of directors, that defendant had permission to proceed with his construction because: (1) none of these conversations purport to be a formal meeting or decision by plaintiff's board, which is the only body authorized to grant approval of a homeowner's lake construction project; (2) defendant was on plaintiff's board, attended board meetings at which he discussed the bylaws and covenants regarding waterfront structures, and defendant had analyzed these restrictions in the hope that his construction might fall within a

"loophole" of the covenants; (3) defendant's letters and other documents establish his intention to proceed with building with or without plaintiff's permission; and (4) defendant was instructed to stop his lakefront construction but continued in defiance of plaintiff's bylaws, and thus, did not act in reliance upon a false representation that it was approved.

3. Judgments— consent judgment—failure to object—failure to sign

The trial court did not err in an action to enforce a subdivision's restrictive covenants by entering a consent judgment, because: (1) defendant did not object to the entry of judgment, file a postjudgment motion to amend or set aside judgment, or present a timely request to the trial court; (2) even though defendant did not sign the judgment, the validity of the judgment depends upon the parties' consent to its terms when recited and explained in court; (3) the findings of fact in the consent order are supported by competent evidence; (4) contrary to defendant's assertions, the agreement does not provide for defendant's approval of a new survey; (5) although the agreement does not explicitly state that defendant's general release of his claims against plaintiff is limited to claims asserted in the present action, defendant has no other claims; and (6) the trial court's suggestion that the letter of agreement should be attached to the consent judgment was not a formal requirement, and defendant has not shown any prejudice attributable to the agreement's not being stapled to the judgment.

Appeal by defendant from judgments entered 24 March 2000 by Judge Wade Barber, and 18 September 2000 by Judge Narley L. Cashwell, both orders entered in Franklin County Superior Court. Heard in the Court of Appeals 17 October 2001.

J. Michael Weeks, for plaintiff-appellee.

Gay, Stroud & Jackson, L.L.P., by Darren G. Jackson and Andy W. Gay, for defendant-appellant.

Bailey & Dixon, L.L.P., by David S. Wisz, for counterclaim defendant.

BIGGS, Judge.

This appeal arises from a dispute over lakefront structures that S. Chris Setzer (defendant) erected on Bunn Lake, in Wake and Franklin

Counties, in North Carolina. For the reasons that follow, we affirm the trial court.

The facts, as established by the record, are as follows: Bunn Lake is a man-made body of water created in the 1960's. In 1966, Bunn Lake Estates, Inc., the owner of the land that includes Bunn Lake, subdivided the property to create Bunn Lake Subdivision. The Bunn Lake Property Owners Association (plaintiff), is the homeowners' association for Bunn Lake Subdivision. In 1978, plaintiff adopted its bylaws, and recorded restrictive covenants. These covenants and bylaws address the type of structures that Bunn Lake residents are permitted to build on the lake. The relevant restrictions are summarized as follows:

1. Lakefront homeowners may have one waterfront boating or fishing pier, whose dimensions over the water are not to exceed 25 feet by 15 feet;

2. Subdivision homeowners are required to get plaintiff's prior approval before constructing a waterfront dock or pier;

3. Plaintiff's Lake Committee evaluates homeowners' requests for permission to construct a pier or dock, and reports to plaintiff's board of directors whether the proposed structure complies with the restrictive covenants and bylaws;

4. Plaintiff's board of directors is the only group authorized under the bylaws or covenants to grant approval of homeowners' construction projects.

In 1992, defendant acquired a lakefront lot in Bunn Lake Subdivision, subject to plaintiff's bylaws and restrictive covenants. At that time, defendant's property already had a concrete walkway and a partially enclosed boat house extending over Bunn Lake. During the following five years, defendant constructed a screen house, a wood deck, a stone planter, a floating dock, and expanded the boat house and dock, without obtaining plaintiff's permission.

In October 1997, defendant began further expansion of his lakefront structures, including: replacement of the existing sea wall by a new wall; extension of his pier further into the lake bed; enlarging the dimensions of his boat house; and adding a new screen porch on the existing dock. Defendant was told by a representative of plaintiff's Lake Committee to stop construction until he had obtained approval from plaintiff's board of directors. Defendant refused to stop con-

struction, which was followed by several months of controversy in Bunn Lake Subdivision over defendant's waterfront construction projects. Plaintiff's board of directors held several meetings, and took the following actions:

1. On 18 November 1997 plaintiff's board of directors, of which defendant was a member, held a meeting which defendant attended. They discussed the covenants and bylaws requiring all homeowners to get prior approval for dock expansions.

2. On 25 November 1997 plaintiff's Lake Committee requested in writing that defendant submit his construction plans for plaintiff's review and possible approval.

3. Defendant responded to plaintiff's request on 27 November 1997 with a drawing of his proposed building project, and a letter arguing that his project was "exempt" from the requirements of Bunn Lake Subdivision bylaws.

4. On 17 December 1997, plaintiff's board of directors met, and the Lake Committee representative formally recommended that the board reject defendant's request. The board voted to conditionally approve defendant's plans, provided that defendant's construction plans subsequently received approval by the subdivision's entire membership.

5. Plaintiff's board met on 18 January 1998, and was informed by the board's attorney that it lacked the authority to approve a project that did not conform to plaintiff's bylaws and restrictive covenants, regardless of the results of the proposed neighborhood referendum.

6. The board voted not to approve defendant's construction, and decided that if defendant did not stop his waterfront construction, plaintiff would institute legal action.

On 18 February 1998, plaintiff filed suit against defendant, alleging that defendant's piers and other structures were in violation of plaintiff's bylaws and encroached on plaintiff's property. The complaint also named defendant's wife as a party; however, the suit against her was subsequently dismissed because she was not an owner of the property. Defendant's answer and counterclaim, filed in April, 1998, raised the defenses of equitable estoppel, waiver and selective enforcement, laches, and the statute of limitations. Defendant also filed a counterclaim for misrepresentation, slander of

title, and an action to compel plaintiff to enforce its bylaws uniformly. On 22 April 1999, plaintiff's claims against defendant's wife, as well as defendant's claim of misrepresentation, were dismissed by Judge James Spencer, Jr. On 19 May 1999, plaintiff filed a motion for summary judgment, which was followed by defendant's summary judgment motion filed on 5 November 1999.

On 24 March 2000, Judge Wade Barber issued an order granting partial summary judgment to plaintiff. The trial court found that the only genuine question of material fact was the location of the boundary line between plaintiff's lake bed and defendant's property line. The trial court concluded that there were no other genuine issues of material fact, and that plaintiff was entitled as a matter of law to summary judgment on "all the remaining issues in this action." Accordingly, the trial court denied defendant's motion for summary judgment, and granted plaintiff's summary judgment motion with respect to all of defendant's affirmative defenses, and on the issue of defendant's encroachment on plaintiff's lake bed. The significant conclusions of law in the summary judgment order are summarized as follows:

1. Defendant has an easement appurtenant to his ownership of a waterfront lot in Bunn Lake Subdivision, allowing him to have one boat or fishing pier, not over 375 square feet.

2. Structures erected by defendant or by his predecessors such as a sea wall, boat house, concrete boat ramp, and screen porch, are not within the scope of the easement, and are an encroachment on plaintiff's lake bed.

3. Structures erected by defendant or by his predecessors in excess of 375 square feet are an encroachment upon plaintiff's lake bed.

4. Plaintiff did not grant approval for defendant to expand his waterfront structures.

5. Defendant knew that approval for construction could only come from a formal decision of plaintiff's board of directors, and that individual officers have no authority to grant approval for construction.

6. Defendant did not rely to his detriment upon statements by individual board members suggesting that he had approval because (a) he knew that approval could come only from a formal

vote by the board, (b) he stated that he didn't need permission because his projects would fall within a "loophole," and (c) he stated that he would continue his project with or without plaintiff's approval.

7. Plaintiff's decision not to grant approval of defendant's lakefront construction was not arbitrary or capricious.

The trial court ordered the case set for trial on the issue of the location of the property line between plaintiff's lake bed and defendant's property; ordered defendant restrained from further encroachment; and ordered that within 30 days of the determination of the location of the property line, defendant was to remove all encroaching structures except for the single fishing pier allowed under the restrictive covenants.

On 17 April 2000, when the case was called for trial, the parties informed the court that they had reached an agreement that plaintiff would sell defendant the area of his encroachment, and that defendant would keep one boathouse and dock, and would demolish his other waterfront structures. The terms of their agreement were read aloud into the record, and upon inquiry by the trial court, the parties indicated their consent to its terms. On 18 September 2000 Judge Narley Cashwell entered a final judgment in the case. Defendant has appealed from the order awarding partial summary judgment for plaintiff, and from the final judgment entered in this case.

I.

[1] Defendant argues first that the trial court erred in its entry of summary judgment on the issues of his encroachment on Bunn Lake, and on his affirmative defense of equitable estoppel.

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(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). With regard to an affirmative defense, summary judgment is appropriate if the movant establishes that the nonmovant cannot prevail on at least one of the elements of his af-

firmative defense. *Development Corp. v. James*, 300 N.C. 631, 268 S.E.2d 205 (1980).

"[T]he party moving for summary judgment ultimately 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) (citation omitted). 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).

Defendant argues that there are genuine issues of fact as to trespass and encroachment. He contends that the trial court's findings of fact are inconsistent with its grant of summary judgment. The relevant findings are summarized as follows:

1. Plaintiff owns the lake bed of Bunn Lake; defendant owns a lot in Bunn Lake Estates subdivision, which he obtained in 1992, and which is subject to plaintiff's bylaws and restrictive covenants.

2. The bylaws and covenants confer an easement on homeowners, allowing construction of one pier or dock of no more than 375 square feet, and requiring plaintiff's prior approval for waterfront construction.

3. Defendant and his predecessors constructed waterfront structures that included a lakeside boat house, deck, a concrete boat ramp, concrete sea wall, a stone planter and stone wall, a floating platform, and a screen porch; these structures exceed 1500 square feet.

4. Defendant was a member of plaintiff's board of directors, had discussed the restrictive covenants concerning waterfront construction with his neighbors, and had told them that his construction fell within a "loophole" to plaintiff's bylaws and covenants.

5. Defendant did not obtain plaintiff's approval for his projects; when plaintiff told defendant to stop his construction, defendant expressed his intention to proceed with construction whether or not plaintiff granted approval, and continued construction.

6. The sea wall, deck, stone wall, and other lakeside structures that defendant erected may have altered the high water mark, requiring the substitution of a metes and bounds description.

Defendant argues that the trial court's finding that there was an issue of the location of the property line precluded its entry of summary judgment. He contends that the exact property line must be established before any determination can be made regarding whether he has encroached on plaintiff's lake. We disagree.

As the owner of the lake bed, plaintiff also owns the water above the bed, and may restrict the use of the land and water, including restrictions on structures built on the lake bed. *Development Corp.*, 300 N.C. 631, 268 S.E.2d 205. If an easement is granted, the user of the easement may neither change the easement's purpose nor expand the easement's dimensions. *Moore v. Leveris*, 128 N.C. App. 276, 495 S.E.2d 153 (1998) (easement to use neighborhood road would not allow defendant to place sewer line under road); *Swaim v. Simpson*, 120 N.C. App. 863, 463 S.E.2d 785 (1995), *aff'd*, 343 N.C. 298, 469 S.E.2d 553 (1996) (where plaintiff was granted easement for ingress and egress to tract, trial court errs by construing easement to permit installation of utility pipes, thus enlarging scope of easement); *Sheftel v. Lebel*, 44 Mass. App. Ct. 175, 689 N.E. 2d 500 (1998) (easement extending to high water line of tidal area does not encompass extension to low water line, or permit defendant to construct pier to low water line).

In the instant case, plaintiff's restrictive covenants and bylaws grant defendant an easement over the lake bed for the restricted purpose of having one fishing pier no larger than 375 square feet. The uncontradicted evidence establishes that defendant has structures on Bunn Lake that are not restricted to a single fishing pier, and whose dimensions exceed 1500 square feet. There is no dispute that these structures extend over the waters of Bunn Lake. The trial court's findings in this regard are the basis of its conclusion that defendant had trespassed and encroached on Bunn Lake. Thus, the trial court's determination that the plaintiff was entitled to summary judgment on the issue of defendant's trespass is based upon facts and conclusions that are unaffected by the exact location of the waterline. As the plaintiff has noted, even if "the boundary line was later established by the jury [to be located] as contended by the Defendant, the Defendant would still be encroaching upon Plaintiff's land[.]" We conclude there was no genuine issue of material fact regarding whether defendant had encroached upon plaintiff's lake bed.

[2] Defendant next argues, however, that assuming *arguendo*, that there was no issue as to defendant's encroachment, the trial court still could not grant summary judgment because defendant success-

fully raised the affirmative defense of equitable estoppel. He contends that he produced "ample evidence" of the existence of this defense. We disagree.

Equitable estoppel is a common law doctrine that "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). The elements of equitable estoppel are (1) speech, conduct, or actions that induce another to believe certain facts exist, that are not in fact true; (2) a lack of knowledge and means of obtaining knowledge as to the true facts in question; and (3) detrimental reliance by the party claiming this defense upon the representations of the party making the false representations. *Keech v. Hendricks*, 141 N.C. App. 649, 540 S.E.2d 71 (2000). The doctrine prevents a party from "asserting a right that 'he otherwise would have had against another' " if his own conduct renders this unfair. *LSB Fin. Servs, Inc. v. Harrison*, 144 N.C. App. 542, 548, 548 S.E.2d 574, 579 (2001) (quoting *In Re Varat Enterprises, Inc.*, 81 F.3d 1310, 1317 (4th Cir. 1996)). Equitable estoppel is established by evidence that " 'an individual . . . induces another to believe that certain facts exist and that other person rightfully relies on those facts to his detriment.' " *Bowers v. City of Thomasville*, 143 N.C. App. 291, 298, 547 S.E.2d 68, 73, (quoting *Miller v. Talton*, 112 N.C. App. 484, 488, 435 S.E.2d 793 (1993)), *disc. review denied*, 353 N.C. 723, 550 S.E.2d 769 (2001).

In the instant case, defendant contends that he relied to his detriment upon false representations by his neighbors, including some members of plaintiff's board of directors, that he had permission to proceed with his construction. In support of his position, defendant has submitted his letters to various neighbors, and synopses of neighborhood conversations concerning defendant's construction plans. These conversations included telephone calls and informal neighborhood visits, in which neighbors either repeated what others were reputed to have said or done, or expressed their own views.

Although the participants in these interactions may have included officers of plaintiff's board of directors, none of these conversations purport to be a formal meeting or decision by plaintiff's board, which is the only body authorized to grant approval to a homeowner's lake construction project. The record establishes unequivocally that defendant was on plaintiff's board, attended board meetings at which he discussed the bylaws and covenants regarding waterfront struc-

tures, and that defendant had analyzed these restrictions in the hope that his construction might fall within a "loophole" of the covenants. We conclude that there is no genuine issue of material fact regarding defendant's knowledge of the relevant facts. Further, defendant's letters and other documents also establish his intention to proceed with building, with or without plaintiff's permission. Defendant was instructed to stop his lakefront construction, but continued in defiance of plaintiff's bylaws, and thus did not act in reliance upon a false representation that it was approved. *Development Corp.*, 300 N.C. 631, 268 S.E.2d 205 (equitable estoppel inapplicable where lake owner tells defendant to cease construction of pier, but defendant disregards plaintiff and continues building). We conclude that the evidence establishes that defendant's actions were not taken in reliance upon plaintiff's representations, and that there is no genuine issue of any material fact that might support defendant's claim of detrimental reliance. For the reasons outlined above, we hold that the trial court did not err in its grant of summary judgment on the issues of encroachment and equitable estoppel. Accordingly these assignments of error are overruled.

II.

[3] Defendant next argues that the trial court erred by entering the consent judgment. He contends that the judgment was not signed, does not accurately reflect the parties' agreement, and that it is otherwise invalid. Plaintiff, on the other hand, argues that we should not reach the merits of defendant's claims because defendant has not preserved these issues for appellate review, as required by N.C.R. App. P. 10(b)(1) ("to preserve a question for appellate review, a party must [present] the trial court [with] a timely request, objection or motion"). In the instant case, defendant did not object to the entry of judgment, file a post-judgment motion to amend or set aside judgment, or present a timely request to the trial court. However, in the interests of justice, and pursuant to our authority under N.C.R. App. P. Rule 2, this Court will consider defendant's contentions on the merits.

The party who challenges a consent judgment bears the burden of proving it is invalid. *Milner v. Littlejohn*, 126 N.C. App. 184, 484 S.E.2d 453, *disc. review denied*, 347 N.C. 268, 493 S.E.2d 458 (1997). To prevail on this issue, defendant must demonstrate that the challenged aspects of the final consent judgment, if error, were prejudicial. *HAJMM Co. v. House of Raeford Farms*, 328 N.C. 578, 403 S.E.2d 483 (1991) (citation omitted).

Defendant first contends that the entry of a final consent judgment is invalid because he did not sign it. However, the validity of a consent judgment depends upon the parties' consent to its terms when recited and explained in court, rather than by the parties' signature at the time the judgment is reduced to writing and signed by the trial court. *Chance v. Henderson*, 134 N.C. App. 657, 518 S.E.2d 780 (1999).

In the instant case, the transcript establishes that the defendant was asked several times by the court if he agreed to the provisions of the parties' agreement, and that defendant through counsel assented to the judgment. Defendant further agreed to the procedure proposed by the trial court, that a judgment be prepared for his signature. We conclude that the consent judgment was not invalidated by the fact that defendant did not sign it.

Defendant next argues that the consent judgment does not, "when viewed in its entirety," accurately reflect the parties' agreement. We disagree.

Defendant first assigns error to the inclusion in the judgment of Judge Barber's findings of fact from the partial summary judgment order entered in this case, contending that the addition of these findings of fact was "unnecessary and prejudicial."

"[A] trial court's findings of fact are deemed conclusive on appeal if they are supported by competent evidence, regardless of whether there is evidence which could have supported findings to the contrary." *Tepper v. Hoch*, 140 N.C. App. 354, 361, fn. 5, 536 S.E.2d 654, 659, fn. 5 (2000) (citation omitted). Findings of fact and conclusions of law are not required in a summary judgment order. *Bland v. Branch Banking & Tr.*, 143 N.C. App. 282, 547 S.E.2d 62 (2001). However, findings of fact "do not render a summary judgment void or voidable[.]" *Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147, *disc. review denied*, 295 N.C. 467, 246 S.E.2d 9 (1978) (citations omitted). Further, defendant has not identified which findings of fact he contends are unsupported by competent evidence. We conclude that the findings of fact in the consent order are supported by competent evidence, and should be upheld. Accordingly, this assignment of error is overruled.

Defendant next argues that the consent agreement provided for his approval of a new survey, separate from the one referenced in the terms of the agreement itself. The transcript of the hear-

ing included no mention of an additional survey, and provides no support for defendant's contention. This assignment of error is overruled.

Defendant also alleges that the consent agreement is void because it does not explicitly state that his general release of his claims against plaintiff is limited to claims asserted in the present action. As defendant has no claims against plaintiff other than those arising from this action, this omission has no effect upon the agreement, and could not prejudice defendant. This assignment of error is overruled.

Defendant finally contends that the judgment is invalid because it was not physically attached to the letter of agreement upon which the recitals in open court were based. At the conclusion of the hearing, the trial court stated in relevant part:

> All right, it sounds like a fair and reasonable settlement . . . I will make the following suggestion to counsel, that you prepare a consent judgment[,] . . . [that will] incorporate the document that Mr. Weeks read in court, [and] that a copy be attached to the judgment[.]

The trial court's "suggestion" was not a formal requirement, and defendant has shown no prejudice attributable to the agreement's not being stapled to the judgment.

For the reasons discussed above, we conclude that the consent judgment reflects in all significant aspects the agreement of the parties, and that the trial court did not err in its entry of judgment. We further conclude that the trial court properly entered the partial summary judgment order. Accordingly, we affirm the order of partial summary judgment, and the consent judgment entered in this case.

Affirmed.

Judges McGEE and TIMMONS-GOODSON concur.

EUGENE A. GRISWOLD, JR., AND EUGENE A. GRISWOLD, JOHN HATCHELL AND KRISTA HATCHELL, A MINOR THROUGH HER GUARDIAN AD LITEM, STEVEN STARNES, BRANNON L. CROWE AND KENNETH CROWE, AND BETTY L. ALLEN, ADMINISTRATRIX OF THE ESTATE OF GEORGE ROBERT ALLEN, DECEASED, PLAINTIFFS v. INTEGON GENERAL INSURANCE CORPORATION, AND NEW SOUTH INSURANCE COMPANY, DEFENDANTS

No. COA01-82

(Filed 19 March 2002)

1. **Insurance— automobile—excess liability coverage—separately insured vehicle—son's negligence**

A policy providing liability coverage for two vehicles owned by the named insureds did not provide excess liability coverage for the negligence of their minor son while he was driving a third vehicle owned by the insureds which was covered by another policy and furnished by the insureds for their son's regular use.

2. **Insurance— automobile—excess liability coverage—family purpose doctrine**

A policy providing liability coverage for two vehicles owned by the named insureds did not provide excess liability coverage to the insureds for the negligence of their minor son while he was driving a third vehicle owned by the insureds and covered by a second liability policy, even if the son's negligence is imputed to them under the family purpose doctrine, because the pertinent policy has an owned vehicle exclusion of liability coverage for the ownership, maintenance or use of any vehicle owned by the insureds other than a covered vehicle.

Judge GREENE concurring in a separate opinion.

Appeal by defendants from order entered 16 November 2000 by Judge Larry G. Ford in Union County Superior Court. Heard in the Court of Appeals 27 November 2001.

Price Smith Hargett Petho and Anderson, by Wm. Benjamin Smith, for Brannon L. Crowe and Kenneth Crowe plaintiff appellees.

Campbell & Taylor, by Clair Campbell and Howard M. Labiner, for Eugene A. Griswold and Eugene A. Griswold, Jr., plaintiff appellees.

The Law Offices of William K. Goldfarb, by William K. Goldfarb, for John Hatchell and Krista Hatchell plaintiff appellees.

Stott, Hollowell, Palmer & Windham, L.L.P., by James C. Windham, Jr., for defendant appellants.

McCULLOUGH, Judge.

This appeal from a declaratory judgment entered during the 23 October 2000 Civil Session of Union County Superior Court stems from an automobile accident that occurred on 17 January 1997.

Prior to 17 January 1997, Wesley Cameron Philips lived with his mother, Teresa Helms, and his stepfather, Ted Helms. The family owned three automobiles: a 1992 Chevrolet, a 1995 Honda, and a 1989 Pontiac. Ted and Teresa Helms co-owned all three vehicles, and provided the 1989 Pontiac to Wesley for his use. Ted and Teresa insured all three vehicles through defendants in this case. They purchased two policies at the advice of the insurance agent, because this would apparently make for lower rates. Under the first policy issued by defendant New South, Policy No. PAF 1850535 the Helmses insured the 1992 Chevrolet and the 1995 Honda in the amount of $100,000 for each person and $300,000 per accident. Under a second policy issued by Integon, Policy No. SAN 8757219 they insured the 1989 Pontiac in the amount of $50,000 for each person and $100,000 per accident.

On or about 17 January 1997, Wesley Philips, while driving the 1989 Pontiac provided to him by his parents, collided with another automobile driven by John Bryant Hatchell. The accident resulted in serious personal injuries, including the death of George Robert Allen.

Plaintiffs have alleged in respective pending civil actions that, as a direct and proximate result of the alleged negligence of Wesley, they have sustained injuries and damages in amounts exceeding the policy limits provided by Policy No. SAN 8757219 covering the 1989 Pontiac. Indeed, defendant Integon has tendered the policy limits of $100,000 from the SAN 8757219 policy. Plaintiffs have also alleged the family purpose doctrine as to Ted and Teresa Helms.

It was with these pending civil actions in mind that plaintiffs filed a complaint for declaratory relief on 23 March 2000 making a claim for excess liability insurance coverage under the PAF 1850535 New

South Insurance Policy. Defendants filed their answer on 1 June 2000, denying any such excess coverage under that policy.

Plaintiffs filed for summary judgment in this declaratory judgment action on the excess liability coverage issue on 25 August 2000, asking that the trial court find that the New South Policy provided excess liability coverage in the pending civil actions for both Ted and Teresa and to Wesley as a matter of law. Defendants filed for summary judgment on 12 October 2000, asking that the trial court find that the New South policy provided no such coverage as to either Ted and Teresa or Wesley. The hearing on the matter was before the Honorable Larry G. Ford on 23 October 2000.

The trial court granted in part and denied in part both motions for summary judgment in its order signed on 16 November 2000. As to plaintiffs, the trial court granted summary judgment "to the extent that the policy issued by the Defendants to Teresa and Ted Helms under Policy No. PAF1850535 provides liability insurance coverage to Teresa and Ted Helms as an excess policy in this case . . . ." As to defendants, the trial court granted summary judgment "finding that Policy No. PAF1850535 does not provide any excess liability insurance coverage to Wesley Philips for his negligence, if any, arising out of the accident which is the subject of this lawsuit." The trial court denied plaintiffs' motion as to Wesley and defendants' motion as to Ted and Teresa. It is from this order that defendants appeal.

Defendants make the following assignments of error: (1) that the trial court erred in granting plaintiffs' motion for summary judgment, to the extent that the policy issued by defendants to Ted and Teresa Helms under Policy No. PAF 1850535 provides excess liability insurance coverage to Ted and Teresa Helms in connection with the 17 January 1997 accident; and (2) the trial court erred in denying defendants' motion for summary judgment as it applied to Ted and Teresa Helms.

Plaintiffs make the following cross-assignments of error: (1) the trial court erred in denying plaintiffs' motion for summary judgment as it applied to Wesley Philips; and (2) that the trial court erred in granting defendants' motion for summary judgment with regard to excess liability coverage under Policy No. PAF 1850535 to Wesley Philips for his negligence.

We shall address the order first as to the child Wesley (A), and then as to the parents, Ted and Teresa (B).

I.

Summary judgment is proper when, from materials presented to the court, there exists "no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999).

"The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction." *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95, *disc. review denied*, 352 N.C. 590, 544 S.E.2d 783 (2000). Where the language of an insurance policy is clear and unambiguous, "the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written." *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 687, 443 S.E.2d 357, 359 (1994).

The pertinent issues before this Court are whether the policy language contained in Policy No. PAF 1850535 allows for coverage for the injuries arising out of the 17 January 1997 accident.

A.

[1] The trial court held that New South Policy No. PAF 1850535 did not provide excess liability insurance coverage for Wesley Philips' negligence, if any, arising out of the accident. Based on the language of the policy, we agree.

The policy grants the following coverage:

> PART A—LIABILITY COVERAGE
>
> INSURING AGREEMENT
>
> We will pay damages for bodily injury or property damage for which any **insured** becomes legally responsible because of an auto accident. . . .
>
> **"Insured"** as used in this Part means:
>
> 1. You or any **family member** for the ownership, maintenanance [sic] or use of any auto or trailer.
>
> 2. Any person using **your covered auto**.

The policy goes on to list exclusions of coverage. Pertinent on appeal are the following:

B. We do not provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle, other than **your covered auto**, which is:

   a. owned by you; or

   b. furnished for your regular use.

2. Any vehicle, other than **your covered auto**, which is:

   a. owned by any **family member**; or

   b. furnished for the regular use of any **family member**.

However, this exclusion (B.2.) does not apply to your maintenance or use of any vehicle which is:

   a. owned by a **family member**; or

   b. furnished for the regular use of a **family member**.

It is crucial to the understanding of this insurance policy to remember that it was issued to Ted and Teresa Helms to provide insurance coverage to their two cars, the Chevrolet and the Honda. The Helmses were the "named insured" on the policy, and those two cars were the "covered autos." Wesley was not a named insured. Indeed, Ted and Teresa provided Wesley with his own insurance policy for the 1989 Pontiac. Thus, as the policy points out in its definitions, the "you" and "your" throughout the policy refer to Ted and Teresa, the named insureds, only.

It is with these facts in mind that we review the trial court's ruling. Initially, the policy provides coverage: Wesley is a family member and had used an automobile, thus was an insured. However, the situation fits into the exclusions provisions of "B".

In Exclusion B.1.a., "[a]ny vehicle other than **your covered auto**, which is: a. owned by you[]" is the 1989 Pontiac. Ted and Teresa paid for and co-owned the Pontiac that they provided to Wesley. It is apparent from the record that it is still titled in their name. Thus, the exclusion applies and there is no coverage.

In Exclusion B.2.b., "[a]ny vehicle other than **your covered auto** which is: . . . b. furnished for the regular use of any family member[]" is also the 1989 Pontiac. As said above, the record shows that Ted and Teresa provided Wesley with the Pontiac for his regular use. This

exclusion also applies, and thus the policy affords no coverage for Wesley.

The exception to the exclusion in B.2 refers to "your maintenance or use of any vehicle which is: . . . b. furnished for the regular use of a **family member**." The "your" is a reference to the named insureds, namely Ted and Teresa. Thus, if Ted or Teresa were actually using the 1989 Pontiac, they would be covered by the higher limits of this policy. However, neither Ted nor Teresa was driving the 1989 Pontiac. It is clear that Wesley was the operator of the vehicle. The exception does not include Wesley's use in this context, therefore the exception does not apply.

The trial court was correct in granting summary judgment in favor of defendants on this issue. From the plain meaning of the language of the policy, direct coverage for the negligence of Wesley driving the 1989 Pontiac is excluded.

The trial court was correct in granting defendants' motion and denying plaintiffs' motion, thus plaintiffs' cross-assignment of error is overruled.

B.

[2] The trial court held that New South Policy No. PAF 1850535 provided liability insurance coverage to Ted and Teresa Helms as an excess policy in this case. Defendants contend that the clear language of the policy excludes such coverage on the facts before this Court. We agree.

To find that the parents of Wesley Philips, Ted and Teresa Helms, have excess coverage from their own automobile insurance policy in this case in which their son is the person alleged to have been negligent implies two things: first, that they can be held liable, and second, that they would be covered, as a matter of law.

As mentioned above, plaintiffs have alleged the family purpose doctrine in pending civil actions against Ted and Teresa Helms. This Court reviewed the family purpose doctrine standard in *Tart v. Martin*, 137 N.C. App. 371, 527 S.E.2d 708, *rev'd on other grounds*, 353 N.C. 252, 540 S.E.2d 332 (2000). Judge Eagles wrote:

> In order to "afford greater protection for the rapidly growing number of motorists in the United States," the family purpose doctrine may be used to *indirectly* hold a vehicle owner liable for the negligent driving of the vehicle by a member of the owner's

household. However, a vehicle owner's liability under the doctrine is limited. In *Taylor v. Brinkman* . . . we held that "the owner or person with ultimate control over the vehicle" may be held liable only if the plaintiff shows that

> (1) the operator was a member of the family or household of the owner or person with control and was living in such person's home; (2) that the vehicle was owned, provided and maintained for the general use, pleasure and convenience of the family; and (3) that the vehicle was being so used with the express or implied consent of the owner or person in control at the time of the accident.

Martin, 137 N.C. App. at 373-74, 527 S.E.2d at 710-11 (citations omitted).

Ted and Teresa Helms could be imputed with Wesley's negligence if plaintiffs were to prove the family purpose doctrine at trial. This determination is a question of fact and we do not decide it here. However, it is proper to consider its applicability in this matter on whether the imputed negligence has any bearing on the determination of coverage under the New South Policy No. PAF 1850535. It is clear that if the family purpose doctrine could be proven by plaintiffs at trial, Ted and Teresa Helms could be personally liable.

This is only part of the necessary discussion. It is now that we must consider whether or not Ted and Teresa Helms would be covered by defendant New South Insurance Company Policy No. PAF 1850535 in the event that Wesley's negligence would be imputed to them.

Quoting the same policy from above, the policy provides coverage for "bodily injury or property damage for which any **insured** becomes legally responsible because of an auto accident." Under the family purpose doctrine, Ted and Teresa would be indirectly held liable for the damages caused by Wesley, thus legally responsible for the accident.

The next step is to determine whether any exclusions apply. As discussed above, Exclusion B.1.a denies "Liability Coverage for the ownership, maintenance or use of: 1. Any vehicle, other than **your covered auto**, which is: a. owned by you[.]" Again, the 1989 Pontiac was owned by Ted and Teresa Helms. It was not a covered auto under the New South policy. There is no exception to this exclusion. Thus, it is excluded by the language of the policy.

It is worth noting that such a result is not repugnant to the purpose of the Financial Responsibility Act. New South Policy No. PAF 1850535 is a liability insurance policy. Even though it is being treated as a potential excess liability coverage in this case, it does not lose its identity as liability insurance. In other words, we do not view this policy in the uninsured motorist (UM)/under insured motorist (UIM) context or as providing any UM/UIM coverage.

In *Haight v. Travelers/Aetna Property Casualty Corp.*, 132 N.C. App. 673, 514 S.E.2d 102, *disc. review denied*, 350 N.C. 831, 537 S.E.2d 824 (1999), this Court dealt with the validity of the "family member-owned vehicle" exclusion in a liability insurance policy in light of the Financial Responsibility Act. This exclusion is the same as Exclusion B.2.a. in the New South policy (we do not provide liability coverage for the ownership, maintenance or use of any vehicle, other than your covered auto, which is owned by any family member).

Haight said, "In applying the Financial Responsibility Act, our courts have consistently recognized a distinction between UM/UIM and liability insurance. Our Supreme Court has said that while UM/UIM insurance is person-oriented in nature, liability insurance is vehicle-oriented." *Haight*, 132 N.C. App. at 679, 514 S.E.2d at 106; *see Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). The basis for the difference of treatment between liability coverage and UM/UIM coverage is the statutory language found in N.C. Gen. Stat. § 20-279.21(b)(3) (1999) pertaining to "persons insured." *See Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 495-96, 467 S.E.2d 34, 42 (1996). This language pertains only to UM/UIM coverage, and does not carry over into the liability coverage realm.

With this in mind, the *Haight* Court noted that the exclusion was a vehicle-oriented exclusion "in that it limits liability coverage to personal injury or property damage arising out of the ownership, maintenance or use of the covered vehicle." *Haight*, 132 N.C. App. at 679, 514 S.E.2d at 106. This being so, it saw "no reason to invalidate the exclusion as repugnant to the [Financial Responsibility] Act." *Id.*

In contrast, our Supreme Court dealt with an owned vehicle exclusion similar to Exclusion B.1.a before this Court in the context of UIM coverage in *Mabe*, 342 N.C. 482, 467 S.E.2d 34. The Supreme Court had previously decided that the owned vehicle exclusion in UM motorist coverage was against the public policy of the Financial Responsibility Act in *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341

N.C. 678, 462 S.E.2d 650 (1995). The *Mabe* Court, reiterating that UM/UIM coverage follows the person rather than the vehicle, held that an exclusion "which purports to deny UIM coverage to a family member injured while in a family-owned vehicle not listed in the policy" is inconsistent with the legislative intent of the Financial Responsibility Act. *Mabe*, 342 N.C. at 495, 467 S.E.2d at 41.

Exclusion B.1.a in the case *sub judice* is of the *Haight* variety "in that it limits liability coverage to personal injury or property damage arising out of the ownership, maintenance or use of the covered vehicle." It does not deal with UM/UIM coverage. As did the *Haight* Court, we see no reason to invalidate the exclusion.

We find that the exclusion is clear, unambiguous and not contrary to public policy. Therefore, the New South policy provides no coverage to Ted and Teresa Helms even if plaintiffs prove the applicability of the family purpose doctrine and the son's negligence is imputed to the parents. Thus, the trial court erred in granting partial summary judgment to plaintiffs and denying partial summary judgment to defendants and the order is reversed as to those parts.

Affirmed in part, reversed in part.

Judge CAMPBELL concurs.

Judge GREENE concurs in the result with separate opinion.

GREENE, Judge, concurring in the result.

The trial court denied Plaintiffs' motion for summary judgment with regard to insurance coverage by New South Insurance Company (New South) for Wesley Philips' negligence. As Plaintiffs did not appeal from that determination, the correctness of that ruling is not before this Court.[1] Accordingly, I would not address the issue discussed in part A of the majority opinion.

With respect to the order of the trial court that the New South policy provides coverage to Teresa and Ted Helms if they are held liable under the family purpose doctrine, I agree the trial court must be reversed. As noted by the majority, the policy excludes coverage for "the ownership, maintenance or use of . . . [a]ny vehicle, other than your covered auto, which is . . . owned by you." The "covered"

1. Plaintiffs did assign error to the denial of their motion for summary judgment, but that is not sufficient to raise the issue on appeal. *See* N.C.R. App. P. 3 (outlining procedure for appealing from judgments and orders).

autos in the New South policy were a 1992 Chevrolet and a 1995 Honda. The 1989 Pontiac operated by Wesley Philips at the time of the accident, although owned by Teresa and Ted Helms, was not a covered auto under the New South policy. Plaintiffs do not argue in their briefs to this Court that the New South policy, as read by this Court, contravenes the purposes of the Financial Responsibility Act and thus must be construed so as to provide coverage. Accordingly, I would not address that issue.

STATE OF NORTH CAROLINA v. DAVID RAY PHILLIPS

No. COA01-648

(Filed 19 March 2002)

1. Appeal and Error— record on appeal—superior court jurisdiction—district court judgment not included

An appeal from convictions for speeding and refusing to produce a driver's license could have been dismissed where the record on appeal did not include a copy of the district court judgment establishing derivative jurisdiction in the superior court.

2. Criminal Law— jurisdiction—assertion that jurisdiction lacking—no opposing statement filed

The Court of Appeals rejected a criminal defendant's argument that the State effectively stipulated that the trial court lacked jurisdiction by failing to file a sworn statement challenging his assertion of a lack of jurisdiction. Defendant failed to cite any legal authority for his proposition.

3. Criminal Law— jurisdiction in state court—constitutional provision

Jurisdiction was established for a prosecution for speeding and failing to produce a license by a citation which clearly averred that the crimes were committed in North Carolina. Article III, Section 2, Clause 1, of the U.S. Constitution does not confer original jurisdiction on the U.S. Supreme Court in criminal matters brought by a state against its citizen for a crime occurring in that state.

4. Statutes— enacting language—preamble—session laws

A defendant convicted of speeding and failure to produce a license failed to show that the phrase "The General Assembly of North Carolina enacts . . ." was not properly included in Chapt. 20, as required by the North Carolina Constitution, where the proper language was included in the session laws. The enacting clause is generally in the preamble to an act and is not required in the law as codified.

5. Criminal Law— limited appearance to contest jurisdiction—not allowed

The trial court had jurisdiction over a defendant convicted of speeding and failure to produce a license where defendant attempted to limit his appearance to challenging jurisdiction, but did not cite any statute or case providing a criminal defendant with this right. Moreover, defendant was properly served with the citation.

6. Criminal Law— officer issuing citation—not unauthorized practice of law

A defendant convicted of speeding and refusing to produce a license was properly charged even though he contended that the officer who issued his citation was not authorized to "enter pleadings" on behalf of the State and was engaged in the unauthorized practice of law, and that the trial court erred by failing to hold a probable cause hearing. The officer issued a citation which complied with the statutory requirements and then transported defendant to a magistrate. The citation indicated that the magistrate determined that probable cause existed.

7. Constitutional Law— right to counsel—voluntarily waived

The defendant in a prosecution for speeding and failing to produce a license voluntarily, knowingly, and intelligently proceeded without counsel where the court repeatedly advised defendant of his right to have an attorney present and that one would be appointed if defendant could not afford an attorney; defendant clearly and unequivocally asserted that he did not wish to proceed with an attorney and protested when the trial court attempted to have one appointed for him; the court informed defendant of the consequences of this action and defendant stated that he understood; and the court engaged in a lengthy discussion with defendant about the nature of the charges and the possible punishments.

8. Criminal Law— citation—statement of charges not required

The trial court did not err by proceeding to trial upon a citation in a prosecution for speeding and failing to produce a license because defendant had already been tried by citation in district court and was no longer entitled to assert his statutory right to require a statement of charges. Because the State was not required to file a statement of charges, the three-day trial preparation period of N.C.G.S. § 15A-922(a) did not apply.

9. Criminal Law— continuance to secure attorney—denied

The trial court did not abuse its discretion by denying defendant's motion for a continuance to secure an attorney in a prosecution for speeding and failing to produce a license where defendant initially asserted that he did not wish to hire an attorney and objected when the court attempted to appoint one for him; defendant objected to having to return to court the following day, stating that he wanted to proceed to trial that day; the next morning, he stated that he wanted a forty-five day continuance to find an attorney; the State objected, stating that defendant had had ample time (5 months) since his arrest to secure an attorney; the trial court allowed defendant that afternoon to bring in an attorney; defendant declined; and the trial proceeded.

Appeal by defendant from judgments entered 12 December 2000 by Judge Judson D. DeRamus, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 13 February 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Hal F. Askins, for the State.

David Ray Phillips, defendant-appellant, pro se.

HUNTER, Judge.

David Ray Phillips ("defendant") appeals convictions for speeding and failure to produce a driver's license. We hold there was no error in defendant's trial or sentencing.

On 28 July 2000, Officer Enned Gaylor of the Winston-Salem Police Department used radar to clock a vehicle driven by defendant as traveling fifty-seven miles per hour in a thirty-five mile-per-hour zone. Officer Gaylor activated the lights and siren on his patrol car and pursued defendant's vehicle for approximately one to one and a

half miles before defenant pulled over. Officer Gaylor approached the vehicle and requested defendant's license and registration. Defendant did not produce a license and registration, but instead opened his window less than an inch and slid a laminated card out of the vehicle. The card read as follows:

> "Dear public servant,
>
> With all due respect to you, and no offense intended, I desire to inform you of the following: I am now exercising my Fifth Amendment right to 'not' answer any questions that may incriminate me, and neither will I present any material evidence that may be used against me in a Court of Law. I do not 'consent' to converse with you.
>
> Unless you are placing me under arrest, or can state specific facts which warrant your detaining me further, I now ask that you allow me to go about my business, as is my right as a United State's citizen.
>
> Thank you."

After reading the card, Officer Gaylor instructed defendant to exit his vehicle. Officer Gaylor attempted to open the vehicle door, but it was locked. Defendant asked if he was under arrest, and when Officer Gaylor responded affirmatively, defendant exited the vehicle. Officer Gaylor stated that defendant was being arrested for failure to produce a driver's license upon request. Although Officer Gaylor noticed that defendant was holding what appeared to be a license in his hand, defendant never gave his license to Officer Gaylor following the request.

Defendant was charged and tried for the offenses of speeding, refusing to produce a driver's license, and failure to stop for a police vehicle with active lights and a siren. On 12 December 2000, a jury convicted defendant of speeding and refusing to produce a license. The trial court entered judgment thereon, and as to both convictions sentenced defendant to forty-five days in prison, which sentences were suspended in exchange for supervised probation, a fine, and court costs.

[1] As a preliminary matter, we note defendant has failed to include in the record on appeal a copy of the district court judgment establishing the derivative jurisdiction of the superior court. As the appellant, it is defendant's burden to produce a record establishing the

jurisdiction of the court from which appeal is taken, and his failure to do so subjects this appeal to dismissal. *See State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). Nevertheless, pursuant to N.C. Gen. Stat. § 7A-32(c) (1999), we elect to exercise our discretion to treat defendant's appeal as a petition for certiorari and grant the writ to address the merits of this appeal. *See Gibson v. Mena*, 144 N.C. App. 125, 127, 548 S.E.2d 745, 746 (2001); *Munn v. Munn*, 112 N.C. App. 151, 154, 435 S.E.2d 74, 76 (1993).

[2] Defendant brings forth ten assignments of error on appeal. By his first assignment of error, he argues the trial court "erred in dismissing [his] sworn demand to dismiss for want of subject-matter/in personam jurisdiction." Defendant argues that it is "a well known maxim of law that sworn statements which go unanswered or uncontested with opposing sworn statements, are considered to be stipulated to as facts of the case by the opposing party." Defendant has failed to cite any legal authority for his proposition that the State effectively stipulated that the trial court lacked jurisdiction when it failed to file an opposing sworn statement challenging defendant's assertion that the trial court lacked jurisdiction. We therefore reject this argument.

[3] By his second assignment of error, defendant argues the trial court erred in exercising subject matter and in personam jurisdiction over him for three reasons. First, defendant argues that because the State is a party to this case, the United States Supreme Court has original subject matter jurisdiction, and thus the trial court could not have had jurisdiction. Defendant cites Article III, Section 2, Clause 2 of the United States Constitution, providing that in cases "in which a state shall be party, the supreme court shall have original jurisdiction." U.S. Const. art. III, § 2, cl. 2. However, defendant fails to recognize that no new jurisdiction is conferred by this section, but rather, it "merely distributes the jurisdiction conferred by clause one," the preceding section. *Massachusetts v. Missouri*, 308 U.S. 1, 19, 84 L. Ed. 3, 10 (1939). "The original jurisdiction of [the Supreme] Court, in cases where a State is a party, 'refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal Courts; not to those cases in which an original suit might not be instituted in a federal Court.' " *Id.* at 19-20, 84 L. Ed. at 10 (citation omitted); *see also Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392, 82 L. Ed. 1416, 1419 (1938) (it is not enough that the State is a plaintiff to bring a case within the original jurisdiction of the Supreme Court).

Article III, Section 2, Clause 1 does not confer jurisdiction over criminal matters brought by a state against its own citizen for a crime occurring in that state. *See* U.S. Const. art. III, § 2, cl. 1. Rather, in such cases, the Constitution specifically provides that the trial of all crimes "shall be held in the state where the said crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3. This argument is rejected. Accordingly, we also reject defendant's related argument that the State failed to affirmatively establish the facts necessary to show jurisdiction, as defendant's citation clearly avers that the crimes were committed in Forsyth County, North Carolina.

[4] Defendant further argues that the trial court lacked subject matter jurisdiction over this case because Chapter 20 of the North Carolina General Statutes, pursuant to which defendant was prosecuted, was not properly enacted, and therefore there was "no duly enacted law as required by the Constitution." Defendant relies upon Article II, Section 21 of the North Carolina Constitution, which states that the style of the acts of the legislature shall be as follows: " 'The General Assembly of North Carolina enacts:' ". N.C. Const. art. II, § 21. Defendant claims that because Chapter 20, as enacted, fails to contain this enacting clause, it is not duly enacted law under which he can be properly prosecuted. However, the State argues, and we agree, that Article II, Section 21 does not require the enacting clause to be included in the actual law as codified; rather, the enacting clause is generally included in the preamble to an act. While the enacting clause is required for the act to become law, it does not itself become law, nor is that required to be the case. The State maintains that the session laws to each of the sections of Chapter 20 under which defendant was prosecuted contain the proper enacting clause language required by the Constitution. Defendant has failed to show that such language was not properly included.

[5] By his third assignment of error, defendant argues the trial court lacked in personam jurisdiction because there was no valid service of process, and because defendant limited his appearances for the purpose of challenging jurisdiction. Defendant has failed to set forth any criminal case or statute providing a criminal defendant with the right to limit his appearance at trial in order to challenge jurisdiction. In any event, the record reveals that defendant was properly served with the citation under N.C. Gen. Stat. § 15A-302(d) (1999).

[6] In his fourth, fifth, and sixth assignments of error, defendant challenges the process by which he was charged with the offenses. He

contends that the citation issued by Officer Gaylor failed to conform to due process of law; that Officer Gaylor was not authorized to "enter pleadings" on behalf of the State, and thus his issuance of the citation constituted the unauthorized practice of law; and that the trial court erred in failing to hold a probable cause hearing. However, the record reveals that defendant was properly charged with the offenses in accordance with the law.

Under N.C. Gen. Stat. § 15A-401(b)(1) (1999), an officer "may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence." N.C. Gen. Stat. § 15A-401(b)(1); *see also* N.C. Gen. Stat. § 15A-302(b) (officer "may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction"). Officer Gaylor testified that he clocked defendant on radar going fifty-seven miles per hour in a zone where the posted speed limit is thirty-five miles per hour, and that defendant failed to produce a valid driver's license upon request. Office Gaylor issued defendant a citation which complied with all necessary requirements of N.C. Gen. Stat. § 15A-302(c) and (d): it identified the crimes charged and the date of the offenses; it contained the name and address of the person cited; it identified the officer issuing the citation; and it designated the court in which defendant was required to appear, and the date and time. Moreover, Officer Gaylor certified service by signing the original citation as permitted by N.C. Gen. Stat. § 15A-302(d).

Upon making the arrest without a warrant, Officer Gaylor was required to take defendant before a "judicial official." N.C. Gen. Stat. § 15A-501(2) (1999). The judicial official is required to make a determination of whether there exists probable cause to believe the crime has been committed. N.C. Gen. Stat. § 15A-511(c)(1) (1999). Officer Gaylor testified that upon arresting defendant, he transported him to a magistrate at the Forsyth County Law Detention Center. Defendant's citation contained in the record has been filled out by a magistrate, indicating that the magistrate determined that there existed probable cause that defendant committed the offenses charged.

We have reviewed defendant's arguments challenging the constitutionality of these statutes, and we hold them to be without merit. The record shows that defendant was properly charged with these offenses under the applicable statutes, and that his constitutional rights were not abridged. These assignments of error are overruled.

[7] By his seventh assignment of error, defendant maintains the trial court erred in imposing a sentence absent defendant's voluntary, knowing, and intelligent waiver of counsel. Defendant argues that he never waived any right to counsel, and further, that the trial court never adequately explained his right to counsel and the nature of the charges against him. Again, we disagree.

Our Supreme Court recently summarized a trial court's responsibilities pertaining to a defendant's waiver of the right to proceed without counsel. *See State v. Fulp*, 355 N.C. 171, 558 S.E.2d 156 (2002). The Court in *Fulp* noted that a defendant has the right to " '. . . "handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." ' " *Id.* at 174, 558 S.E.2d at 158 (citations omitted). However, before the trial court may permit a defendant to proceed without counsel, the court must ensure that various requirements are met. *Id.* at 174-75, 558 S.E.2d at 159. First, a defendant must express his desire to proceed without counsel ". . . ' "clearly and unequivocally." ' " *Id.* at 175, 558 S.E.2d at 159. (citations omitted). Second, the trial court must determine whether a defendant " 'knowingly, intelligently, and voluntarily' waives his right to counsel." *Id.* (citation omitted). In determining if this requirement is met, it is sufficient if the trial court is satisfied as to factors set forth in N.C. Gen. Stat. § 15A-1242 (1999). *Id.* That statute provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242.

Applying these principles here, it is clear that the trial court conducted the proper inquiry into the statutory factors, and that these factors were satisfied. The trial court repeatedly advised defendant of

his right to have an attorney present, and that if he could not afford an attorney, one would be appointed to him. Defendant clearly and unequivocally asserted that he did not wish to proceed with an attorney, and protested when the trial court attempted to have one appointed for him. The trial court informed defendant of the consequences of this action, including that he would not have the assistance of an attorney, that he would be held to the same standards as an attorney, and that the court would not act as his attorney during trial. Defendant stated that he understood and appreciated these consequences.

The trial court also engaged in a lengthy discussion with defendant about the nature of the charges to ensure that he understood them. The trial court also informed defendant of the possible punishments for all charges if convicted. The trial court complied with N.C. Gen. Stat. § 15A-1242 prior to allowing defendant to proceed without counsel, and thus, defendant's decision to do so was voluntary, knowing, and intelligent. *See Fulp*, 355 N.C. at 176, 558 S.E.2d at 159. This assignment of error is overruled.

[8] By his eighth assignment of error, defendant maintains that the trial court erred in proceeding upon a citation. Defendant is correct in stating that N.C. Gen. Stat. § 15A-922(a) (1999) requires that the State file a statement of the charges where a defendant objects to being tried by citation. However, a defendant's objection to trial by citation must be asserted in the court of original jurisdiction, in this case, the district court. *See State v. Monroe*, 57 N.C. App. 597, 599, 292 S.E.2d 21, 22 (1982) (defendant's statutory right to object under N.C. Gen. Stat. § 15A-922(a) applies only in the court of original jurisdiction). Thus, in *Monroe*, we held that "[o]nce jurisdiction had been established and defendant had been tried in district court, therefore, he was no longer in a position to assert his statutory right to object to trial on citation when he appealed to superior court." *Id.* Here, defendant, having already been tried by citation in district court, is no longer entitled to assert his right under N.C. Gen. Stat. § 15A-922(a). This assignment of error is overruled.

Defendant next argues that the trial court erred in failing to give him three days to prepare his defense. Defendant cites N.C. Gen. Stat. § 15A-922(b)(2), requiring that upon motion, a defendant is entitled to three working days for the preparation of his defense following the State's filing of a statement of the charges. However, we have already held that the State was not required to file a statement

of the charges under N.C. Gen. Stat. § 15A-922(a), and thus, N.C. Gen. Stat. § 15A-922(b) does not apply.

[9] By his final assignment of error, defendant asserts the trial court erred in denying his motion to continue, thereby failing to allow defendant time to secure his own attorney. The transcript shows that when defendant initially appeared before the trial court he repeatedly asserted that he did not wish to hire an attorney, nor did he want one appointed to represent him. Indeed, defendant objected when the trial court attempted to appoint one for him. Defendant also objected to having to return to court the following morning for trial, stating that he wanted to proceed to trial that day. The next morning as the trial was set to commence, defendant informed the trial court that he wished to have a continuance of forty-five days in order to secure his own attorney. The State objected, stating that defendant had had ample time since his arrest (approximately five months earlier) to secure an attorney, and that defendant had been informed of his right to an attorney the preceding day and had repeatedly expressed his desire to proceed without one. The trial court acknowledged that it had told defendant that he could bring his own attorney in at any time during the trial should he want the assistance of counsel, and thus, the trial court told defendant he could bring in an attorney. However, the trial court determined that defendant was not entitled to a forty-five day continuance in order to do so. Rather, the trial court, noting that defendant had had ample time to secure an attorney in the matter, allowed defendant until that afternoon to bring in an attorney for the commencement of trial. Defendant declined to do so, and the trial proceeded.

"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. Call*, 353 N.C. 400, 415, 545 S.E.2d 190, 200, *cert. denied*, — U.S. —, 151 L. Ed. 2d 548 (2001). "Even when the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that 'the denial was erroneous and also that [defendant's] case was prejudiced as a result of the error.' " *Id.* (citation omitted).

In the present case, we hold the trial court's denial of the motion was not erroneous in light of the circumstances of the case, particularly because defendant had some five months' time prior to trial in which to hire an attorney, but declined to do so. Moreover, the trial court did not deny defendant the ability to have his own attorney present, and offered to delay defendant's trial by several hours to per-

mit defendant to hire an attorney. Defendant declined to do so. Defendant has also failed to argue on appeal that the denial of his motion prejudiced him in any way.

Defendant's trial was free of error.

No error.

Judges WALKER and BRYANT concur.

LOIS AUBIN, PLAINTIFF v. ANTHONY A. SUSI, NEW HARBORGATE CORPORATION, AND BLUEBIRD CORPORATION, DEFENDANTS

No. COA01-427

(Filed 19 March 2002)

1. Corporations— closely-held—shareholder—individual claims

Plaintiff shareholder of a closely-held corporation did not have standing to maintain a direct action seeking recovery against defendants based upon her allegations of fraud, constructive fraud, and unfair and deceptive trade practices, because: (1) plaintiff, as a fifty percent shareholder, cannot maintain an action against defendants for her individual recovery absent a showing that she has sustained a loss peculiar to herself by reason of some special circumstances or special relationship to defendants; and (2) plaintiff failed to show that she has sustained a loss different from that sustained by the corporation.

2. Costs— attorney fees—shareholder derivative claims

The trial court erred in a fraud, constructive fraud, and unfair and deceptive trade practices case by denying plaintiff shareholder's motion for attorney fees under N.C.G.S. § 55-7-46(1) based upon her derivative claims, because: (1) even though the award is within the trial court's discretion, the trial court was required to at least consider whether the proceeding resulted in a substantial benefit to the corporation and whether such benefit warranted any award of fees; and (2) N.C.G.S. § 55-7-46 does not require that plaintiff be a successful litigant in order to recover attorney fees based upon her derivative claims.

Judge GREENE concurring in the result.

AUBIN v. SUSI

[149 N.C. App. 320 (2002)]

Appeal by plaintiff from judgment entered 2 October 2000, from an order denying plaintiff's motion for attorney's fees entered 2 October 2000, and from an order denying plaintiff's motion for a new trial entered 8 November 2000 by Judge W. Erwin Spainhour in Davidson County Superior Court. Heard in the Court of Appeals 22 January 2002.

Brinkley Walser, P.L.L.C., by G. Thompson Miller, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Reid L. Phillips, for defendant-appellees.

HUNTER, Judge.

Lois Aubin ("plaintiff") appeals the grant of a directed verdict in favor of Anthony A. Susi ("Susi"), New Harborgate Corporation (formerly and hereinafter "The Susi Corporation") and Bluebird Corporation ("Bluebird") (collectively "defendants") on her claims of fraud, constructive fraud, and unfair and deceptive practices. She further appeals the trial court's denial of her motions for attorney's fees and a new trial. We vacate the trial court's 2 October 2000 judgment granting a directed verdict in favor of defendants, and remand for entry of an order dismissing plaintiff's claims for lack of standing. We reverse the trial court's 2 October 2000 order denying plaintiff's motion for attorney's fees on her derivative claim, and remand for further proceedings.

This case stems from events surrounding the purchase of Harborgate, a development located on High Rock Lake in Davidson County, North Carolina. Plaintiff and Susi are each fifty percent shareholders of Bluebird, a New York corporation formed in 1997 to purchase and sell commercial property. Plaintiff and Susi had a written agreement whereby Susi would loan money to Bluebird to acquire or improve property, and plaintiff would assist in day to day business operations, including the marketing of Bluebird properties. Plaintiff alleged that in January 1998, she discovered the Harborgate development as a potential property for Bluebird to acquire. Both plaintiff and Susi visited the property, and negotiations for Bluebird's purchase of Harborgate commenced. In July 1998, Bluebird purchased four lots in Harborgate, and retained an option to purchase the remaining lots.

In September 1998, plaintiff and Susi met to discuss the purchase of the remainder of Harborgate. During this meeting, Susi expressed

to plaintiff that he did not feel she should have a fifty percent interest in Harborgate. According to plaintiff, Susi suggested that the profits should be split one-third for plaintiff, two-thirds for Susi. Plaintiff disagreed, and the two did not come to a resolution about their ownership percentage, nor did they ever discuss the matter again.

A closing for the purchase of Harborgate was set for 15 January 1999. Plaintiff alleged that when she arrived at the closing, Susi and Bluebird's attorney explained to her that they were going to close the property through a new North Carolina corporation, The Susi Corporation, which had been formed at the last minute. They explained that Bluebird would execute the purchase agreement, which would then be assigned to The Susi Corporation. Plaintiff did not object, although there was no discussion as to what the distribution of shares would be in the new corporation. Plaintiff assumed The Susi Corporation would either be owned by Bluebird, or that she and Susi would be fifty-fifty owners of The Susi Corporation. Susi advanced the entire purchase price for acquisition of Harborgate.

In reality, plaintiff had no interest in The Susi Corporation, and thus, no interest in Harborgate. Plaintiff alleged she did not discover that Susi was the sole owner of The Susi Corporation until 1 March 1999. According to plaintiff, Susi never mentioned before the day of closing that Harborgate would be purchased by a North Carolina corporation, and Susi never told her she was not a fifty percent shareholder in The Susi Corporation. Susi refused plaintiff's demand to immediately give her a fifty percent ownership interest in The Susi Corporation.

Plaintiff instituted this action against defendants on 19 March 1999, alleging claims of conversion, constructive fraud, and usurpation of corporate opportunity. On 19 May 1999, defendants moved to dismiss the claims on grounds that plaintiff had no right to recover individually based on the claims, which defendants asserted were Bluebird's claims, and thus, were derivative. On 15 July 1999, plaintiff filed an amended complaint which added claims of fraud, unfair and deceptive practices, and breach of contract. Defendants' motion to dismiss was heard on 23 August 1999. On 23 November 1999, Judge Sanford L. Steelman, Jr. entered an order dismissing with prejudice plaintiff's original three claims for relief, which claims plaintiff's attorney classified as her derivative claims: conversion, constructive fraud, and usurpation of corporate opportunity. Judge Steelman denied plaintiff's motion for rehearing on 4 February 2000.

Thereafter, on 11 February 2000, Judge Mark E. Klass allowed plaintiff to amend her complaint to add back the three claims that had been dismissed by Judge Steelman. Plaintiff's final amended complaint, filed 11 February 2000, alleged claims of conversion, constructive fraud, usurpation of corporate opportunity, fraud, unfair and deceptive practices, and breach of contract. Plaintiff's amended complaint averred that she was filing the suit both in an individual capacity and derivatively in her capacity as a shareholder of Bluebird. The amended complaint sought relief in the form of recovering the property for Bluebird; requiring that Susi issue plaintiff fifty percent of all outstanding Harborgate shares, or in the alternative, to recover the outstanding shares for Bluebird; judgment against Susi in the amount of the outstanding equity value of one-half Harborgate; punitive damages against Susi; treble damages against Susi pursuant to N.C. Gen. Stat. § 75-16; judgment against Susi for breach of contract; and recovery of all costs and expenses, including attorney's fees.

In May 2000, approximately four months prior to trial, Susi transferred Harborgate to Bluebird. The matter came to trial in September 2000. Plaintiff proceeded solely on her claims of fraud, constructive fraud, and unfair and deceptive practices, which plaintiff's counsel conceded both at trial and during the hearing on plaintiff's motion for attorney's fees, were being asserted by plaintiff individually, not derivatively. However, plaintiff's counsel noted that while plaintiff had essentially abandoned any derivative claims as a result of Susi's May 2000 transfer of the property to Bluebird, she was still asserting her motion for attorney's fees based on her derivative claims to recover the property for Bluebird.

At the conclusion of plaintiff's evidence, defendants moved for a directed verdict on the three claims. By judgment entered 2 October 2000, the trial court directed a verdict in favor of defendants as to all claims, concluding plaintiff had failed to show damages and other elements of her claims. The trial court entered a separate order on 2 October 2000 denying plaintiff's motion for attorney's fees based on her previously abandoned derivative claims to recover the property for Bluebird. Plaintiff moved for a new trial, and on 8 November 2000, the trial court entered an order denying the motion.

Plaintiff appeals from entry of judgment directing a verdict for defendants, and the orders denying her motion for attorney's fees and for a new trial. Defendants bring forth two cross-assignments of error, arguing that the trial court erred in failing to dismiss plaintiff's

claims as moot prior to trial, and that Judge Klass erred in permitting plaintiff to amend her complaint to include her derivative claims previously dismissed with prejudice by Judge Steelman.

Plaintiff brings forth six assignments of error on appeal; however, we need not address all of her arguments. We conclude that plaintiff, as a fifty percent shareholder in Bluebird, has failed to show that any damage which she has sustained as a result of Susi's actions is different from that sustained by Bluebird, and therefore, plaintiff does not have standing to maintain a direct action against defendants for individual recovery. However, we reverse and remand the issue of attorney's fees based upon plaintiff's previously abandoned derivative claims.

I. Plaintiff's Individual Claims

[1] Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001). Therefore, issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by the Court. *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 341, 543 S.E.2d 169, 171 (2001).

This Court recently examined the law in this state as to when a shareholder of a closely-held corporation may sue other shareholders derivatively, and when the shareholder may sue to recover individually. *See Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 537 S.E.2d 248 (2000). We noted that a derivative action is one brought by a shareholder " 'in the right of' " a corporation. *Id.* at 395, 537 S.E.2d at 253 (citing N.C. Gen. Stat. § 55-7-40.1 (1999)). An individual action "is one a shareholder brings to enforce a right which belongs to him personally." *Id.* As a general rule, "shareholders have no right to bring actions 'in their [individual] name[s] to enforce causes of action accruing to the corporation[,]' " but they "must assert such claims derivatively on behalf of the corporation." *Id.* (citation omitted). In *Norman*, this Court held that minority shareholders in a closely-held corporation alleging wrongful conduct against the majority shareholders may bring an individual action against those shareholders in addition to maintaining a derivative action on behalf of the corporation. *Id.* at 405, 537 S.E.2d at 259. In so holding, we reviewed prior cases from this state allowing shareholders in closely-held corporations to maintain individual actions against other shareholders. *Id.* at 401-03, 537 S.E.2d at 257-58. In each case,

however, as well as in *Norman*, the plaintiff-shareholders were minority shareholders seeking to recover from majority shareholders for their wrongdoing. *Id.* We observed the rationale behind allowing minority shareholders to bring individual claims:

> [T]he recovery in a derivative action goes to the corporation. . . . Thus, disposition of the recovery in a derivative action based on wrongdoing by the directors of a corporation would be under the control of the wrongdoers . . . . It would be unrealistic to expect the interests of plaintiff minority shareholders who prevail in a derivative action to be protected by defendant majority shareholders who have allegedly converted, appropriated, and wasted corporate assets.

Id. at 405, 537 S.E.2d at 259.

We distinguished the case of *Outen v. Mical*, 118 N.C. App. 263, 454 S.E.2d 883 (1995), in which this Court held that the plaintiff-shareholder in a closely-held corporation could not maintain an individual action against the defendant-shareholder where the plaintiff was not a minority shareholder, but owned a fifty percent interest, as did the defendant. In *Outen*, this Court held that "a shareholder may attempt to bring a direct cause of action in addition to a derivative action and might be able to recover individual damages if the shareholder can ' "allege a loss peculiar to himself" by reason of some special circumstances or special relationship to the wrongdoers.' " *Outen*, 118 N.C. App. at 266, 454 S.E.2d at 885.

The plaintiff in *Outen* attempted to show such a special circumstance or relationship by virtue of the fact that he and the defendant were each fifty percent shareholders in a closely-held corporation. *Id.* Although we observed that the plaintiff and the defendant may have had a special relationship because they were each fifty percent shareholders, we held the "plaintiff did not show that he suffered a loss different from the loss to the corporation." *Id.* We rejected the plaintiff's arguments that he could maintain an individual action because the corporation was powerless to act and because different rules should apply to closely-held corporations, noting that the precedent for a shareholder to act in those situations applied to minority shareholders. *Id.* at 266-67, 454 S.E.2d at 885-86.

Clearly, the present case is most analogous to *Outen*. Plaintiff and Susi are each fifty percent shareholders in Bluebird. The same concerns underlying this Court's rationale in *Norman* and other cases

involving minority shareholders bringing suit against majority shareholders are not present in this case. We are bound by *Outen* to hold that plaintiff, as a fifty percent shareholder of Bluebird, cannot maintain an action against defendants for her individual recovery absent a showing that she has sustained " ' ". . . a loss peculiar to [her]self" by reason of some special circumstances or special relationship . . .' " to defendants. *See Outen*, 118 N.C. App. at 266, 454 S.E.2d at 885 (citation omitted).

As we held in *Outen*, plaintiff cannot carry this burden by simply alleging a special circumstance or relationship due to the fact that she and Susi are fifty percent shareholders in a closely-held corporation. Plaintiff has simply failed to show that she has sustained a loss different from that sustained by Bluebird as a result of Susi's transfer of Harborgate to The Susi Corporation as opposed to Bluebird. Therefore, plaintiff does not have standing to maintain a direct action seeking individual recovery against defendants based upon her allegations in this suit. Plaintiff conceded at trial that the three claims upon which she was proceeding were not derivative in nature, but rather were individual claims. The trial court should have dismissed plaintiff's claims for want of subject matter jurisdiction. We therefore vacate the trial court's judgment, and remand for entry of an order of dismissal.

II. Attorney's Fees

[2] By her fifth assignment of error, plaintiff argues the trial court erred in denying her motion for attorney's fees based upon her derivative claims to recover Harborgate for Bluebird. N.C. Gen. Stat. § 55-7-46(1) (1999) provides that upon "termination of the derivative proceeding" the court may order the corporation to pay the plaintiff's reasonable expenses, including attorney's fees, "if it finds that the proceeding has resulted in a substantial benefit to the corporation." N.C. Gen. Stat. § 55-7-46(1).

Under the plain language of this statute, the party seeking attorney's fees need not necessarily be the prevailing party, nor must the derivative claim have proceeded to a final judgment or order. Although the statute makes clear that it is within the court's discretion to award fees (i.e., the court "may" do so), we believe that, upon plaintiff's motion, the trial court was at least required to consider whether the proceeding resulted in a substantial benefit to the corporation, and whether such benefit warranted any award of fees.

In the present case, plaintiff's counsel made clear throughout trial that while plaintiff was not proceeding on her derivative claims to recover Harborgate for Bluebird, she was still pursuing her claim to recover attorney's fees based upon those claims. Following the grant of a directed verdict in favor of defendants, plaintiff's counsel reminded the trial court that plaintiff's motion for attorney's fees on the derivative claims was still pending. The trial court did not make any findings as to whether plaintiff's derivative action resulted in a substantial benefit to Bluebird. Moreover, in its 8 November 2000 order denying plaintiff's motion for a new trial, which motion was brought based on the grant of a directed verdict and the denial of plaintiff's motion for attorney's fees on her derivative claims, the trial court determined that plaintiff was not entitled to any such fees because she "failed to prevail on any of her claims at trial."

Although this reasoning may be valid as to plaintiff's individual claims, we observe again that the plain language of N.C. Gen. Stat. § 55-7-46 does not require that plaintiff be a successful litigant in order to recover attorney's fees based upon her derivative claims. The trial court's statement that plaintiff is not entitled to attorney's fees because she did not succeed at trial suggests that the trial court failed to consider plaintiff's motion for attorney's fees under the correct standard. In order to ensure that plaintiff's motion for attorney's fees was considered under the appropriate standard as set forth in N.C. Gen. Stat. § 55-7-46(1), we reverse the trial court's denial of her motion and remand for consideration of whether plaintiff's derivative proceeding "resulted in a substantial benefit" to Bluebird, and whether such benefit warrants an award of expenses, including attorney's fees.

Defendants argue that New York law must apply to this issue since Bluebird is incorporated in New York. While it is true that any derivative claim on behalf of Bluebird would generally be governed by New York law as provided by N.C. Gen. Stat. § 55-7-47 (1999), that statute also explicitly provides that N.C. Gen. Stat. § 55-7-46 applies to both domestic and foreign corporations.

We hereby vacate the trial court's 2 October 2000 judgment and remand for entry of an order dismissing plaintiff's individual claims for lack of standing. Plaintiff's claim for attorney's fees is remanded to the trial court for a determination of whether plaintiff is entitled to fees on her derivative claims under N.C. Gen. Stat. § 55-7-46(1). We

need not address plaintiff's remaining assignments of error, nor defendants' cross-assignments of error.[1]

Vacated and remanded in part; reversed and remanded in part.

Judge TYSON concurs.

Judge GREENE concurs in the result in a separate opinion.

GREENE, Judge, concurring in the result.

Although I agree with the majority that "plaintiff does not have standing to maintain a direct action seeking individual recovery against defendants based upon her allegations in this suit," I write separately to address when a plaintiff-shareholder can maintain an individual action against fellow shareholders.

Generally, "shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997). This general rule, however, is governed by two exceptions. "First, a shareholder may bring an individual action against a third party when the third party 'owed [her] a special duty.' " *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 419, 537 S.E.2d 248, 267 (2000) (Greene, J., dissenting) (quoting *Barger*, 346 N.C. at 658-59, 488 S.E.2d at 219), *appeal withdrawn*, 354 N.C. 219, 553 S.E.2d 684 (2001). "Second, a shareholder may bring an individual action against a third party when the shareholder suffered a 'separate and distinct' injury as a result of the alleged wrongful conduct of the third party." *Id.* (quoting *Barger*, 346 N.C. at 658-59, 488 S.E.2d at 219). Thus, a plaintiff-shareholder, regardless of her status as a minority shareholder, can only bring an individual claim against majority shareholders if she is able to show they owed her "a 'special duty' or [she] suffered a 'separate and distinct injury' as a result of their alleged wrongful conduct." *Id.*

In this case, as plaintiff has failed to show defendants owed her a "special duty" or she suffered a "separate and distinct injury," she is not permitted to bring an individual claim against defendants.

1. We need not address defendants' argument that plaintiff should not have been able to amend her complaint to re-state her derivative claims since those claims were never brought forward and ruled upon by the trial court.

HENLAJON, INC., A NORTH CAROLINA CORPORATION, PLAINTIFF v. BRANCH HIGHWAYS, INC., A VIRGINIA CORPORATION, DEFENDANT

No. COA01-445

(Filed 19 March 2002)

1. Appeal and Error— notice of appeal—time for service

The Court of Appeals had jurisdiction to hear plaintiff's appeal from entry of summary judgment for defendant where plaintiff filed and served his notice of appeal within the thirty-day period prescribed in Rule of Appellate Procedure 3(c) even though service of the notice of appeal did not occur "at or before the time of filing" as required by Rule of Appellate Procedure 26(b). While failure to comply with the Rule 26(b) service requirement is obligatory and may subject the appeal to dismissal, it is not jurisdictional and dismissal was not required where defendant failed to argue or show any prejudice from being served on the Monday after the notice of appeal was filed the previous Friday afternoon.

2. Statutes of Limitations and Repose— breach of contract—letter denying contract

Plaintiff's claim for breach of a contract was barred by the statute of limitations where a letter from defendant expressly denied the existence of a contract and sufficiently informed plaintiff of defendant's intent not to perform, and plaintiff filed suit more than 3 years later. N.C.G.S. 1-52(1).

Judge GREENE dissenting.

Appeal by plaintiff from order and judgment entered 7 December 2000 by Judge Robert H. Hobgood in Chatham County Superior Court. Heard in the Court of Appeals 22 January 2002.

Bradshaw, Vernon, & Robinson, L.L.P., by Patrick E. Bradshaw, for plaintiff-appellant.

Sharpless & Stavola, P.A., by Frederick K. Sharpless and Joseph P. Booth, III, for defendant-appellee.

TYSON, Judge.

Henlajon, Inc., a North Carolina Corporation ("plaintiff") appeals from the trial court's entry of summary judgment in favor of Branch

Highways, Inc., a Virginia Corporation ("defendant") on plaintiff's breach of contract claim. We affirm the trial court's order and judgment.

I. Facts

The State of North Carolina contracted with defendant to improve portions of U.S. Highway 64 in Chatham County ("road project"). Plaintiff owned real property in Chatham County, North Carolina and was contacted by defendant in September 1996 concerning the placement of excess dirt from the road project as fill material onto plaintiff's land. No dirt was ever placed on plaintiff's property.

On 18 December 1996 and on 20 December 1996, plaintiff sent defendant two letters contending that a contract existed. Defendant responded by letter on 23 December 1996 stating: "Accordingly, we state in no uncertain terms that there is no contract (verbal, written, or otherwise) between Branch Highways and Henlajon, Inc. regarding the placement of excess construction soils onto your lands from any existing or pending NCDOT construction project." John Blair ("Blair"), plaintiff's representative, acknowledged receipt of the letter, and testified in his deposition that the letter denied the existence of a contract. Plaintiff's attorney sent defendant a letter on 12 March 1997 stating that plaintiff believed that a contract existed, and that plaintiff expected defendant to perform. Defendant did not respond further.

Plaintiff filed suit against defendant 10 March 2000 alleging breach of contract. Defendant filed motions to dismiss pursuant to Rule 12(b)(6) and for summary judgment. The trial court granted defendant's motion for summary judgment on 7 December 2000. The judgment was served on plaintiff on 12 December 2000. Plaintiff filed his notice of appeal at 3:43 p.m. on Friday, 5 January 2001, and served it on defendant Monday, 8 January 2001 by mail.

II. Motion to Dismiss

[1] Defendant has moved to dismiss plaintiff's appeal. Defendant argues that plaintiff did not file and serve its notice of appeal in accordance with Rules 3 and 26 of the North Carolina Rules of Appellate Procedure, and that we lack jurisdiction to hear the appeal and must dismiss. We disagree.

Rule 3(a) provides:

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

N.C.R. App. P. (3)(a) (2001) (emphasis added). Subdivision (c) states that "[a]ppeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry." N.C.R. App. P. 3(c).

"In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citations omitted). "Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed. *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683 (1990) (citing *Giannitrapani v. Duke Univ.*, 30 N.C. App. 667, 228 S.E.2d 46 (1976)); *Bailey*, 353 N.C. at 156, 540 S.E.2d at 322 (failure to comply "mandates" dismissal of the appeal). This Court "cannot waive the jurisdictional requirements of Rule 3 if they have not been met." *Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 9, 441 S.E.2d 177, 181 (citing *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L. Ed.2d 285, 291 (1988); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990)). "Under Rule 3(a) of the Rules of Appellate Procedure, a party . . . may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner. This rule is jurisdictional." *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 402 S.E.2d 407, 408 (1991) (citing *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 301 S.E.2d 98 (1983)).

Defendant contends that plaintiff's failure to serve the notice of appeal "at or before the time of filing" mandates dismissal because Rule 3(e) makes reference to the service requirements of Rule 26(b).

Rule 3(e), entitled "Service of notice of appeal," provides that "[s]ervice of copies of the notice of appeal may be made as provided in Rule 26 of these rules." (emphasis supplied). Rule 26 (b), states

that "[c]opies of all papers filed by any party . . . shall, at or before the time of filing, be served on all other parties to the appeal." N.C.R. App. P. 26(b) (2001). Defendant's interpretation would constructively rewrite and shorten the time requirements for service of the notice of appeal. Under defendant's construction, a party would have thirty days from entry of judgment, or within thirty days of the judgment's service where service was not perfected within three days of entry of judgment as required by N.C. Gen. Stat. § 1A-1, Rule 58, to serve the notice of appeal, unless the notice is filed before the thirty day period expires in which case the notice of appeal must be served on or before that date. The rules do not compel this result.

Rule 26(b) is a general provision that is broad in scope and covers all documents filed. Rule 3 is a specific provision that applies only to the time to file and serve a notice of appeal in superior court. If "one statute deals with a particular subject or situation in specific detail, while another statute deals with the subject in broad, general terms, the particular, specific statute will be construed as controlling, absent a clear legislative intent to the contrary." *Nucor Corp. v. Gen. Bearing Corp.*, 333 N.C. 148, 154-55, 423 S.E.2d 747, 751 (1992). Rule 3 explicitly provides a party thirty days from the entry of judgment to file and serve a notice of appeal. Our appellate courts have consistently held that the thirty days is a jurisdictional requirement that can neither be waived nor extended by this Court. We have no authority to extend nor reduce the jurisdictional time frames established by Rule 3. Had the Supreme Court intended Rule 26(b) to shorten the time for service of the notice of appeal as expressly set out in Rule 3, it could have provided for it in the rules. *See e.g.* Rule 21 "Certiorari . . . . The petition shall be filed without unreasonable delay *and shall be accompanied by proof of service* upon all other parties." N.C.R. App. P. 21 (2001); Rule 22 "Mandamus and prohibition . . . . The petition shall be filed without unreasonable delay . . . *and shall be accompanied by proof of service* . . . ." N.C.R. App. P. 22 (2001); Rule 23 "Supersedeas . . . . The petition shall be filed with the clerk of the court . . . *and shall be accompanied by proof of service* upon all other parties. N.C.R. App. P. 23 (2001) (emphasis supplied).

In *Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 436 S.E.2d 588 (1993), our Supreme Court addressed the issue of whether compliance with the service requirements of Rule 26(b) were required to confer jurisdiction on the Court of Appeals. The Supreme Court reversed *per curiam* the Court of Appeals' majority opinion, 110 N.C.

App. 621, 430 S.E.2d 457 (1993) (Greene, J.), for the reasons set forth in the dissent.

In *Hale*, the record on appeal contained a "notice of appeal" but "[n]othing in the notice . . . shows that plaintiff was given notice of the appeal through service as required by Rule 26(b)." *Id.* at 623, 430 S.E.2d at 458. "The [Court of Appeals] majority concluded that this was a jurisdictional defect which both the parties and the court were powerless to remedy," *Hale*, 335 N.C. at 232, 436 S.E.2d at 589, and held that our Court lacked jurisdiction to hear the appeal. *Hale*, 110 N.C. App. at 623, 430 S.E.2d at 459.

The dissent and our Supreme Court disagreed. The Supreme Court approved Judge Wynn's reasoning and concluded that "a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal . . . ." *Hale*, 335 N.C. at 232, 436 S.E.2d at 589. "Judge Wynn [and the Supreme Court] concluded that . . . the Court of Appeals had jurisdiction of the appeal and should consider the case on its merits." *Id.* If a party may waive the requirements of Rule 26(b), Rule 26(b) cannot be jurisdictional. Failure to serve the notice of appeal on or before the date of filing pursuant to Rule 26(b) does not automatically mandate dismissal.

Defendant contends that *Smith v. Smith*, 43 N.C. App. 338, 258 S.E.2d 833 (1979) and *Shaw v. Hudson*, 49 N.C. App. 457, 271 S.E.2d 560 (1980) necessitate dismissal of the appeal because plaintiff failed to comply with the requirements of Rule 26(b).

We do not read either *Smith* or *Shaw* to hold that Rule 26(b) is jurisdictional. Both cases were decided under former Rule 3 and prior to our Supreme Court's decision in *Hale*. Although some language in both cases implies that the service requirements of Rule 26(b) are jurisdictional, a proper analysis of the holdings in those cases does not support that proposition, and any language to that effect is *obiter dictum*. "Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Tech. College v. Hammond Assocs.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (citations omitted).

In *Smith*, we held that serving a notice of appeal on the same day, but after the filing of the notice, is equivalent to serving "at or before the time of filing" as required by Rule 26(b). Any discussion in that

case suggesting that Rule 26(b) or (c) is jurisdictional was unnecessary to decide that case. The notice of appeal was filed with the clerk of superior court and served upon all parties within ten days, as required by former Rule 3, from the trial court's entry of judgment.

In *Shaw*, we held that "plaintiff's service of notice of appeal was not timely made . . . ." *Shaw*, 49 N.C. App. at 459, 271 S.E.2d at 561. The defendant did not serve his notice of appeal within ten days from the date the trial court entered judgment as required by former Rule 3. A review of the applicable dates in *Shaw* reveals that judgment was entered on 19 October. The plaintiff filed notice of appeal on 26 October. The plaintiff did not serve the notice of appeal until 5 November, seventeen days after filing the notice of appeal. Plaintiff did not comply with the jurisdictional requirements of former Rule 3 that the notice of appeal be filed and served within ten days from entry of judgment. Our court lacked jurisdiction pursuant to former Rule 3. Any suggestion that Rule 26(b) and 26(d) were jurisdictional requirements was unnecessary to decide that case and is *obiter dicta*.

We hold that Rule 3 sets the time at thirty days from entry of judgment, or within thirty days of the judgment's service where service was not perfected within three days from entry of judgment as required by N.C. Gen. Stat. § 1A-1, Rule 58, for filing and serving a notice of appeal; and failure to serve the notice of appeal "at or before the time of filing" is not a jurisdictional requirement that automatically requires dismissal. Rule 26 is obligatory and failure to comply with its requirements, like all other obligatory provisions of the Rules of Appellate Procedure, may subject an appeal to dismissal. We do not encourage "sand bagged" service, particularly where, as here, the certificate of service in the record shows service the same date as filing. The better practice is to serve on or before the filing date.

Here, plaintiff filed and served his notice of appeal within thirty days from entry of judgment as required by Rule 3. Defendant has failed to argue or show any prejudice from being served on the Monday after filing the previous Friday afternoon. Our Court has jurisdiction to hear the appeal. Defendant's motion to dismiss plaintiff's appeal is denied.

III. Summary Judgment

[2] Plaintiff assigns as error the trial court's granting of defendant's motion for summary judgment arguing that genuine issues of mate-

rial fact exist regarding: (1) when the statute of limitations began to run, (2) whether a contract was formed, and (3) the time of defendant's performance of the contract. We disagree.

A. Standard of Review

We review a grant of summary judgment using "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.' " *Bradley v. Hidden Valley Transp. Inc.*, 148 N.C. App. 163, 165 557 S.E.2d 610, 612 (2001) (citations omitted). The burden of proof is on the movant to show that summary judgment is appropriate. *Id.* The record is reviewed in the light most favorable to the non-movant. *Id.*

B. Statute of Limitations

Plaintiff contends that a jury could have concluded that defendant did not breach the alleged contract when it sent the 23 December 1996 letter arguing that defendant was continuing to work on the construction project and had time to perform until some time after 12 March 1997.

The statute of limitations for a breach of contract action is three years. The claim accrues at the time of notice of the breach. N.C. Gen. Stat. § 1-52(1) (2000); *Abram v. Charter Med. Corp.*, 100 N.C. App. 718, 398 S.E.2d 331 (1990). Once the statute of limitations is properly pled and the facts are not in conflict, summary judgment is appropriate. *Soderlund v. Kuch*, 143 N.C. App. 361, 546 S.E.2d 632 (2001). The burden of proof shifts to the plaintiff to show that the action was filed within the statute of limitations. *Id.*

Presuming that a contract existed between plaintiff and defendant, plaintiff has failed to produce any evidence that defendant's 23 December 1996 letter was not a breach. Mr. Blair testified in his deposition that upon receipt of defendant's letter, he understood that defendant denied the existence of a contract. We hold, presuming a contract existed, that defendant's letter expressly denied the existence of a contract and sufficiently informed plaintiff of defendant's intent not to perform. "The statute begins to run on the date the promise is broken." *Glover v. First Union Nat'l Bank*, 109 N.C. App. 451, 455, 428 S.E.2d 206, 208 (1993). Plaintiff did not file suit until 10 March 2000, more than three years after receipt of defendant's letter. Plaintiff's claim is barred by the statute of limitations.

Alternatively, plaintiff argues that defendant's letter dated 23 December 1996 was an anticipatory repudiation of the alleged contract rather than a breach. After carefully reviewing the entire record, we find no merit to this argument. Plaintiff has not produced any evidence that defendant's letter was anything other than either notice that no contract existed or a breach of an alleged contract. This assignment of error is overruled. The trial court properly entered summary judgment against plaintiff. We affirm the judgment of the trial court.

Affirmed.

Judge HUNTER concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

Because I believe Rule 26 of the North Carolina Rules of Appellate Procedure mandates the proper procedure for service of a Rule 3 notice of appeal, I dissent.

Rule 3 mandates the *filing* of a notice of appeal, as a general proposition, to be within 30 days after entry of judgment. N.C.R. App. P. 3(c)(1). *Service* of the notice of appeal must be made on all other parties to the appeal pursuant to Rule 26.[1] N.C.R. App. P. 3(e); *Shaw*, 49 N.C. App. at 459, 271 S.E.2d at 561 (rejecting argument that notice of appeal is timely served if done so after filing the notice of appeal); *Smith v. Smith*, 43 N.C. App. 338, 339, 258 S.E.2d 833, 835 (1979) (Rule 26 "prescribes the proper procedure for service of the notice of appeal"), *disc. review denied*, 299 N.C. 122, 262 S.E.2d 6 (1980). Rule

1. If Rule 26 is not used to establish the time for service of the notice of appeal, we are left with the language of Rule 3(c) permitting service, as a general rule, within 30 days of the entry of the judgment appealed from without regard to the time of the filing of the notice of appeal. Thus, an appellant could file his notice of appeal the same day the judgment is entered and delay serving that notice until 30 days later. This procedure does not represent sound public policy and is inconsistent with other provisions in the North Carolina Rules of Appellate Procedure requiring service contemporaneous with the filing of petitions for a writ of certiorari, N.C.R. App. P. 21(c), a writ of mandamus, N.C.R. App. P. 22(b), and a writ of supersedeas, N.C.R. App. P. 23(c). All parties affected by a notice of appeal should know of the appeal as soon as it is filed. Thus, our courts have properly construed the word "may" in Rule 3(e) as mandatory, not directory. *See Shaw v. Hudson*, 49 N.C. App. 457, 459, 271 S.E.2d 560, 561 (1980); *see also N.C. State Art Soc'y, Inc. v. Bridges*, 235 N.C. 125, 130, 69 S.E.2d 1, 5 (1952) ("may" can be either mandatory or directory depending on legislative intent).

26(b) has been construed to require the notice of appeal to be served "on the same day as" it is filed. *Smith*, 43 N.C. App. at 340, 258 S.E.2d at 835. These filing and service requirements are jurisdictional and failure to follow them requires dismissal of the appeal. *Crowell Constructors, Inc. v. State*, 328 N.C. 563, 563, 402 S.E.2d 407, 408 (1991) (per curiam).

I do not believe that *Hale v. Afro-American Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (*per curiam*) overrules this long-established relationship between Rule 3 and Rule 26. The single issue in *Hale* was whether the appeal must be dismissed when the record on appeal did not show the notice of appeal had been served on the other parties to the appeal. The *Hale* Court held this defect in the record on appeal should have been raised prior to settling the record on appeal and the failure to timely raise the issue constituted a waiver. I do not read *Hale* to hold that service of the notice of appeal may be waived by the party entitled to the service. Indeed, I do not read the majority opinion in this case to hold that service of the notice of appeal can be waived.[2]

In this case, the record on appeal shows the filing of the notice of appeal occurred within the thirty-day period prescribed in Rule 3(c) and that service of the notice of appeal did not occur at or before the time of the filing, as required by Rule 26(b). Defendant moved to dismiss the appeal on this basis in the trial court and also in this Court. Accordingly, as the service defect appears on the face of the record, I would dismiss plaintiff's appeal for failure to comply with Rules 3 and 26.

2. I, however, do read the majority opinion in this case to hold that Rule 3(c) does establish a jurisdictional service requirement and that failure to comply with this rule mandates the dismissal of the appeal. I further read the majority opinion as holding that the Rule 26(b) service requirement is mandatory and that failure to comply with this rule *subjects* the appeal to dismissal, but dismissal is not required. These competing service requirements will necessarily create great confusion to appellants in this state.

MATTHEW J. BRIDWELL, PLAINTIFF-EMPLOYEE v. GOLDEN CORRAL STEAK HOUSE, DEFENDANT-EMPLOYER, CIGNA INSURANCE COMPANY, DEFENDANT-CARRIER, (GAB ROBINS, SERVICING AGENT)

No. COA01-428

(Filed 19 March 2002)

Workers' Compensation— temporary disability—medical evidence insufficient—employment evidence sufficient

The Industrial Commission did not err in a worker's compensation proceeding by awarding plaintiff temporary total disability benefits following a knee injury where the medical evidence was not sufficient to show disability, but plaintiff met his burden by providing evidence that he was unsuccessful in reasonable efforts to obtain suitable employment. A job in telemarketing was not indicative of his wage earning capacity because he was allowed to get up and walk around as needed, a special accommodation not common in the competitive market, and a vacuum cleaner sales position was not suitable because it aggravated plaintiff's knee condition.

Appeal by defendants from opinion and award entered 26 January 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 January 2002.

Mark T. Sumwalt, P.A., by Mark T. Sumwalt and Vernon Sumwalt, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Robert H. Stevens, Jr., and Joy H. Brewer, for defendant-appellant.

MARTIN, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission (hereinafter "Commission") awarding plaintiff, Matthew J. Bridwell, temporary total disability benefits. At the time of the incident giving rise to this action, plaintiff was employed by defendant-employer, Golden Corral Steak House, as a waiter. Plaintiff's average weekly wage while working for defendant-employer was $195.67. On 3 May 1998, plaintiff slipped on a wet floor at work while carrying a heavy load of dishes into the kitchen area. Plaintiff felt his right knee pop and experienced the onset of pain and numbness. Immediately after plaintiff's fall, he was unable to walk without assistance.

Prior to this injury, plaintiff had injured his right knee while playing basketball in February 1997. Dr. John P. Ternes of the Nalle Clinic treated plaintiff for this previous injury and performed an anterior cruciate ligament reconstruction on 20 February 1997. Dr. Ternes last examined plaintiff in connection with this surgery on 22 July 1997 and found that plaintiff had no swelling, no patellar inhibition or crepitus, a negative pivot shift test (which suggested the ligament was intact), and a stable knee with only two millimeters of anterior translation, which is within the normal range and further suggested the ligament was intact. Dr. Ternes also found that plaintiff's quadriceps had atrophied, but this is not unusual following such a surgery and does not reflect instability of the knee. Plaintiff was not having problems with his right knee prior to his injury on 3 May 1998. From his examination on 22 July 1997 to his 3 May 1998 injury, plaintiff did not see any medical provider in connection with his knee.

Subsequent to plaintiff's 3 May 1998 knee injury, Dr. Donald B. Goodman at the Nalle Clinic took an x-ray of plaintiff's right knee which was interpreted as normal. Plaintiff was examined by Dr. Ternes on 8 July 1998. Dr. Ternes discovered an increase of four to five millimeters in plaintiff's anterior translation compared to plaintiff's anterior translation on 22 July 1997. Dr. Ternes' examination also revealed that plaintiff had a positive pivot shift. From his examination, Dr. Ternes opined that plaintiff had torn the graft in his right knee and that this injury was related to plaintiff's 3 May 1998 slip-and-fall at work. On 8 July 1998, Dr. Ternes noted that he saw no contraindication of full work with plaintiff's brace on. An MRI of plaintiff's knee was performed on 31 July 1998 and revealed a partial tearing of the graft and a tearing of the postural horn of the medial meniscus. The partial tearing of the graft caused the anterior cruciate ligament to be dysfunctional. Dr. Ternes recommended a second anterior cruciate ligament reconstruction and opined that if plaintiff does not have the recommended surgery, his knee will never become fully functional. Plaintiff saw Dr. Ternes again on 7 August 1998 at which point Dr. Ternes discussed treatment options—continued bracing and exercising versus a reconstruction of his anterior cruciate ligament. Plaintiff expressed a desire to proceed with surgery. On this same date, Dr. Ternes restricted plaintiff from employment through 30 September 1998, based on his assumption that plaintiff would have the surgery immediately. The last time plaintiff saw Dr. Ternes about his knee before the Commission hearing was 28 May 1999, and Dr. Ternes had the same recommendations. At the date of the hearing of the Commission, plaintiff had not undergone surgery.

Despite Dr. Ternes' recommendation on 7 August 1998 that plaintiff have surgery and refrain from working until the surgery could be performed, plaintiff returned to work with defendant-employer on 7 August 1998 and informed his supervisor about his condition. On this same day, after speaking to his supervisor, plaintiff telephoned his mother to inform her of his condition and the doctor's recommendations. Plaintiff was fired by his supervisor after not terminating the call to his mother as his supervisor directed him to do. Following his termination, plaintiff was unable to undergo the recommended surgery because he did not have adequate insurance coverage.

After termination from defendant-employer, plaintiff worked as a telemarketer with Community Funding for approximately two months beginning 19 August 1998 and ending 20 October 1998, earning approximately $320.00 per week. In the telemarketer position, plaintiff was required to sit for long periods of time. Due to his knee condition, plaintiff had difficulty with this aspect of the job. Plaintiff's supervisor was aware of plaintiff's condition and allowed plaintiff to get up and walk around as needed. Plaintiff left this job in order to locate a better paying job. Subsequently, plaintiff worked for a two week period beginning 20 January 1999 and ending 2 February 1999 selling vacuum cleaners. During the two week period, plaintiff sold one vacuum cleaner and received $350.00 in commission. Plaintiff quit this job because it was causing him to have knee problems.

On 14 May 1999, plaintiff returned to Dr. Ternes at which time Dr. Ternes noted that plaintiff had never made a follow-up appointment after the MRI. Dr. Ternes noted that "[i]f the patient were to continue with his present course of buckling and giving way in his knee," he would recommend repeat reconstruction of the anterior cruciate ligament graft. He further noted:

> At this point in time, the brace is adequate to hold him in a good position and limit further injury. He should use this at all times when he is working or attempting any sporting activities.

Dr. Ternes stated that plaintiff would follow up with him on an as-needed basis.

On 4 May 1998, defendant-employer completed a Form 19, Employer's Report of Injury to Employee, documenting plaintiff's alleged contusion to the knee. Plaintiff then filed a Form 33 Request for Hearing. Plaintiff's claim was heard by a deputy commissioner who issued an opinion and award on 26 April 2000, awarding plaintiff

medical treatment, including surgery, relating to his compensable injury, as well as temporary total disability benefits ($130.45 per week), pursuant to G.S. § 97-29, beginning on 7 August 1998 and continuing until plaintiff returns to employment or until further order of the Commission. Defendants subsequently filed a Form 44 Application for Review by the Full Commission; and on 26 January 2001, the Full Commission filed its opinion and award affirming the deputy commissioner's opinion and award. Defendant appeals.

The ultimate issue on appeal is whether the Commission erred by concluding that plaintiff was disabled as defined by G.S. § 97-2(9) and awarding temporary total disability benefits.

When reviewing an appeal from the Commission, our review is limited to two issues: " '[W]hether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact.' " *In re Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)). If the Commission's findings of fact are supported by any competent evidence, they are conclusive on appeal. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* The Commission is the sole judge of the credibility of the witnesses and the weight to be accorded their testimony. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). We review the Commission's conclusions of law, however, *de novo*. *Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 499 S.E.2d 470, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998).

An employee is entitled to compensation under the Workers' Compensation Act if he is disabled as a result of a work-related injury. *Rhinehart v. Market*, 271 N.C. 586, 157 S.E.2d 1 (1967). "Disability" is defined as an ". . . incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (1999). In order to show the existence of a disability under this Act, an employee has the burden of proving:

> (1) that [he] was incapable after his injury of earning the same wages he had earned before his injury in the same employment,

> (2) that [he] was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that [his] incapacity to earn was caused by [his] injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Whether a disability exists is a question of law. *Id.* The employee may meet his initial burden of production by producing:

> (1) . . . medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, (2) . . . evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment, (3) . . . evidence that he 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 he has obtained other employment at a wage less than that earned prior to the injury.

Russell, 108 N.C. App. at 765, 425 S.E.2d at 457 (citations omitted). Once an employee meets his initial burden of production, the burden shifts to the employer to show "that suitable jobs are available" and that the employee is capable of obtaining a suitable job "taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990).

Defendants first contend that the medical evidence presented in this case fails to support a finding of disability. While we agree that plaintiff's medical evidence is insufficient to show disability, we conclude that plaintiff has met his initial burden of production through other evidence.

The Commission made the following findings of fact with regard to plaintiff's ability to work from a medical standpoint:

> 6. Dr. Ternes saw plaintiff again on 7 August 1998, and plaintiff had virtually the same findings. Dr. Ternes restricted plaintiff entirely from any and all employment as of 7 August 1998, based on his assumption that plaintiff would have the surgery immediately. Dr. Ternes saw plaintiff on one last occasion on 28 May 1999, and at this examination Dr. Ternes had virtually the same recommendations. Plaintiff had not undergone the surgery as of the date of the hearing in the matter.

7. Dr. Ternes recommended surgery for plaintiff on 7 August 1998 and also recommended that he not return to any work until the surgery could be performed. Following this examination, and despite Dr. Ternes recommendations, plaintiff returned to work with defendant-employer on 7 August 1997 and informed his supervisor regarding his condition.

Upon reviewing the medical records and testimony, we conclude that these findings are not supported by competent evidence. There was no evidence in the record to suggest that Dr. Ternes recommended that plaintiff refrain from working indefinitely. In fact, there is ample evidence in the record supporting a finding to the contrary.

First, Dr. Ternes' office note indicates that plaintiff be totally restricted from any and all employment for a specified period of time—from 7 August 1998 through 30 September 1998. Further, after the MRI revealed the tear of the graft, Dr. Ternes recommended that plaintiff have surgery but also mentioned, as another option, exercise with a brace. After plaintiff indicated that he chose surgery, Dr. Ternes recommended that plaintiff be restricted from all employment until his surgery date in order to lessen the risk of plaintiff re-injurying his knee prior to having surgery.

Moreover, in his report dated 14 May 1999, Dr. Ternes specifically addresses plaintiff's work status. Dr. Ternes notes,

> [a]t this point in time, the brace is adequate to hold him in a good position and limit further injury. He should use this at all times when he is *working* or attempting any sporting activities (emphasis added).

The medical evidence simply does not support findings that plaintiff is restricted from any and all employment indefinitely. Therefore, these findings of fact are not supported by the evidence and cannot support the Commission's conclusion that plaintiff is entitled to continuing temporary total disability benefits.

However, this Court has approved methods of proof other than medical evidence to show that an employee has lost wage earning capacity, and is therefore, entitled to total disability benefits. *See Russell*, 108 N.C. App. 762, 425 S.E.2d 454. We conclude plaintiff has satisfied his burden of proof by producing "evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment. . . ." *Id.* at

765, 425 S.E.2d at 457. The Commission made the following findings of fact with regard to plaintiff's wage earning capacity:

> 10. Following his termination, plaintiff was unable to undergo the surgery recommended by Dr. Ternes because he did not have adequate insurance coverage. Also, plaintiff was not offered assistance by defendants in locating suitable employment.
>
> 11. On his own, plaintiff located a job as a telemarketer with Community Funding and attempted to return to work for [sic] in this position approximately two months beginning 19 August 1998 and ending 20 October 1998. The telemarketing position normally required sitting for long periods of time and due to his knee condition, plaintiff had difficulty with this aspect of the job. Because plaintiff's supervisor knew of his condition, plaintiff was provided a special accommodation by being permitted to get up and walk around as needed.
>
> 12. Given the sedentary nature of the telemarketing job with Community Funding and the special accommodations given to plaintiff, the wages he earned in that job were not indicative of his wage earning capacity.
>
> 13. Plaintiff then located work, again on his own, with Freeman Distributors selling vacuum cleaners for a two week period beginning 20 January 1999 and ending 2 February 1999. He sold one vacuum cleaner and received $350.00 in commission, but he thereafter had to stop work because of the problems he was experiencing with his knee. This vacuum salesman job was not suitable and plaintiff's attempt to perform it constituted a failed trial return to work.
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> 14. Plaintiff has not worked in any capacity for any employer since 2 February 1999 because of his impending surgery.
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> . . .
>
> 18. As the result of his 3 May 1998 injury by accident and aggravation of his knee condition, plaintiff has been incapable of earning wages in his former position with defendant-employer or in any other employment for the period of 7 August 1998 through the present and continuing, except for the period he was able to work with Community Funding and Freeman Distributors.

In determining whether plaintiff is incapable of earning the same wages at other employment, the Commission is required to focus not

on "whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff [him]self has such capacity." *Little v. Food Service*, 295 N.C. 527, 531, 246 S.E.2d 743, 746 (1978). ". . . [A]n injured employee's earning capacity must be measured . . . by the employee's own ability to compete in the labor market." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986). Post-injury earnings should not be relied on in determining earning capacity when they do not reflect this ability to compete with others. *Id.* at 437, 342 S.E.2d at 805-06.

Defendants argue that several of the Commission's findings with regard to plaintiff's wage earning capacity were not supported by competent evidence. We disagree. The Commission found that the wages plaintiff earned in his telemarketing job with Community Funding ($320.00 per week) were not indicative of his wage earning capacity because the job was sedentary in nature and plaintiff was provided special accommodations. When plaintiff was asked whether his employer (Community Funding) was accommodating him with respect to his knee problem, plaintiff responded: "Uh-huh. He was giving me breaks. We had a break every hour or so—every hour or two." When asked whether there was anything about the telemarketing job that affected his knee, plaintiff responded:

> Sitting in a spot for a while. I mean, I had—my boss, he knew. He knew my knee was messed up, so he let me walk about every once in a while, so I was pretty much all right.

Therefore, there is evidence in the record supporting the Commission's finding that ". . . plaintiff was provided a special accommodation by being permitted to get up and walk around as needed." Plaintiff's testimony, as provided above, also supports the Commission's finding that plaintiff had difficulty sitting for long periods of time, which was required in the telemarketing position, due to his knee condition. Since there is evidence that plaintiff was specially accommodated while working for Community Funding and plaintiff had difficulty sitting for long periods of time in this position, the Commission did not err in finding that the wages earned by plaintiff while working for Community Funding do not constitute evidence of wage earning capacity. Defendants did not show that these accommodations are common in the competitive market.

Defendants also contend that the Commission erred in finding that the vacuum salesman job was not suitable to plaintiff and his attempt to perform it constituted a failed trial return to work. We

again conclude that this finding is also supported by competent evidence. "A 'suitable' job is one the claimant is capable of performing considering his age, education, physical limitations, vocational skills, and experience." *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994). Plaintiff testified that he quit this job after two weeks because the job was aggravating his knee condition. Therefore, the Commission did not err in finding that the position as vacuum salesman was not a "suitable job."

We conclude that the Commission's findings, which are supported by competent evidence, show that plaintiff has satisfied his burden of proving total loss of wage earning capacity and that defendant has failed to rebut plaintiff's evidence by showing that plaintiff possessed wage earning capacity. These findings justify the Commission's conclusion of law that plaintiff is entitled to temporary total disability benefits.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

RUPERTO GAYTON, EMPLOYEE-PLAINTIFF-APPELLEE v. GAGE CAROLINA METALS INC., EMPLOYER, KEY RISK MANAGEMENT SERVICES, INC., SERVICING AGENT, DEFENDANT-APPELLANTS

No. COA01-234

(Filed 19 March 2002)

Worker's Compensation— illegal alien—disability

The Industrial Commission did not err in a worker's compensation proceeding by requiring defendants to continue to pay benefits until an illegal alien returns to work. The employer has the burden of returning the employee to a state where the employee could obtain employment "but for" his illegal status, with the employee's illegal alien status being the last consideration.

Judge WALKER concurring

Appeal by defendants from an opinion and award entered 8 November 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 January 2002.

Robert J. Willis for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Timothy S. Riordan and John H. Ruocchio, for defendant-appellants.

North Carolina Justice and Community Development Center, by Carol Brooke, for El Pueblo, Inc., North Carolina Council of Churches Farmworker Ministry Committee, and the North Carolina Chapter of the National Lawyers Guilda, amicus curiae.

McGEE, Judge.

Defendants appeal from the opinion and award of the Industrial Commission which denied their request to terminate workers' compensation benefits awarded to plaintiff Ruperto Gayton. When plaintiff began working for defendant Gage Carolina Metals, Inc., he presented a false social security card and a false resident alien card. Defendant Gage Carolina Metals, Inc. failed to require plaintiff to complete an Employment Eligibility Verification form (I-9 form), which would have required plaintiff to swear under oath that the social security and resident alien cards were valid.

Plaintiff sustained an injury while working for defendant Gage Carolina Metals, Inc. on 19 May 1997. Plaintiff injured his back while he was moving a pallet, resulting in two herniated central discs. Defendants accepted the claim and began paying plaintiff temporary total disability.

Following the accident, plaintiff received treatment from Dr. William Markworth for several months. Dr. Markworth determined plaintiff reached maximum medical improvement on 4 March 1998 and ordered a functional capacity evaluation to determine the appropriate work restrictions for plaintiff. Plaintiff was released to return to work on 6 April 1998 with restrictions not to engage in heavy lifting over twenty pounds and that he be allowed to change positions frequently. In consideration of these restrictions, defendant Gage Carolina Metals, Inc. determined plaintiff could not return to his previous job and hired Janet Clarke, a vocational rehabilitation specialist, to assist in returning plaintiff to suitable employment outside of Gage Carolina Metals, Inc.

Clarke attempted to place plaintiff with a company at which he had previously worked, Leslie Locke. However, when she attempted to have plaintiff hired through Manpower, a temporary service which

handled all of Leslie Locke's new placements, Manpower discovered plaintiff's illegal status and refused to hire him. Clarke later performed a labor market survey. She contacted twenty-one potential employers in the area; however, most were out of business, unavailable, or had no jobs suitable for plaintiff's work restrictions. Clarke did not present any specific job available for plaintiff that met his work restrictions. Peggy Bowen, a branch manager of Manpower, stated that Leslie Locke did request workers from Manpower, and she was not aware of any reason they would not have hired plaintiff had he been a legal alien.

Defendants filed a Form 24 application to terminate benefits to plaintiff on 13 July 1998. The Industrial Commission denied this application. Defendants appeal from this denial.

Defendants argue several assignments of error all of which essentially concern the procedure used by the Industrial Commission following defendants' filing of a Form 24 application to terminate workers' compensation benefits to plaintiff. Defendants argue the Industrial Commission erred in requiring defendants to continue to pay ongoing benefits until plaintiff, an illegal alien, returns to work. Defendants argue this error occurred because the Industrial Commission erred in not reaching the ultimate issue in this case as to whether defendants are obligated to violate federal law by returning plaintiff to work through vocational rehabilitation and other commonly accepted ways to terminate benefits following the filing of a Form 24. Defendants contend plaintiff's illegal work status should constitute a constructive refusal to perform vocational rehabilitation; therefore, defendants should be allowed to terminate benefits pursuant to N.C. Gen. Stat. § 97-25. We disagree with defendants' assignments of error as they pertain to the case before us.

North Carolina has well established procedures in place under our Workers' Compensation Act for dealing with injured employees and their return to the workplace.

> A claimant who asserts that he is entitled to compensation under N.C. Gen. Stat. § 97-29 has the burden of proving that he is, as a result of the injury arising out of and in the course of his employment, totally unable to "earn wages which . . . [he] was receiving at the time [of injury] in the same or any other employment."

Burwell v. Winn-Dixie Raleigh, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (quoting *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726,

730, 403 S.E.2d 548, 550, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991)). Defendants admitted liability in this case in that plaintiff's injury arose out of and in the course of employment. Defendants also concede that plaintiff's status as an illegal alien is not a bar to his receiving workers' compensation benefits pursuant to *Rivera v. Trapp*, 135 N.C. App. 296, 519 S.E.2d 777 (1999) (holding that illegal aliens are not barred from workers' compensation benefits and that illegal aliens possess an earning capacity based on pre-injury wages).

Once a plaintiff has established a compensable injury, "there is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred." *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971). Once the claimant has established disability, "the employer has the burden of producing evidence to rebut the claimant's evidence. This requires the employer to 'come forward with evidence to show not only that suitable jobs are available, *but also that the plaintiff is capable of getting one*, taking into account both physical and vocational limitations.' " *Burwell*, 114 N.C. App. at 73, 441 S.E.2d at 149 (quoting *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990) (emphasis in *Burwell*)).

Defendants argue, however, that due to plaintiff's illegal status, it is theoretically impossible for defendants to overcome this burden since plaintiff is an illegal alien who will never legally be capable of obtaining a job until plaintiff obtains proper work authorization. Plaintiff, at least theoretically, would have no incentive to achieve legal status since he can continue to draw total disability benefits indefinitely. The crux of defendants' argument is that they contend federal law prohibits their ability to perform vocational rehabilitation for plaintiff, or to return plaintiff to suitable employment. Federal law states "it is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a) (1) (A) (1994).

Defendants contend the use of vocational rehabilitation constitutes a recruitment as well as a referral; therefore, they are barred from using these practices. However, the phrase "recruit for a fee" is defined as "the act of soliciting a person, directly or indirectly, and referring that person to another with the intent of obtaining employ-

ment for that person, for remuneration whether on a retainer or contingency basis." 8 C.F.R. § 274a.1 (e) (2001). The definition of referral is similar. To refer someone for a fee "means the act of sending or directing a person or transmitting documentation or information to another, directly or indirectly, with the intent of obtaining employment in the United States for such person, for remuneration whether on a retainer or contingency basis." 8 C.F.R. § 274 a.1 (d) (2001).

We agree that engaging in vocational rehabilitation that violates these provisions should be avoided; however, several vocational rehabilitation practices are available to defendants which would not violate federal law. Defendants can perform labor market surveys to determine what jobs, if any, are available in the area where plaintiff resides that fit plaintiff's physical limitations. Vocational rehabilitation services may also include counseling, job analysis, analysis of transferable skills, job-seeking skills training, or vocational exploration. *See* N.C. Industrial Commission Rules for the Utilization of Rehabilitation Professionals in Workers' Compensation Claims (III)(E)(1) (effective 1 June 2000). Vocational rehabilitation is not limited to the services enumerated in the Workers' Compensation Rules. Other services the employer might choose to utilize may include teaching an employee new work skills, teaching an employee to speak and read English, or assisting an employee in earning a General Equivalency Diploma.

While we agree employers may not rehire illegal aliens to the same pre-injury job or any other suitable job, federal law does not prevent looking into the surrounding community to locate other suitable jobs the plaintiff might be able to obtain but for the plaintiff's illegal alien status. Furthermore, it is not required that the employer produce a specific job that has already been offered to the employee in order to terminate workers' compensation benefits.

> An employee is "capable of getting" a job if "there exists a reasonable likelihood . . . that he would be hired if he diligently sought the job." It is not necessary . . . that the employer show that some employer has specifically offered plaintiff a job. If the employer produces evidence that there are suitable jobs available which the claimant is capable of getting, the claimant has the burden of producing evidence that either contests the availability of other jobs or his suitability for those jobs, or establishes that he has unsuccessfully sought the employment opportunities located by his employer.

Burwell, 114 N.C. App. at 73-74, 441 S.E.2d at 149 (quoting *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984)).

The reasoning set forth above has been adopted in other jurisdictions which have requirements similar to those in North Carolina for terminating workers' compensation benefits and a situation where the employee was an illegal alien. In *Reinforced Earth Co. v. W.C.A.B.*, 749 A.2d 1036 (2000), defendants argued the claimant's benefits should be suspended because the claimant would never be available for suitable employment. Normally, defendants would have been required to "establish actual job referrals." *Id.* at 1040 n5. However, the court held that defendants would have to show "evidence of earning power similar to Act 57." *Id.* at 1040. Act 57 states earning power "shall be determined by the work the employe[e] is capable of performing and shall be based upon expert opinion evidence which includes job listings with agencies of the department, private job placement agencies and advertisements in the usual employment area." Pa. Stat. Ann. 77 P.S. § 512 (2) (Supp. 2001). The court determined that "[a]ctual job referrals would not have to be made to determine the extent of Claimant's earning power because requiring Claimant to go to interviews would be useless because he would be unable to accept any position as it would be illegal for him to work." *Reinforced Earth*, 749 A.2d at 1040. While the North Carolina Workers' Compensation Act does not exactly mirror Pennsylvania's statute, the reasoning the Pennsylvania court employed in applying workers' compensation laws to illegal aliens is sound, and this reasoning is also consistent with the ruling in *Burwell* of not requiring actual job offers to the plaintiff in order to terminate benefits.

Applying this rule to the case before us and other cases involving illegal aliens, it is the employer's burden to produce sufficient evidence that there are suitable jobs plaintiff is capable of getting, "but for" his illegal alien status. Until the employee reaches this "but for" situation, the employer may perform any vocational rehabilitation to place employee in a position where if the employee were a legal alien he could be employed. This vocational rehabilitation may even include helping the employee take steps to obtain proper authorization forms. However, we reiterate that the employee's illegal alien status is the last step for consideration. An employer still has the burden of returning the employee to a state where "but for" the illegal status, the employee could obtain employment.

In the case before us, defendants contend they had done all that was allowed under the law to return plaintiff to work, and that plaintiff's illegal alien status was the only barrier to plaintiff's returning to work. In other words, defendants argue that "but for" plaintiff's illegal status, he is capable of returning to work. We disagree. In making this argument, defendants essentially contest the Industrial Commission's finding of fact that plaintiff cannot return to work.

> 12. In anticipation of the hearing before the deputy commissioner, Ms. Clarke completed a labor market assessment by contacting twenty-one employers in plaintiff's general locality. Out of the twenty-one prospective employers Ms. Clarke attempted to contact, most were out of business, unavailable when she called, or had employment that would not have been suitable for plaintiff's physical capacity. . . .
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> 13. The record contains no evidence of the physical requirements of the job at Leslie Locke or of whether plaintiff would have been able to perform the job, except that plaintiff did testify that he thought he might have been able to perform portions of the job he previously had there.
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> . . .
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> 16. Although plaintiff's illegal alien status is a barrier to finding employment in the United States, at the time of the hearing before the deputy commissioner, plaintiff was unable to return to suitable employment given his pain and restrictions and his work experience and qualifications.

On an appeal from an opinion and award of the Industrial 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). "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)).

In the case before us, there is competent evidence to support the Industrial Commission's findings of fact. Defendants never conclusively identified a specific job which plaintiff would have been able to accept "but for" his illegal alien status.

Ms. Clarke made a general statement as to jobs being available at Leslie Locke; however, on cross-examination Ms. Clarke could not specifically identify any job at Leslie Locke that would be available for plaintiff and that would fit the work restrictions he required. Consequently, defendants have not proven that "but for" plaintiff's illegal alien status he could return to suitable work that met plaintiff's work restrictions.

We therefore overrule defendants' assignments of error and affirm the opinion and award of the Industrial Commission.

Affirmed.

Judge BIGGS concurs.

Judge WALKER concurs with a separate opinion.

WALKER, Judge, concurring.

I agree with the majority that the Workers' Compensation Act has not been superseded by federal law regarding the employment, referral, or recruitment of individuals who may be illegal aliens. Therefore, the obligations and burdens, as set forth in the Workers' Compensation Act and our case law, of an employer of an injured illegal alien are no different from those of an employer whose injured employee is not an illegal alien.

The burden is on the employer to show that there are suitable jobs available for the employee which he is capable of performing "considering his age, education, physical limitations, vocational skills, and experience." *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994); *McCoy v. Oxford Janitorial Service Co.*, 122 N.C. App. 730, 733, 471 S.E.2d 662, 664 (1996). Here, the Commission found that "at the time of the hearing before the deputy commissioner, plaintiff was unable to return to suitable employment given his pain and restrictions and his work experience

and qualifications." There is competent evidence in the record to support the findings of the Commission. Thus, the employer has not met its burden and is required to continue payments under N.C. Gen. Stat. § 97-29 (1999).

However, once the employer does present evidence sufficient to meet its burden as set forth in *Burwell* and *McCoy*, the burden shifts back to the employee to either present evidence to dispute the employer or to show that he had unsuccessfully sought employment. *McCoy*, 122 N.C. App. at 733, 471 S.E.2d at 664. If "the plaintiff [does] not make a 'reasonable effort to find employment,' " he has "failed in his obligation to seek employment opportunities located by the employer and thus failed to satisfy his burden." *Id.* The failure of the plaintiff to receive the status of a legal alien would be a crucial fact for the Commission in its determination of whether plaintiff has made a reasonable effort to find employment and meet his burden as set forth in *McCoy*.

Here, we need not reach the analysis of whether the plaintiff has made such a reasonable effort to find employment because the employer has failed to present sufficient evidence to meet its burden. Until such time, the question of the illegal alien status of the plaintiff is not a factor for consideration by the Commission.

STATE OF NORTH CAROLINA v. MARK STEPHAN PATTERSON

No. COA01-275

(Filed 19 March 2002)

1. Evidence— limitation on cross-examination—victims' sexual activity

The trial court did not err in a contributing to the delinquency of a juvenile, taking indecent liberties with a child, second-degree kidnapping, and third-degree sexual exploitation case by refusing to allow defendant to question witnesses concerning the alleged victims' sexual activity involving a codefendant where the codefendant was unavailable, because: (1) there is nothing in the record to indicate what response the witness would have provided to these questions, nor what information further cross-examination would have revealed; (2) the evidence showed that

defendant would not have been helped by this testimony since he was not merely a passive observer when he provided the alcohol, encouraged the victims to remove their clothing and pose for pictures, and attempted to engage in sexual acts with some of the victims; and (3) even though defendant asked the trial court during pretrial discussion for permission to cross-examine these witnesses, defendant failed to request a voir dire hearing at the time he wanted to pursue this line of questioning.

2. Evidence— defendant's statement—prior crimes or bad acts

The trial court did not err in a contributing to the delinquency of a juvenile, taking indecent liberties with a child, second-degree kidnapping, and third-degree sexual exploitation case by allowing the prosecutor to publish defendant's statement without redacting the mention of his prior charges, because: (1) the statement had already been offered into evidence and published to the jury without objection and without a motion to suppress; (2) defendant concedes that he was provided with a copy of the statement during the discovery process and that it was properly reviewed at that time; (3) defendant failed to argue plain error; and (4) the trial court cured any alleged error by instructing the jury to disregard that portion of the statement.

3. Criminal Law— motion for mistrial—publication of defendant's statement without proper redaction

The trial court did not err in a contributing to the delinquency of a juvenile, taking indecent liberties with a child, second-degree kidnapping, and third-degree sexual exploitation case by denying defendant's motion for a mistrial after defendant objected to the continued reading of defendant's statement by a detective when that objection was sustained but the jury had already been provided with copies of the statement without the improper content having first been redacted, because: (1) defendant failed to properly preserve this issue for appellate review as required by N.C. R. App. P. 10(b)(1); and (2) even if this argument had been properly preserved, the jury was instructed to disregard the portion of the statement not read aloud.

4. Evidence— prior crimes or bad acts—sexual activity—common scheme or plan

The trial court did not err in a contributing to the delinquency of a juvenile, taking indecent liberties with a child, second-degree kidnapping, and third-degree sexual exploitation case by allowing

evidence under N.C.G.S. § 8C-1, Rule 404(b) of defendant's prior bad acts and criminal convictions in Delaware including his convictions involving meeting young teenage girls at a skating rink, inviting them to his home for parties, providing drugs and alcohol to these teens at these parties, and photographing them in various stages of undress, because: (1) the current acts are sufficiently similar to the previous acts in Delaware to show a common scheme or plan; and (2) these prior incidents occurring between ten and fifteen years before defendant's trial were not so remote in time as to no longer be more probative than prejudicial.

5. Evidence— seventeen-year-old videotape—defendant having sex with a minor

The trial court did not abuse its discretion in a contributing to the delinquency of a juvenile, taking indecent liberties with a child, second-degree kidnapping, and third-degree sexual exploitation case by allowing the jury under N.C.G.S. § 8C-1, Rule 403 to view portions of a seventeen-year-old videotape of defendant having sex with a minor, because: (1) the trial court excluded most of the videotape; and (2) even if there was error, the error was harmless in light of the overwhelming evidence of defendant's guilt.

Appeal by defendant from judgments entered 15 August 2000 by Judge Sanford L. Steelman, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 22 January 2002.

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

Richard D. Locklear for defendant-appellant.

HUNTER, Judge.

Mark Stephan Patterson ("defendant") appeals his convictions and sentencing for contributing to the delinquency of a juvenile, taking indecent liberties with a child, second degree kidnapping, and third degree sexual exploitation. We find no error.

The evidence presented at trial tended to establish that the bulk of the crimes of which defendant was convicted involved four girls ages thirteen and fourteen: Sharon Solomon ("Solomon"); Amanda Trull ("Trull"); Amanda Mauney ("Mauney"); and Rebecca Benton ("Benton").

Defendant lived in a mobile home in North Carolina with his friend Tonya Anderson ("Tonya") and often spent time at Kate's Skating Rink in Salisbury, North Carolina, where Tonya worked. Defendant and Tonya would introduce themselves to others at Kate's as brother and sister. They befriended Trull and Solomon, who also frequented Kate's. In April of 1999, Tonya invited Solomon to spend the night with her because defendant was going to be out of town. Solomon invited Trull to accompany her. The original plan was for the three of them to watch movies and drink wine coolers but Trull invited some boys over who also brought alcohol. That night they all sat around talking, drinking, and listening to music. After the boys left, Solomon and Trull spent the night. Defendant returned from Delaware the next day and Solomon and Trull also spent that night at defendant's house.

Trull and Solomon continued to spend more time and nights with defendant and Tonya. On one occasion, when Trull was staying over, defendant climbed into bed, nude, with her and asked for oral sex and began touching her "privates." After she refused and pushed his hand away, they went to sleep. Defendant photographed Trull and Solomon posing in their underwear on numerous occasions and at one point he told Solomon that he liked to get young girls drunk in order to photograph them and have sex with them.

Later that year, defendant and Tonya decided to have a big party. In addition to Solomon and Trull, there were boys at this party, along with Benton and Mauney. Defendant and Tonya provided alcohol and marijuana to the teens. As the young girls consumed alcohol, defendant encouraged them to remove their clothing and pose for pictures in their underwear. Defendant later encouraged Benton and Mauney, both wearing only t-shirts and panties, to simulate lesbian sex acts in the spare bedroom while he took pictures.

A few weeks after this party, Solomon and Trull called the police and defendant and Tonya were arrested. The police executed search warrants of the house and seized numerous photographs of young girls, included Solomon, Trull, Mauney, and Benton, in various stages of undress, consuming alcohol, and in some cases performing simulated sex acts. The police also seized a seventeen year-old videotape of defendant engaging in sexual acts with a fourteen year-old girl.

On 15 August 2000, defendant was convicted on eight (8) counts of contributing to the delinquency of a juvenile, five (5) counts of taking indecent liberties with a child, four (4) counts of second degree

kidnapping, and one (1) count of third degree sexual exploitation. Defendant was sentenced to consecutive sentences of ninety (90) days for the contributing to the delinquency of a juvenile convictions, a minimum of 95 months and a maximum of 115 months for the taking indecent liberties with a child convictions, a suspended sentence of between forty-six (46) and seventy-four (74) months for the second degree kidnapping convictions, and a suspended sentence of between six (6) and eight (8) months for the third degree sexual exploitation conviction. Defendant appeals.

Defendant brings forth five assignments of error on appeal: (1) the trial court erred by refusing to allow defendant to question witnesses concerning the alleged victims' sexual activity involving a co-defendant where the co-defendant was unavailable; (2) reversible error was committed when the prosecutor failed to correct what she knew, or should have known, was inadmissible evidence; (3) reversible error was committed as a consequence of defense counsel's untimely objection to defendant's statement when the statement contained information concerning prior convictions; (4) the trial court erred in allowing the introduction of evidence under N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999) concerning defendant's prior bad acts and criminal convictions while living in Delaware; and (5) defendant was unfairly prejudiced under N.C. Gen. Stat. § 8C-1, Rule 403 (1999) when the trial court allowed the jury to view portions of a seventeen year-old videotape of defendant having sex with a minor. For reasons stated herein, we conclude defendant's trial was free of error.

I.

[1] Defendant first argues that the trial court erred in refusing to allow him to question the State's witnesses concerning the victims' sexual activity with others at the party. Specifically, defendant challenges the trial court's refusal to allow him to cross-examine Detective Tonya Rusher about alleged sexual activity between the victims and other males at the parties. Defendant contends that he was simply a passive observer who took photographs of normal teenage behavior at parties: dancing, drinking, and stripping off their clothing.

During the trial, defendant asked Detective Rusher:

> Q. Now, without identifying or revealing the names of the victim, if you could tell us what other young men were charged and what were the charges.

[PROSECUTOR]: Objection.

THE COURT: Sustained.

Q. Have the charges against these young men been resolved, been to trial?

A. I believe one.

Q. And what was the disposition to that?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

There is nothing in the record to indicate what response the witness would have provided to these questions, nor what information further cross-examination would have revealed. "An exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness's testimony would have been had he been permitted to testify." *State v. Barts*, 321 N.C. 170, 178, 362 S.E.2d 235, 239 (1987) (citations omitted). In addition, the evidence presented at trial showed that defendant was not merely a passive observer, he provided the alcohol, encouraged the victims to remove their clothing and pose for pictures, and attempted to engage in sexual acts with some of the victims. He also admitted that he liked to get young girls drunk in order to photograph them and to engage in sexual acts with them.

During a pre-trial discussion, defendant did ask the trial court for permission to cross-examine witnesses about possible sexual conduct between the victims and others at the party. The trial court declined to rule at that time and suggested that defendant request a *voir dire* hearing so that the trial court could properly consider the proffered evidence if there came a point where defendant wanted to pursue this line of questioning. Defendant never requested a *voir dire* hearing at the time he wanted to pursue this line of questioning.

Because the record does not indicate what the cross-examination would have revealed, and because the evidence elsewhere tends to show that defendant would not be helped by this testimony, we conclude that defendant was not prejudiced by the denial of opportunity to cross-examine further. *See State v. Lynch*, 337 N.C. 415, 423, 445 S.E.2d 581, 584 (1994) (when there is nothing in the record to indicate what the answers would have been, and it is not apparent that the witness would have answered as the defendant wanted him to answer,

the court cannot rule favorably for the defendant on this question). Defendant also failed to follow the trial court's instruction to request a *voir dire* hearing so that the trial court could properly assess the proffered evidence. This assignment of error is overruled.

II.

[2] Defendant next argues that reversible error was committed when the prosecutor failed to prevent what she knew, or should have known, was inadmissible evidence from being published to the jury. During the trial, Detective Rusher was asked to read a handwritten statement that had been given to Detective Rusher by defendant after he was read his rights. In this statement, defendant mentions his 1986 convictions for contributing to the delinquency of a minor in Delaware. Prior to Detective Rusher's reading of the statement, it was properly admitted into evidence and published to the jury, without objection. When Detective Rusher read "[a]bout mid or late 80's, I was charged with several counts," defendant objected and the trial court sustained the objection and instructed the jury to disregard that portion of the statement in their deliberation. The portion of the statement not read aloud to the jury was:

> About mid or late 80's I was charged with several counts of contributing to the delinquency of a minor. I was also charged with giving kids drugs to take to school & sell and with giving them alcohol. I plead guilty to two counts of contributing to the delinquency of a minor. I got 5 years probation for that.

However, this statement had already been offered into evidence and published to the jury without objection and without a motion to suppress. The only objection came when the statement was being read aloud by Detective Rusher.

Defendant concedes that he was provided with a copy of the statement during the discovery process and that it was properly reviewed at that time. Because defendant allowed this statement to be published to the jury without objection, and does not argue the admission to be plain error, he cannot now say it was error for the statement to be published without first redacting the mention of prior charges. N.C.R. App. P. 10(c)(4).

Even if it were error to provide the jury with the excluded portion of the statement, for the reasons stated in III below, the trial court cured any error by instructing the jury to disregard that portion of the statement. This assignment of error is overruled.

III.

[3] In his next assignment of error, defendant argues that the trial court erred in not granting a mistrial after defendant objected to the continued reading of defendant's statement by Detective Rusher when that objection was sustained but the jury had already been provided with copies of the statement without the improper content having first been redacted. As noted in II above, these unredacted copies were provided to the jury without objection from defendant.

Defendant did not move for a mistrial so the failure of the trial court to grant one is not an error properly preserved for appellate review. *See* N.C.R. App. P. 10(b)(1).

Even if this argument had been properly preserved, the defendant's own cited authority shows that a motion for a mistrial must only be granted if "there occurs an incident of such a nature that it would render a fair and impartial trial impossible under the law." *State v. McCraw*, 300 N.C. 610, 620, 268 S.E.2d 173, 179 (1980) (citation omitted). Even if the publication of the statement was in error, the jury was instructed to disregard the portion of the statement not read aloud. "When a jury is instructed to disregard improperly admitted testimony, the presumption is that it will disregard the testimony." *Id.* at 610, 268 S.E.2d at 179 (defendant's motion for mistrial was properly denied when the trial judge instructed the jury to disregard testimony of a prior arrest). This assignment of error is overruled.

IV.

[4] In his fourth assignment of error, defendant argues that the trial court erred under N.C. Gen. Stat. § 8C-1, Rule 404(b) by allowing the introduction of evidence of defendant's prior bad acts and convictions while living in Delaware. Defendant had been convicted of crimes in Delaware that involved meeting young teenage girls at a skating rink, inviting them to his home for parties, providing drugs and alcohol to these teens at these parties, and photographing them in various stages of undress.

Defendant argues introduction of this evidence violated Rule 404(b) which provides:

> 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, prepara-

tion, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b). Defendant argues that since the identity of defendant was not at issue, identity evidence is not admissible under 404(b). *See State v. White*, 101 N.C. App. 593, 401 S.E.2d 106, *appeal dismissed and disc. review denied*, 329 N.C. 275, 407 S.E.2d 852 (1991). Defendant further argues that this evidence was admitted solely to show that defendant had the propensity or disposition to commit the crime charged. We disagree.

"Rule 404(b) is one of '*inclusion* of relevant evidence of other crimes . . . 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. Faircloth*, 99 N.C. App. 685, 689, 394 S.E.2d 198, 201 (1990) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)). "[S]uch evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635, *appeal dismissed and disc. review denied*, 353 N.C. 382, 546 S.E.2d 114 (2000). Here, the trial court allowed the prior bad acts to be admitted under Rule 404(b) "as evidence of the motive of the defendant, the intent of the defendant, and of a common scheme of [sic] plan."

The test for determining whether evidence showing a common scheme or plan is admissible is "whether the incidents establishing the common plan or scheme are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 299 (1996). In the present case, the similarities between the incidents involving the current crimes and the actions in Delaware are sufficient to establish a common scheme or plan. The trial court allowed the evidence to be admitted after holding a *voir dire* hearing. At this *voir dire* hearing, the trial court made extensive findings of fact concerning defendant's prior acts in Delaware, including:

a. In the 1980's and early 1990's the defendant resided in the State of Delaware. The defendant helped to start a roller skating club known as the "Aces". The defendant used the skating club to meet underage females.

b. . . . On weekends, there would be parties at the home of the defendant. The defendant provided liquor, marijuana, and caffeine pills to girls who were minors. . . . There would be girls at these parties who were between the ages of 13 and 28 years of age. Strip poker was played at these parties, and the defendant would take pictures of girls during these games, in various stages of undress. . . . In 1986 the defendant . . . [was] convicted of multiple counts of contributing to the delinquency of a juvenile in the State of Delaware arising out of this conduct. Despite this conviction, the parties at the residence of the defendant continued.

c. . . . Following his separation [from his wife], the parties at the residence of the defendant continued and increased, with more marijuana and nudity.

. . .

e. The defendant kept a log of his sexual conquests, beginning in 1974, listing the ages of the girls, and the type of sex that he had with them.

In the present case, defendant met the victims at a skating rink, invited them to his home for parties where alcohol and drugs were provided, and then proceeded to take photographs of the victims in varying stages of undress. Defendant also attempted to engage in sexual activities with at least one of the victims. We hold that the current acts are sufficiently similar to the previous acts in Delaware.

The second part of the test for admissibility is whether or not these prior incidents were so remote in time as to no longer be more probative than prejudicial. *Id.* In the present case, defendant's prior crimes and bad acts took place over a number of years in Delaware and again in North Carolina. As our Supreme Court noted in *State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989):

> While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, . . . the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

Id. at 445, 379 S.E.2d at 847. We hold that the prior bad acts, occurring in Delaware between ten and fifteen years before defendant's trial, were not too remote to be considered as relevant evidence of defendant's common scheme or plan to meet young girls at a skating rink, provide them drugs and alcohol, and photograph them in varying stages of undress for the purposes of sexual gratification. *See State v. Miller*, 142 N.C. App. 435, 543 S.E.2d 201 (2001) (prior convictions dating back sixteen years are admissible).

We also find that the trial court did not abuse its discretion in finding that this evidence of a common scheme or plan was more probative than prejudicial under the balancing test of Rule 403. *See State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48. This assignment of error is overruled.

V.

[5] Defendant's final argument is that the trial court erred in allowing portions of a seventeen year-old videotape of defendant engaging in sexual activity with a minor to be played for the jury. Defendant argues that any probative value of the videotape is outweighed by its prejudicial effect upon him. *See* N.C. Gen. Stat. § 8C-1, Rule 403.

"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 (citing *State v. Mercer*, 317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986)). The decision to admit or exclude evidence under Rule 403 is left to the discretion of the trial court and will only be disturbed upon a showing of abuse of discretion. *Id.* In this case, the trial court excluded most of the videotape, only allowing portions to be shown to the jury. The trial court did not abuse its discretion in allowing portions of the videotape to be shown to the jury.

Even if the admission of the videotape were determined to be error, it was harmless error. In order to show prejudicial error, defendant must show that a different result would have been reached at trial if the evidence had not been admitted. N.C. Gen. Stat. § 15A-1443(a) (1999). In light of the overwhelming evidence against defendant, it is unlikely that the jury would not have convicted had they not seen the portions of this videotape that the trial court allowed. This assignment of error is overruled.

No error.

Judges GREENE and TYSON concur.

BILLY V. CAIN, PETITIONER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. COA01-233

(Filed 19 March 2002)

Highways and Streets— outdoor advertising permit—billboard—illegal cutting and destruction of vegetation

A de novo review reveals that the trial court did not err by upholding the revocation of petitioner's outdoor advertising permit for a billboard even though petitioner alleged there was an insufficient connection existing between petitioner and the perpetrator of the illegal cutting and destruction of the vegetation surrounding the outdoor advertising structure, because: (1) N.C. Admin. Code tit. 19, r. 2E.0210(8) provides for revocation of a permit for unlawful destruction of trees or shrubs or other growth located on the right of way in order to increase or enhance the visibility of an outdoor advertising structure; (2) direct involvement by the permit holder in the alleged violation is not necessary to uphold a revocation; and (3) petitioner had a responsibility to abide by NC DOT's requirements and his responsibility did not end when petitioner leased billboard space to a third party, nor did it end when a sublessee violated those requirements.

Judge TYSON concurring in the result.

Appeal by petitioner from judgment entered 29 December 2000 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 December 2001.

Hutchens & Senter, by H. Terry Hutchens and Rudolph G. Singleton, Jr., for petitioner-appellant.

Attorney General Roy A. Cooper, by Assistant Attorney General Gaines M. Weaver, for respondent-appellee.

TIMMONS-GOODSON, Judge.

Billy Cain ("petitioner") appeals the 29 December 2000 order of the trial court affirming the revocation of his outdoor advertising permit issued by the North Carolina Department of Transportation ("NCDOT").

The relevant facts are as follows: Petitioner was the owner of an outdoor advertising structure located on Interstate 95 in Cumberland County. Petitioner leased the billboard to Sunshine Outdoor of Florida, Inc. ("Sunshine Outdoor") under the terms of a written agreement by which Sunshine Outdoor was granted the use of the billboard for a term of ten years. Sunshine Outdoor subleased the billboard to Café Risque, a business operated adjacent to Interstate 95 in Harnett County.

On 7 February 1998, NCDOT Maintenance Manager, Hugh S. Matthews, responded to a report of an apparent destruction of trees, shrubs, and other vegetation located on the right-of-way of Interstate 95. The apparent removal of the vegetation was in order to increase or enhance visibility of the outdoor advertising structure. On 10 February 1998, the Department District Engineer revoked petitioner's permit.

Petitioner contended that neither he nor any of his employees was directly or indirectly engaged in the illegal cutting reported on 7 February 1998. Petitioner also alleged that neither Sunshine Outdoor nor Café Risque sought permission to remove vegetation from the permit site, nor did they inform petitioner of their intention to remove vegetation. On 28 May 1998, the Secretary of NCDOT received a letter from Jean Claude Brunnell of Sunshine Outdoor asserting that Café Risque was responsible for the illegal cutting and that neither Sunshine Outdoor nor petitioner were aware of the destruction of the vegetation.

On 9 September 1999, pursuant to an appeal by petitioner, the Secretary of NCDOT entered a final decision upholding and affirming the revocation of petitioner's permit. Petitioner petitioned for judicial review of the final agency decision. The trial court in affirming the revocation of petitioner's permit made the following pertinent findings of fact:

> 7. The billboard at the permit site was leased to Sunshine Outdoor, Inc. by Billy V. Cain under the terms of a written agreement, by the terms of which, Sunshine Outdoor of Florida, Inc.

was granted the rights to the use of the billboard for a term of ten (10) years and included options to renew, in consideration of payments to Billy V. Cain in the approximate amount over the initial term of the lease in the approximate amount of One-Hundred Fifty Thousand Nine Hundred Thirty-Five Dollars ($150,935.00). Neither Billy V. Cain, nor any employee of Billy V. Cain was engaged directly or indirectly in the illegal cutting at the permit site on February 7, 1998, or at any other time.

8. Neither Billy V. Cain nor any employee of Billy V. Cain authorized, controlled, directed or otherwise participated in the illegal cutting of the vegetation at the permit site on February 7, 1998.

9. Neither Sunshine Outdoor, Inc. nor Café Risque nor anyone on behalf of either entity, sought Billy V. Cain's permission to remove any vegetation from the permit site nor did they inform Billy V. Cain of their intention or plan to remove the vegetation.

10. Billy V. Cain had no knowledge whatsoever that any person or entity intended to remove vegetation at the permit site or, in fact, had removed any vegetation at the permit site.

. . . .

15. Illegal cutting of vegetation at the permit site was carried out by agents of either Sunshine Outdoor of Florida, Inc. or Café Risque.

Based on the above findings of fact, the trial court made the following conclusions of law:

1. The Final Decision of the Secretary of Transportation is not in violation of any constitutional provisions.

2. The Final Decision of the Secretary of Transportation was made with the Outdoor Advertising Control Act, N.C. Gen. Stat. 136-126, et. seq. and rules and regulations promulgated by the Department of Transportation.

3. The Final Decision of the Secretary of Transportation is not effected [sic] by any other error of law.

4. Pursuant to *National Advertising Co. Bradshaw*, 60 N.C. App. 745, 299 S.E.2d 817 (1983), the Department must clearly show the following in order to revoke a permit for the unlawful destruction of trees or shrubs or other growth located on the right of way (1) the identity of the persons, (2) who committed a violation for

which revocation is permissible and (3) show a sufficient connection between those persons and the permit holder.

5. The contract between the Petitioner Billy V. Cain and Sunshine Outdoor of Florida, Inc. for the lease of the billboard is a sufficient connection to satisf[y] the third element established by the *National Advertising Co.* court.

Petitioner appeals.

On appeal, petitioner contends that the trial court erred in affirming the decision of the Secretary of Transportation in revoking petitioner's outdoor advertising permit. Specifically, petitioner argues that an insufficient connection existed between petitioner and the perpetrator of the illegal cutting and therefore, petitioner bears no responsibility for the apparent destruction of the vegetation. Thus, petitioner asserts that the revocation of his outdoor advertising permit was not justified. We disagree.

The Outdoor Advertising Control Act ("OACA")is codified in N.C. Gen. Stat. § 136-126 (1999). The purpose of the Act is to "promote the safety, health, welfare and convenience and enjoyment of travel on and protection of the public investment in highways within the State, . . . and to promote the reasonable, orderly, and effective display of such signs, displays and devices." N.C. Gen. Stat. § 136-127 (1999). N.C. Gen. Stat. § 136-130 provides NCDOT with the authority to promulgate rules and regulations concerning:

> (1) outdoor advertising signs along the right-of-way of interstate or primary highways in this State; (2) 'the specific requirements and procedures for obtaining a permit for outdoor advertising as required in [N.C. Gen. Stat.] § 136-133'; and (3) 'for the administrative procedures for appealing a decision at the agency level to refuse to grant or in revoking a permit previously issued.'

Advertising Co. v. Bradshaw, Sec. of Transportation, 48 N.C. App. 10, 16-17, 268 S.E.2d 816, 820 (quoting N.C. Gen. Stat. 136-130), *disc. review denied*, 301 N.C. 400, 273 S.E.2d 446 (1980).

N.C. Gen. Stat. § 136-133(a) (1999) provides that except as allowed by statute, "no person shall erect or maintain any outdoor advertising within 660 feet of the nearest edge of the right-of-way of the interstate or primary highway system" without first obtaining a permit from NCDOT. The statute further provides that such "permit

shall be valid until revoked for nonconformance with this Article or rules adopted by the Department of Transportation." In accordance with N.C. Gen. Stat. § 136-130, NCDOT has promulgated N.C. Admin. Code tit. 19, r. 2E.0210(8) (2000) which provides for revocation of a permit for "unlawful destruction of trees or shrubs or other growth located on the right of way in order to increase or enhance the visibility of an outdoor advertising structure[.]"

When a permit issued for an outdoor advertising structure has been revoked and all administrative remedies have been exhausted, the party aggrieved is entitled to judicial review of the decision of the Secretary of Transportation. N.C. Gen. Stat. § 136-134.1 (1999). Under N.C. Gen. Stat. § 136-134.1, the party may appeal the order of the Department of Transportation and has a right to a hearing *de novo* in the Superior Court of Wake County. The Superior Court, after hearing the matter, may affirm, reverse or modify the decision if the agency decision is "(1) in violation of constitutional provisions; or (2) not made in accordance with this Article or rules or regulations promulgated by the Department of Transportation; or (3) affected by other error of law." *Id.*

The task of this Court in reviewing a trial court's order of an agency decision is two-fold: (1) determine whether the trial court exercised the appropriate standard of review and (2) determine whether the trial court properly applied this standard. *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999). The standard of review depends on the nature of the issues presented on appeal. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). Allegations that a decision is based upon an error of law dictate *de novo* review. *Id. De novo* review "requires a court to consider the question anew[,]" as if the agency has not addressed it. *Eury v. N.C. Employment Security, Comm.*, 115 N.C. App. 590, 597, 446 S.E.2d 383, 387, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). Incorrect statutory interpretation by an agency constitutes an error of law. *Brooks, Comm'r. of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988).

In the instant case, petitioner contends that the court's order affirming the final decision of the Secretary of Transportation revoking petitioner's outdoor advertising permit was contrary to law. Accordingly, we review the Secretary's decision *de novo*.

In determining whether there has been a violation of an outdoor advertising regulation sufficient to support a permit revocation, our Court has held NCDOT must "(1) clearly identify persons, (2) who committed a violation for which revocation is permissible, and (3) show a sufficient connection between those persons and the permit holder." *Whiteco Industries, Inc. v. Harrelson*, 111 N.C. App. 815, 434 S.E.2d 229 (1993), *disc. review denied*, 335 N.C. 566, 441 S.E.2d 135 (1994).

Since *National*, it has been established that direct involvement by the permit holder in the alleged violation is not necessary to uphold a revocation. In *Whiteco Metrocom, Inc. v. Roberson*, 84 N.C. App. 305, 306, 352 S.E.2d 277, 277 (1987), petitioner, owner of an outdoor advertising structure, hired an independent contractor to maintain its signs. Petitioner's permit was revoked because of the violations committed by independent sign maintenance subcontractors. *Id.* at 306, 352 S.E.2d at 277. Petitioner contended his permit could not be revoked since "the delinquencies were those of an independent contractor." *Id.* at 307, 352 S.E.2d at 278. This Court held that "by obtaining the statutorily authorized permit, petitioner accepted the duty to follow the law in its exercise; and petitioner did not rid itself of this duty by hiring an independent substitute to act for it; for a duty imposed by statute cannot be delegated." *Id.* at 307, 352 S.E.2d at 278.

Similarly, in *Whiteco Industries*, 111 N.C. App. 815, 434 S.E.2d 229, Whiteco leased a billboard to Comfort Inn. Subsequently, three men were observed cutting trees on the right-of-way. *Id.* at 816, 434 S.E.2d at 231. The men admitted that they were hired by the owner of Comfort Inn. The permit holder, Whiteco, argued that because the lessee of the billboard had hired the violators, there was not a sufficient connection to warrant permit revocation. *Id.* at 820, 434 S.E.2d at 233. This Court held that "this argument would be tantamount to inviting circumvention of the law, and we reject it. Petitioner's responsibility to abide by DOT's requirements to obtain and retain outdoor advertising permits *did not end when it leased billboard space to a third party*, and is not excused when an agent of the third party violates those requirements." *Id.* at 821, 434 S.E.2d at 233 (emphasis added).

Our *de novo* review in the instant case leads us to conclude that the trial court's decision was not affected by errors of law. The fact that petitioner did not know of the alleged violation nor hired the vio-

lators, did not relieve him of liability. The fact remains that there existed a contractual relationship between petitioner and Sunshine Outdoor. As in *Whiteco*, petitioner had a responsibility to abide by NCDOT requirements and his responsibility did not end when petitioner leased billboard space to a *third* party, nor did it end when a *sublessee* violated those requirements. Based on prior rulings of this Court, we hold that the trial court properly affirmed the revocation of petitioner's outdoor advertising permit.

Petitioner presents two new arguments on appeal: (1) recent changes to the administrative code provisions related to outdoor advertising show that the permit at issue was unfairly revoked; and (2) NCDOT has ample means to protect against illegal cutting on the right-of-way through enforcement of N.C. Gen. Stat. § 14-128. However, these arguments were not presented at trial, nor does the record reflect that petitioner has assigned them as error. Arguments not made before the trial court are not properly before this Court. *See* N.C.R. App. P. 10 (b)(1) (2000). Accordingly, we do not address petitioner's remaining assignments of error.

Based on the foregoing, we affirm the trial court's order upholding the revocation of petitioner's outdoor advertising permit.

Affirmed.

Judge Hudson concurs.

Judge Tyson concurs in the result with a separate opinion.

TYSON, Judge concurring in the result.

I concur in the result of the majority. There was substantial evidence of a "sufficient connection" between the permit holder and his lessee, the person who cut the vegetation, to uphold the revocation of the permit. I disagree with the majority that it is irrelevant whether Sunshine Outdoor or Café Risque hired the violators.

At the hearing below, the Secretary of Transportation found that Richard Marshburn ("Marshburn"), agent for Sunshine Outdoor, authorized and hired Danny Moore ("Moore"), the party who cut the vegetation without a permit. This finding of fact is supported by: (1) a memo from R.R. Stone, the District Engineer, which states that Marshburn informed him that Sunshine Outdoor was responsible for the cutting; and (2) a letter from Hugh Matthews, the County

Maintenance Engineer, which states that upon reporting to the site of the cutting, Moore informed him that Marshburn had hired him and that Moore went to the motel and brought Marshburn back to the site with him. These facts establish a "sufficient connection" between the person who violated 19A N.C. Admin. Code r. 2E.0210(8) and the permit holder. *See Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 819, 434 S.E.2d 229, 232-33 (1993) (violators hired by lessee of the permit holder was a sufficient connection to warrant revocation of the holder's permit) ("*Whiteco I*").

However, the majority implies that petitioner's responsibility to abide by NCDOT requirements does not end when the violators are the sublessee or are hired by the sublessee. A "sufficient connection" between the permit holder and the violator, as required in *National Adver. Co. v. Bradshaw*, 60 N.C. App. 745, 749, 299 S.E.2d 817, 819 (1983), does not extend to third party strangers to the permit holder, such as a sublessee. To hold otherwise would leave the permit holder without recourse against an unknown third party whose actions caused the permit holder to lose not only his permit, but his structural improvements on the property as well. *See* 19A N.C. Admin. Code r. 2E.0212(b) (2000) (when the outdoor advertising structure is unlawful and a nuisance, it must be made to conform, if permitted by the rules, or removed); 19A N.C. Admin. Code r. 2E.0212(c) (2000) (an outdoor advertising structure cannot be made to conform when the permit is revoked under 19A NCAC 2E.0210(2),(3),(11), or (12)).

There exists no "privity of contract" between the original landlord-permit holder and the sublessee or other third party stranger to the agreement between the permit holder and the lessee. The original landlord has no right of direct action against the sublessee with respect to violations of covenants in the original lease. *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 162, 356 S.E.2d 912, 915 (1987) (citing Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina*, § 241 at 251 (Rev. ed. 1981)). A contractual relationship exists between the original lessor-permit holder and sublessee only if a sublease constitutes an actual assignment. *Northside Station Assocs. Partnership v. Maddry*, 105 N.C. App. 384, 388, 413 S.E.2d 319, 321 (1992) (citation omitted). "[A] conveyance is an assignment if the tenant conveys his 'entire interest in the premises, without retaining any reversionary interest in the [lease] term itself.' " *Id.* If the conveyance is an assignment, "privity of estate" is created between the original lessor and the sublessee

with regard to lease covenants that run with the land, and the original lessor will have a right of action directly against the sublessee. *Id.* Absent an assignment, "privity of estate" is not established and the original landlord-permit holder has no direct action and thus no recourse against the sublessee. There is no evidence in the record that shows petitioner's lease with Sunshine Outdoor was assigned to Café Risque.

This interpretation has been adopted and incorporated in recent amendments to 19A N.C. Admin. Code r. 2E.0210 which provides for revocation of the permit for:

> (11) destruction or cutting of trees, shrubs, or other vegetation located on the state-owned or maintained right of way where an investigation by the Department of Transportation reveals that the destruction or cutting:
>
> (c) was conducted by one or more of the following: the sign owner, the permit holder, the lessee or advertiser employing the sign, the owner of the property upon which the sign is located, or any of their employees, agents *or assigns*, including, but not limited to, independent contractors hired by the permit holder/sign owner, the lessee/agents or advertiser employing the sign, or the owner of the property upon which the sign is located.

19A N.C. Admin. Code r. 2E.0210(11)(c) (2000) (emphasis supplied).

National, *Whiteco I*, and the amendment to the rules adopted by the Department of Transportation do not extend "sufficient connection" to those third parties with which the permit holder does not have such a legal relationship to allow him recourse for the revocation of his permit and the loss of his improvements. Given the finding of fact by the Secretary of Transportation, that Sunshine Outdoor, petitioner's lessee, was present and ordered the illegal cutting of the vegetation, I concur that a "sufficient connection" between the permit holder and his lessee was established to uphold the revocation of petitioner's permit. *See Whiteco I*, 111 N.C. App. at 819, 434 S.E.2d at 232-33.

DOWELL GRAY, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, RESPONDENT, DOWELL GRAY, PETITIONER v. ONSLOW COUNTY DEPARTMENT OF HEALTH, RESPONDENT

No. COA01-22

(Filed 19 March 2002)

1. **Administrative Law— judicial review of agency decision— timeliness of petition—subject matter jurisdiction**

The trial court did not err by concluding that petitioner timely filed his petition for a contested case hearing in the Office of Administrative Hearings (OAH) regarding petitioner's reinstatement to his authority to issue permits for septic systems and by concluding that the trial court had subject matter jurisdiction over the case, because: (1) both parties participated in prehearing motions and discovery, OAH scheduled a hearing which was held in August 1997, and respondent raised no issue about timeliness of the petition until 15 October 1997; (2) although respondent complied with N.C.G.S. § 150B-23(f) by notifying petitioner, respondent also supplied the incorrect address of OAH which meant the thirty day filing period was not triggered; and (3) although a faxed petition was not followed by an original copy within five days as required by 26 N.C. Admin. Code tit. 26, r. 3.0101(3), respondent waived this objection based on its failure to object to this omission and its active participation in the prehearing procedures and hearing.

2. **Administrative Law— judicial review of agency decision— standard of review**

The trial court's order reviewing an agency decision terminating petitioner from his position of issuing permits for septic systems is reversed and remanded so that the trial court may provide its own characterization of the issues presented by petitioner and for the trial court to clearly and separately detail the standards of review used to resolve each distinct issue raised.

Appeal by respondents from judgment entered 16 July 2000 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 November 2001.

Jeffrey S. Miller, for petitioner-appellee.

Attorney General Roy A. Cooper, by Assistant Attorney General Judith Tillman, for respondent-appellant North Carolina

Department of Environment and Natural Resources, formerly North Carolina Department of Environment, Health and Natural Resources.

Womble, Carlyle, Sandridge & Rice, by Mark A. Davis, for respondent-appellant Onslow County Department of Health.

HUDSON, Judge.

Respondents appeal an order of the Superior Court which reviewed consolidated final agency decisions of the State Health Director ("SHD") and the State Personnel Commission ("SPC"). The Superior Court order required respondent-appellant North Carolina Department of Environment and Natural Resources ("DENR") to reinstate to petitioner his authority to issue permits, ordered Onslow County Department of Health ("OCDH") to pay petitioner lost wages, and ordered DENR and OCDH to each pay equal shares of petitioner's attorney's fees and court costs. For the reasons stated herein, we reverse the trial court's order and remand.

We begin with a brief summary of the facts. Petitioner-appellee worked as an Environmental Health Specialist for OCDH from 9 September 1983 until 10 February 1997. Among other duties, he inspected sites for proposed septic systems and issued permits for the installation of these systems when they met applicable standards. For this position, the agency required petitioner to maintain a "valid authorization card" issued by DENR. *See* Respondent OCDH's Attachment III, Position Description Form (PD-102R-8), State of North Carolina, Office of State Personnel, pA-43. As the parent agency for county health departments in the state, DENR regulated the administration of OCDH, pursuant to N.C. Gen. Stat. § 130A-4(b) (1999). In May 1996, DENR sent Regional Soil Specialist, John Williams, to Onslow County to conduct a quality assurance review. During that visit, Williams learned that petitioner had improperly issued a permit for a septic system in Onslow County, and notified the County that it should revoke the permit. Concerned about petitioner's ability to work independently, Williams returned to Onslow County for three days in June 1996 to work with petitioner and evaluate his job performance. Williams formally recommended on 8 June 1996 that DENR place petitioner on probation, but action was delayed by the two hurricanes that came through North Carolina later that summer. DENR placed petitioner on probation by letter dated 22 October 1996, and DENR sent Williams back to Onslow County to further evaluate petitioner. Based on this evaluation, which included field work

as well as a written test, DENR wrote to OCDH on 31 December 1996 and again on 10 January 1997, stating that it was revoking petitioner's authority to issue permits for septic systems, effective thirty days from the date of the letter. Relying on the second letter from DENR, OCDH Health Director Danny Jacob wrote petitioner on 15 January 1997 informing him that his employment would be terminated effective 5:00 p.m. on 10 February 1997.

The following is a summary of the procedural path that ensued. Petitioner filed two petitions for contested case hearings: the first challenged DENR's revocation of his authority to issue permits, and the second challenged OCDH's decision to terminate his employment.

On 8 May 1997, an Administrative Law Judge ("ALJ") ordered petitioner's cases against DENR and OCDH consolidated for a hearing, which was held on 26 August 1997. In a recommended decision filed 24 November 1997, the ALJ found facts and concluded as law that: (1) petitioner's "delegation of authority" to issue permits is a "license" within N.C. Gen. Stat. § 150B-2(3) (1999); (2) DENR erred when it failed to give proper notice to petitioner *before* the commencement of proceedings to revoke or suspend the license, *see* N.C. Gen. Stat. 150B-23(f) (1999) (requiring the time limitation to "commence when notice is given of the agency decision"); (3) OCDH did not have "just cause" to dismiss petitioner, a career state employee; and (4) OCDH erred in relying on DENR's improper revocation of petitioner's license to terminate petitioner. The ALJ recommended that petitioner's delegation of authority and employment be reinstated, and that DENR and OCDH each pay an equal share of petitioner's attorney's fees and court costs. Both DENR and OCDH noted exceptions to the recommended decision of the ALJ, and both submitted alternative proposed findings and conclusions to the SHD and to the SPC, respectively.

The SHD declined to adopt the ALJ's recommended decision, but instead adopted verbatim DENR's alternative proposals. In pertinent part, SHD's Order: (1) held that petitioner's right to inspect and issue permits for septic systems was not a license, so that the provisions of N.C.G.S. § 150B-3 did not apply, and (2) affirmed the revocation of the delegation of authority by DENR.

The SPC calendared the OCDH case for its meeting 2 April 1998 and considered the ALJ's recommended decision, as well as the whole record, including the proposals and exceptions filed by OCDH. The SPC recommended that Onslow County Board of Health, as local

appointing authority, find and conclude that OCDH had "just cause to dismiss the Petitioner from his employment with the Respondent [OCDH]." In its Final Decision, the local Board accepted the recommendations of the SPC.

The SHD issued its Final Decision 1 June 1998, and the SPC issued its Final Decision on 21 July 1998. Petitioner sought Judicial Review of both decisions in Superior Court and the two were consolidated for review by Order of Judge Robert F. Floyd on 8 December 1998. From that date to the present, the two matters have been litigated together.

In his petition to the Superior Court for review of the decision of the SHD, petitioner-appellee contended, as to DENR, that: (1) the SHD erroneously determined that petitioner's delegation of authority was not a license within N.C.G.S. § 150B-2(3), (2) DENR's decision to revoke petitioner's license was "arbitrary, capricious, and is not supported by competent and substantial evidence in the record," (3) DENR's actions affected petitioner's employment, (4) DENR'S actions violated petitioner's due process rights, and (5) the ALJ's "decision is supported by competent evidence which supports the sufficient findings of fact and is correct as a matter of law."

In his petition for review of the final decision of the Onslow County Board of Health, petitioner-appellee contended, as to OCDH, that: (1) OCDH wrongfully relied on DENR's revocation of petitioner's delegation of authority, (2) OCDH erroneously determined that it had just cause to terminate him, (3) OCDH failed to follow proper procedures for terminating him, (4) OCDH violated his rights to due process, and (5) the decision of the ALJ was correct and "supported by competent and substantial evidence and sufficient findings of fact, and is correct as a matter of law." The Superior Court affirmed the ALJ's decision, awarding petitioner attorney's fees and court costs from both respondents, as well as lost wages from OCDH. The trial court also ordered DENR to reinstate petitioner's delegation of authority.

Both respondents appealed to this Court, raising separate assignments of error, and filing separate briefs. We need only address DENR's first assignment of error, which challenges the jurisdiction of the Superior Court. Having determined that the court did have jurisdiction over these matters, we remand to that court because of our inability to review the order, as explained below.

[1] In its first assignment of error and its Motion to Dismiss, DENR contends that petitioner did not timely file his petition for a contested case hearing in the Office of Administrative Hearings ("OAH"), and that neither the Superior Court nor this Court has subject matter jurisdiction over the case. While we agree that timely filing of a petition is necessary to confer subject matter jurisdiction on the agencies as well as the courts, we believe this petition was timely filed. *See Nailing v. UNC-CH*, 117 N.C. App. 318, 451 S.E.2d 351 (1994) (holding that the OAH did not have subject matter jurisdiction over petitioner's case if she did not timely file her petition), *disc. rev. denied*, 339 N.C. 614, 454 S.E.2d 255 (1995); *Gummels v. N.C. Dept. of Human Resources*, 98 N.C. App. 675, 677, 392 S.E.2d 113, 114 (1990) (holding that a petition for a contested case hearing must be filed within thirty days and this leaves "no room for judicial construction").

DENR notified petitioner by letter dated 10 January 1997 that it was revoking his delegation of authority, effective thirty days from the date of the letter.[1] The letter also informed petitioner that he had the right to appeal that decision within thirty days of the date of the letter by filing a petition for a contested case hearing "with the Office of Administrative Hearings pursuant to North Carolina General Statutes 130A-24. The address for the Office of Administrative Hearings is P.O. Drawer *17447*, Raleigh, N.C. 27611-7447." The correct address for the OAH is P.O. Drawer *27447*. It is undisputed that the address in the letter was incorrect and we see nothing in the record to indicate that DENR sent a corrected letter to petitioner.

Petitioner alleges in his brief that he sent his petition for a contested case hearing to OAH on or about 5 February 1997, and that it did not come back to him in the mail. On or about the same date, petitioner mailed a copy of his petition to DENR. The return receipt, attached to his response to the Motion to Dismiss, shows that it was picked up 7 February 1997 by one Nelson Avery for DENR. It is also undisputed that someone from DENR faxed the copy to OAH, which received the petition 20 February 1997. Subsequently, both parties participated in pre-hearing motions and discovery. OAH scheduled a hearing, which was held in August 1997. DENR raised no issue about timeliness of the petition until 15 October 1997.

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1. DENR sent an identical letter dated 31 December 1996, but since the 10 January 1997 letter is the one OCDH relied on, it is the only one relevant to this discussion.

The terms of N.C.G.S. § 150B-23(f) require, in pertinent part, the following: "[t]he notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition." Pursuant to the same section, "[u]nless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days." N.C.G.S. § 150B-23(f). N.C. Gen. Stat. § 130A-24(a1) (1999) requires that a petition appealing an action taken by an agency "shall be filed not later than 30 days after notice of the action." DENR complied with N.C.G.S. § 150B-23(f) in notifying petitioner, but also supplied the incorrect address of OAH. While we need not decide whether DENR must provide the address for OAH, we believe that if it does supply an address, it must do so accurately in order to trigger the running of the thirty day filing period. *See* N.C. Gen. Stat. §§ 130A-23, 130A-24(a1), 150B-23 (1999).

In addition, 26 N.C. Admin. Code tit. 26, r. 3.0101(3) (Feb. 2000) requires that a faxed petition be followed by an original copy within five days. This did not occur, apparently because petitioner believed he had already filed an original copy of his petition with OAH. Since DENR never corrected its notice letter to petitioner, the petition that was filed by facsimile, and admittedly received by the OAH on 20 February 1997, must be considered timely. Although petitioner did not file a subsequent original petition until after the motion to dismiss, we believe that by failing to object to this omission, and by actively participating in the pre-hearing procedures and hearing, respondents have waived this objection. *See e.g., Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990); *Clement v. Clement*, 230 N.C. 636, 55 S.E.2d 459 (1949) (noting that procedural rights may be waived by failing to raise the issue over a period of time). Accordingly, the tribunals involved here correctly exercised subject matter jurisdiction over this case. Respondent-DENR's first assignment of error is overruled, and its Motion to Dismiss this appeal is denied.

[2] Next, we address our inability to review the Superior Court's Order. On review, we are required to "examine[] the trial court's order for error[s] of law" by "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994); *see also ACT-UP Triangle v. Commission for Health*

Services, 345 N.C. 699, 483 S.E.2d 388 (1997). "[T]he proper manner of review depends upon the particular issues presented on appeal." *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118 (citing *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)). If the petitioner alleges that the agency's decision was based on an error of law, then the superior court applies *de novo* review. *See id. De novo* review requires the court "to consider a question anew, as if not considered or decided by the agency." *Id.* If the petitioner alleges either that the agency's decision was not supported by the evidence, or that the agency's decision was arbitrary and capricious, then the superior court applies the "whole record" test. *See id; see also* N.C. Gen. Stat. § 150B-51(b) (1999). "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*, 114 N.C. App. at 674, 443 S.E.2d at 118 (quoting *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991)).

> [W]hile [t]he nature of the contended error dictates the applicable scope of review, this rule should not be interpreted to mean the manner of . . . review is governed merely by the label an appellant places upon an assignment of error; rather, [the court] first determine[s] the actual nature of the contended error, then proceed[s] with an application of the proper scope of review.

In re Appeal of Willis, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725-26 (1998) (citing *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981); *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118)) (internal quotations omitted).

Accordingly, the first question we reach in this analysis is "whether the trial court exercised the appropriate scope of review." *See ACT-UP*, 345 N.C. at 706, 483 S.E.2d at 392. "Absent a declaration by the superior court denominating its process of review, we look to the parties' characterization of the alleged error on appeal [to the trial court]." *Willis*, 129 N.C. App. at 502, 500 S.E.2d at 726 (internal citations and quotations omitted). We noted in *Willis*, 129 N.C. App. at 503, 500 S.E.2d at 726-27, and *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 349, 543 S.E.2d 169, 176 (2001), that in reviewing a decision from an agency, a trial court's order must: (1) set out the appropriate standards of review, and (2) "delineate which standard the court utilized in resolving each separate issue." Without these two necessary steps, "this Court is unable to make the requisite

threshold determination that the trial court 'exercised the appropriate scope of review.' " *See Hedgepeth*, 142 N.C. App. at 348, 543 S.E.2d 175 (quoting *Willis*, 129 N.C. App. at 503, 500 S.E.2d at 726).

Here, there are multiple issues on appeal, some requiring *de novo* review and others requiring the "whole record" test. *See McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363 ("A reviewing court may even utilize more than one standard of review if the nature of the issues raised so requires"). Neither the petitioner nor the trial court specified which standard of review it applied to each alleged error. *See Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118 (noting that the Court is not limited to the manner of review specified by an appellant; the Court must determine for itself the actual nature of the error). "Given the nature of the trial court's order, we find ourselves unable to conduct our necessary threshold review," and " 'we decline to speculate in that regard.' " *Hedgepeth*, 142 N.C. App. at 349, 543 S.E.2d at 176 (quoting *Willis*, 129 N.C. App. at 503, 500 S.E.2d at 726).

Accordingly, we reverse the trial court's order and remand this matter so that the trial court may (1) provide its own characterization of the issues presented by petitioner and (2) clearly and separately detail the standards of review used to resolve each distinct issue raised.

Motion to Dismiss denied.

Reversed and remanded.

Judges TIMMONS-GOODSON and JOHN concur.

DENNIS MOORE, EMPLOYEE, PLAINTIFF v. CONCRETE SUPPLY COMPANY, EMPLOYER, ROYAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA01-302

(Filed 19 March 2002)

1. Workers' Compensation— Form 21 agreement—not located

The Industrial Commission did not err in a workers' compensation action by making findings and conclusions regarding a stipulation that the parties had entered into a Form 21 agreement where defendant contended that the stipulation had been condi-

tioned upon the Form 21 being located, which was not done. Defendants did not argue that the stipulation was the result of fraud, misrepresentation, undue influence, or mistake, and all of the evidence in the record supported the existence of the stipulation.

2. Workers' Compensation— Functional Capacity Evaluation—evidence

The trial court did not err in a workers' compensation action by making a finding regarding plaintiff's Functional Capacity Evaluation which defendant challenged as incomplete without offering supporting legal authority. The evidence supported the finding.

3. Workers' Compensation— ability to earn former wages—job search—evidence sufficient

The Industrial Commission did not err in a workers' compensation action in its findings regarding plaintiff's ability to earn his former wages and his job search where defendant contended that plaintiff was not truly interested in working, but there was evidence supporting both findings.

4. Workers' Compensation— make work position—justified refusal

The Industrial Commission did not err in a workers' compensation action by finding that plaintiff was justified in turning down a "maintenance worker" position offered by defendant because the position was "make work" and not suitable employment for plaintiff, a former concrete truck driver, where there was testimony that no individual employee assumed the duties of the maintenance worker position, that the position was never advertised to the public, and that it had never existed and was never filled after being refused by plaintiff.

Appeal by defendants-appellants from Amended Opinion and Award of the North Carolina Industrial Commission entered 18 September 2000. Heard in the Court of Appeals 30 January 2002.

Tania L. Leon, P.A., by Tania L. Leon, for the plaintiff-appellee.

Jones, Hewson & Woolard, by Kenneth H. Boyer, for the defendants-appellants.

WYNN, Judge.

Employer Concrete Supply Company and insurer Royal Insurance Company appeal from an 18 September 2000 amended opinion and award of the Industrial Commission, awarding employee Dennis Moore ongoing workers' compensation disability benefits and medical expenses resulting from a compensable back injury by accident at work on 30 April 1995. On that date, Moore—a concrete truck driver—sustained a lower-back injury while using a jack-hammer to remove hardened concrete from inside his truck.

Dr. Russell T. Garland initially treated Moore for lower-back pain, instructing him to avoid heavy lifting, and recommending that he undergo physical therapy. Thereafter, Dr. Garland placed Moore on light duty. An 11 August 1995 MRI of Moore's lumbar spine revealed no evidence of a herniated disc or root compression; however, the MRI indicated congenital canal stenosis due to congenitally short pedicles with interfacetal hypertrophy at multiple levels. Dr. Garland referred Moore to Dr. Mark B. Hartman of the Miller Orthopaedic Clinic.

In the fall of 1995, Moore underwent a Functional Capacity Evaluation to determine his ability to work and his work restrictions, if any. Following completion of the evaluation, Dr. Hartman determined that Moore was capable of medium level work but was incapable of long-term truck driving. On 5 November 1995, Moore reached maximum medical improvement but was still unable to return to his pre-injury employment due to his 30 April 1995 injury by accident.

In January 1996, defendants employed John P. McGregor to provide vocational rehabilitation services to Moore; McGregor took Moore's medical and vocational history and outlined a work plan for him. In April 1996, McGregor met with Jim Shaar, Concrete Supply Company's personnel manager, to discuss positions for which Moore might qualify.

In early May 1996, McGregor prepared a job description for a "maintenance worker" position with Concrete Supply Company, and forwarded the job description to Dr. Hartman. Dr. Hartman opined that the job duties of the position were within Moore's physical limitations and restrictions, and approved the job description. Dr. Garland reviewed Moore's Functional Capacity Evaluation and similarly concluded that the proffered job was within Moore's physical

limitations and restrictions. Concrete Supply Company formally offered the "maintenance worker" position to Moore, to begin on 24 June 1996; but Moore refused to accept or even attempt the position.

Thereafter, defendants filed a Form 24 to terminate payment of compensation to Moore, which was approved on 12 November 1996 by an administrative order of the Commission retroactive to 24 June 1996 based upon Moore's unjustified refusal to attempt the physician-approved "maintenance worker" position with Concrete Supply Company. Following a hearing on 7 December 1997, Deputy Commissioner W. Bain Jones, Jr. filed an opinion and award on 30 April 1998 concluding that Moore unjustifiably refused a suitable job within his restrictions offered by Concrete Supply Company, and that Moore's compensation was properly terminated effective 24 June 1996. Moore appealed; on 28 May 1999, the full Commission modified and affirmed in relevant part Deputy Commissioner Jones's opinion and award. Moore moved for reconsideration; on 30 September 1999, the full Commission entered a new opinion and award denying Moore's motion, vacating the previous 28 May 1999 opinion and award as a result of errors therein, but otherwise concluding that Moore unjustifiably refused Concrete Supply Company's suitable job offer.

Moore again moved for reconsideration of the award; on 16 November 1999, the Commission granted that motion which resulted in an amended opinion and award on 18 September 2000 finding that the "maintenance worker" position offered by Concrete Supply Company to Moore was "make work" and was not suitable employment. The Commission therefore concluded that Moore's refusal of the position was justified, and that the Form 24 terminating Moore's compensation was erroneously approved. Accordingly, the Commission awarded Moore ongoing total disability compensation for the period from 13 November 1996 continuing until Moore returns to work or until further order of the Commission. From this amended opinion and award, defendants appeal.

On an appeal from an opinion and award of the Commission, this Court is generally limited to addressing two questions: (1) Whether there is any competent evidence to support the Commission's findings of fact; and (2) Whether the Commission's findings of fact support its conclusions of law. *See Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996). The Commission's find-

ings are conclusive on appeal if supported by any competent evidence, even where the evidence may support a contrary finding. *See Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 652-53, 508 S.E.2d 831, 834 (1998). "[T]he Commission is the sole judge of the credibility of the witnesses as well as how much weight their testimony should be given." *Id.* at 653, 508 S.E.2d at 834.

[1] Defendants first challenge the Commission's Stipulation 4, which provides:

> 4. Pursuant to an approved Form 21 entered into by the parties, plaintiff received compensation at the rate of $301.35 from 1 May 1995 through 13 November 1995 and from 8 December 1995 through 12 November 1996.

Defendants also challenge Conclusion of Law 2 and Finding of Fact 4 based on the alleged invalidity of Stipulation 4. Conclusion of Law 2 states that:

> 2. On 30 April 1995, plaintiff sustained a compensable injury by accident arising out of and in the course of his employment with defendant employer. G.S. § 97-2(6). As the result of his 30 April 1995 injury by accident plaintiff was paid worker's compensation benefits from 30 April 1995 through 12 November 1996 pursuant to an approved Form 21 Agreement for Compensation entered into by the parties. G.S. § 97-29.

Finding of Fact 4 details the evidence supporting Stipulation 4:

> 4. The parties in this matter entered into a Pre-Trial Agreement, which set forth certain stipulations. One such stipulation, (1)(E) in the parties['] Pre-Trial Agreement, establishes that "[t]he parties entered into a Form 21 agreement which was approved by the Commission." The Pre-Trial Agreement further establishes the periods for which plaintiff was paid temporary total disability benefits following the entering of this Form 21. In addition to the written Pre-Trial Agreement, at the hearing on 9 December 1997, Deputy Commissioner Jones read into the record a summary of the stipulations entered into by the parties. Beginning on line 17 of Page 1 of the transcript, the Deputy [Commissioner] stated that "[t]he parties have also stipulated that the compensation rate in this matter is $301.35, pursuant to a Form 21 agreement, which was entered into by the parties and approved by this Commission." Also, it is undisputed that defendants filed an Industrial Commission Form 24 Application to Suspend Benefits,

> which was approved on 12 December 1996. This course of action by defendants supports the conclusion that a Form 21 had been approved in this case. Although the parties and the Commission are presently unable to locate the approved Form 21 in this matter, that facts and procedural history in this case without question establishes that such a form did exist and supports the [f]ull Commission['s] inclusion of the proper stipulation which had been previously agreed to by the parties. Accordingly, the [f]ull Commission finds that the parties entered into a Form 21 agreement for the payment of temporary total disability compensation which was approved by the Commission.

Defendants do not contest the finding that "plaintiff received compensation at the rate of $301.35 from 1 May 1995 through 13 November 1995 and from 8 December 1995 through 12 November 1996," but rather challenge only the stipulation that the parties entered into an approved Form 21. Defendants contend in their first assignment of error that Stipulation 4, Conclusion of Law 2 and Finding of Fact 4 "are not supported by competent evidence and are contrary to the evidence that the stipulation regarding the Form 21 was conditioned on the parties or the Industrial Commission locating a signed or approved Form 21, which did not occur." In their brief, defendants argue that the stipulation that the parties had entered into a Form 21 agreement was entered by defendants "on the condition that the plaintiff produce the Form 21 that the plaintiff alleged the parties had entered into, but which no one had been able to locate[.]" Because the Form 21 was not located, and the Commission file did not contain a signed or approved Form 21, defendants assert that this "conditional stipulation was deemed withdrawn[.]" We disagree.

"A stipulation approved by the Commission 'is binding absent a showing that there has been error due to fraud, misrepresentation, undue influence or mistake . . . [.]' " *Tucker v. Workable Company*, 129 N.C. App. 695, 701, 501 S.E.2d 360, 365 (1998) (quoting *Little v. Food Service*, 295 N.C. 527, 534, 246 S.E.2d 743, 747 (1978) (citations omitted)). *See* N.C. Gen. Stat. § 97-17 (1999).

In the instant case, defendants do not argue that Stipulation 4 was a result of error due to fraud, misrepresentation, undue influence or mistake. Indeed, all the evidence in the record, including the transcript from the 9 December 1997 hearing before Deputy Commissioner Jones and the Pretrial Agreement (signed by the parties and submitted to the Commission on 21 November 1997), support the existence of this stipulation. The evidence further supports

Finding of Fact 4, which in turn supports Conclusion of Law 2. Defendants' first assignment of error is therefore rejected.

[2] Defendants next contest the Commission's finding 8, which provides:

> 8. In September 1995, a Functional Capacity Evaluation was to be performed to determine whether plaintiff was capable of working and if so, what were his restrictions, if any. At the completion of the evaluation, Dr. Hartman indicated plaintiff was capable of medium level work with lifting limitations of fifty (50) pounds occasionally, twenty to twenty-five (20-25) pounds constantly and standing for no longer tha[n] twenty (20) minutes consecutively. Dr. Hartman further determined plaintiff was unable to continue to do long term truck driving.

Defendants' only argument concerning this finding states that "[t]he findings of the [Functional Capacity Evaluation] ordered by Dr. Hartman and reviewed by both Dr. Hartman and Dr. Garland specify plaintiff's physical capabilities and contradict the incomplete summary contained in Finding of Fact 8." Defendants apparently are challenging the "completeness" this finding, rather than the sufficiency of the evidence supporting it. However, defendants offer no legal authority in support of this challenge, and a review of the record reveals competent evidence supporting this finding. Miller Orthopaedic Clinic's medical records for Moore reveal an entry by Dr. Hartman dated 8 November 1995 evaluating Moore's Functional Capacity Evaluation, indicating that it "basically says that [plaintiff] is capable of a medium level job with lifting limitations of 50 lbs. occasionally, 20-25 lbs. constantly and no standing for longer than 20 minutes consecutively or sitting longer than 45-50 minutes consecutively." This evidence more than adequately supports the Commission's finding; defendants' assignment of error is rejected.

[3] Defendants next challenge findings 12 and 13, which provide as follows:

> 12. With the assistance of Mr. McGregor, plaintiff made approximately one-hundred and twenty (120) job contacts from January 1996 through early May 1996, averaging approximately thirty (30) contacts per month. Plaintiff also contacted Mr. Shaar weekly to inquire about job openings with defendant-employer. However, during this period, no job openings with defendant-employer were communicated to plaintiff.

> 13. In early May 1996, a job description of a "maintenance worker" position for plaintiff was prepared by Mr. McGregor who forwarded the job description to Dr. Hartman on or about 31 May 1996. Mr. McGregor followed this up with a telephone conversation regarding Dr. Hartman's decision. Plaintiff was not provided with a copy of the job description prior to it being sent to Dr. Hartman.

Defendants contend that Moore's job search records indicate that he was not truly interested in working, in contradiction of finding 12, and that "the facts of record" contradict finding 13. However, a review of Moore's job search records reveals competent evidence supporting finding 12, and both Moore's and McGregor's testimony on 9 December 1997 before Deputy Commissioner Jones support finding 13. Defendants' arguments to the contrary are without merit.

Defendants also challenge finding 29, which states:

> 29. Although plaintiff reached maximum medical improvement by 8 November 1995 and had been assigned a 5% permanent partial impairment for his back, plaintiff was unable to earn wages in his former job as a truck driver for defendant-employer or for any other employer from 13 November 1996 through the present and continuing.

Defendants contend that "[t]here is no evidence, medical or otherwise, that plaintiff is totally disabled, in contradiction of" finding 29. However, finding 8, which is uncontested by defendants, states that Moore reached maximum medical improvement on 5 November 1995 "but was unable to return to his pre-injury employment due to [his] 30 April 1995 injury by accident." Dr. Hartman's medical records and deposition testimony indicate that he assigned Moore a 5% permanent partial impairment rating on 8 November 1995 following a review of Moore's Functional Capacity Evaluation. A Form 25R, signed by Dr. Hartman on 8 November 1995, was filed with the Commission on 15 November 1995 indicating a 5% permanent impairment to Moore's back. Furthermore, McGregor testified before Deputy Commissioner Jones that there was no question that Moore could not return to his former job as a concrete truck driver. Defendants' challenge to finding 29 is without merit.

[4] Defendants next challenge the Commission's findings and conclusions concerning the "maintenance worker" position offered by Concrete Supply Company to Moore. Defendants contend that the

Commission erred in finding that the "maintenance worker" position constituted "make work" and was not suitable employment for Moore, and that Moore's refusal thereof was therefore justified. We disagree.

To obtain worker's compensation, the claimant must prove both the existence and extent of his disability. *See Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997). "[O]nce a Form 21 agreement is entered into by the parties and approved by the Commission, a presumption of disability attaches in favor of the employee." *Id.* The burden then shifts to the employer to show that the claimant is employable. *See id.* The claimant need not present evidence at the hearing unless the employer claims that the employee is capable of earning wages and presents evidence showing both that suitable jobs are available, and that the claimant is capable of getting one, taking into account the claimant's limitations. *See id.* "[W]hen an employer attempts to show an employee is no longer entitled to compensation for disability based upon the proffer of a job specially created for the employee, the employer must come forward with evidence that others would hire the employee 'to do a similar job at a comparable wage.' " *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 362, 489 S.E.2d 445, 447 (1997) (quoting *Saums*, 346 N.C. at 765, 487 S.E.2d at 750).

In the instant case, the parties entered a Form 21 agreement that was approved by the Commission, thereby entitling Moore to a presumption of disability and shifting the burden to defendant-employer to rebut that presumption. Defendants presented evidence that a "maintenance worker" position was offered to Moore but was refused. Defendants contend that this constituted competent evidence that a suitable job was available to Moore that he was capable of securing, given his limitations.

Under N.C. Gen. Stat. § 97-32 (1999), an injured employee is not entitled to worker's compensation if the employee refuses suitable employment, unless such refusal is justified in the Commission's opinion. Clearly, if the proffered employment is not suitable for the injured employee, the employee's refusal thereof cannot be used to bar compensation to which the employee is otherwise entitled. *See McLean v. Eaton Corp.*, 125 N.C. App. 391, 481 S.E.2d 289 (1997); *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986). Furthermore, an employer cannot avoid its duty to pay compensation by offering the employee a position that could not be found else-

where under normally prevailing market conditions. *See Peoples*, 316 N.C. at 439, 342 S.E.2d at 806.

Competent evidence existed before the Commission that the "maintenance worker" position constituted "make work" specially created for Moore, and did not exist in the ordinary marketplace. Testimony by McGregor and Moore before Deputy Commissioner Jones, and deposition testimony by Shaar, indicated that no individual employee at Concrete Supply Company assumed the duties of the "maintenance worker" position; rather, the duties were performed by various drivers. Shaar testified that the position was never advertised to the public, had never previously existed and was never subsequently filled after being refused by Moore. This evidence supports the finding that the offered position was make-work, and thus Moore was justified in refusing the "maintenance worker" position. *See Smith*, 127 N.C. App. at 363, 489 S.E.2d at 447-48 (describing factors tending to establish a position as make-work).

Defendants have abandoned their remaining assignments of error 8-10 by failing to argue them in their brief. *See* N.C.R. App. P. 28(b)(6) (2002). Nonetheless, we have reviewed the record in its entirety and conclude that the Commission's conclusions of law were supported by its findings of fact, which in turn were supported by competent evidence in the record. Accordingly, the Commission's 18 September 2000 amended opinion and award is, in all respects,

Affirmed.

Judges HUDSON and THOMAS concur.

STATE OF NORTH CAROLINA v. ERIC L. KORNEGAY

No. COA01-585

(Filed 19 March 2002)

1. Confessions and Incriminating Statements— free to leave test—formal arrest test—defendant not in custody

The trial court did not err in a first-degree murder and armed robbery case by failing to suppress statements that were obtained before defendant received Miranda warnings because although

the trial court applied the less restrictive "free to leave" test to conclude that defendant's statements should not be suppressed, instead of the newly articulated "formal arrest" test, it follows that an application of the more restrictive "formal arrest" test would yield the same conclusion that defendant was not in custody for purposes of Miranda.

2. Homicide— first-degree murder—voluntary intoxication

The trial court did not err in a first-degree murder case by failing to instruct on voluntary intoxication, because: (1) while defendant may have consumed controlled substances prior to the murder, there is no evidence to suggest that he was intoxicated at the time he committed the murder; (2) defendant remembered specific details surrounding the murder including the clothes he was wearing and the conversation he had with the victim prior to the murder; and (3) defendant disposed of the murder weapon and the bags of stolen property after leaving the store, indicating a capacity to form premeditation and deliberation.

3. Homicide— first-degree murder—failure to instruct on lesser-included offense of second-degree murder

The trial court did not err in a first-degree murder case by failing to instruct on the lesser-included offense of second-degree murder, because the State's evidence tended to show that defendant killed the victim with premeditation and deliberation.

4. Criminal Law— jury instructions—flight

The trial court did not commit plain error in a first-degree murder and armed robbery case by its instructions to the jury on flight, because: (1) the evidence revealed that defendant fled the scene after committing the crimes charged; and (2) upon leaving the store, defendant discarded the murder weapon and the bags of stolen items.

5. Homicide— first-degree murder—short-form indictment

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder based on the use of a short-form indictment, because the indictment is constitutional.

Appeal by defendant from judgment entered 31 August 2000 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 13 February 2002.

Attorney General Roy A. Cooper, by Special Deputy Attorney General Robert J. Blum, for the State.

Russell J. Hollers, III, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Eric L. Kornegay ("defendant") appeals his convictions of first-degree murder and armed robbery.

The evidence at trial tended to show the following: Byong Kook Min ("Min") was the owner and operator of Lexton's, a store located in downtown Kinston, North Carolina. On 28 August 1998, law enforcement officers discovered Min's body lying on the floor of his store.

On or around the time of the murder, defendant was seen in downtown Kinston. On 3 September 1999, six days after Min's murder, law enforcement agents of the Kinston Police Department attached a recording device on Clifton Edwards ("Edwards") and sent him to speak with defendant. Defendant was heard describing to Edwards how he shot Min and the items he stole from the store. Later that day, Officer Jackie Rogers and Detective Ken Barnes of the Kinston police department located defendant at his home. Defendant agreed to accompany the officers to the police station for questioning.

At the police station, defendant was not handcuffed nor restrained in any manner. After repeated denials of his involvement in the crimes, defendant confessed to Captain Randy Askew ("Captain Askew") that he committed the robbery and murder. In his confession, defendant admitted riding downtown on his moped with a .22 rifle revolver in his pocket. Once inside Lexton's, defendant looked at clothing, jewelry and tried on a pair of shoes. At one point, Min turned around and defendant pulled out his revolver and pointed it at Min's head. However, defendant confessed, he became scared and put the revolver back in his pocket. When Min turned around the second time, defendant fired a gunshot to the back of Min's head. After the shooting, defendant stated that he stole five (5) twenty-dollar bills, three (3) ten-dollar bills and six (6) one-dollar bills. He also filled four bags with clothing and one bag with jewelry.

Captain Askew reduced defendant's confession to writing. Defendant subsequently read and signed the statement. Shortly after giving the statement to Captain Askew, Special Agent Forrest

Kennedy of the State Bureau of Investigation, read defendant his *Miranda* rights, at which point defendant gave another statement confessing to the crimes.

After confessing to the crimes, defendant rode with the police to his home where they recovered a .22 caliber revolver. While at defendant's home, defendant's mother asked him if he in fact, "shot that man." She asked the question twice and defendant responded that he shot Min. At trial, the recorded conversation between defendant and Clifton was played in court for the jury. Defendant was subsequently found guilty of first-degree murder and armed robbery and was sentenced to life imprisonment without parole. Defendant appeals.

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[1] In his first assignment of error, defendant contends that the trial court erroneously failed to suppress statements that were obtained in violation of his constitutional rights. For the following reasons stated herein, we disagree.

" 'The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law.' " *State v. Cabe*, 136 N.C. App. 510, 512, 524 S.E.2d 828, 830 (quoting *State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993)), *disc. review denied*, 351 N.C. 475, 543 S.E.2d 496 (2000). We note that defendant does not except to any of the trial court's findings of fact. This Court's review is therefore, "limited to whether the trial court's findings of fact support its conclusions of law." *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000). "While the trial court's factual findings are binding if sustained by the evidence, the court's conclusions based thereon are reviewable *de novo* on appeal." *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000).

Defendant argues that the trial court articulated the wrong test for determining whether he was "in custody" for purposes of *Miranda* in light of the recent Supreme Court decision, *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001).

In *State v. Buchanan*, our Supreme Court redefined the test that a trial court must employ in determining whether a person is "in cus-

tody" for purposes of *Miranda*. In *Buchanan*, defendant made two statements to law enforcement officers before he was arrested, charged and afforded his *Miranda* rights. *Id.* at 335, 543 S.E.2d at 825. In suppressing the defendant's statements, the trial court found that defendant was in custody before he was afforded his *Miranda* rights and thus his statements were not admissible. The State appealed, contending that the trial court applied an "incomplete test" in determining that defendant was in custody. *Id.* at 335, 543 S.E.2d at 826. The State argued that the trial court erred in applying the test of whether a reasonable person in defendant's position would have felt "free to leave," rather than utilizing a test which inquires whether a "reasonable person would have perceived that there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.* at 336, 543 S.E.2d at 826. Therefore, the State argued, the trial court erred in granting defendant's motion to suppress. *Id.*

In summarizing the law regarding the application of *Miranda* in custodial interrogations, the Supreme Court in *Buchanan* "disavowed" the long-standing "free to leave" test for determining whether a defendant is in custody. *Id.* at 340, 543 S.E.2d at 828. Instead, the Supreme Court articulated that the " 'ultimate inquiry,' " based on the totality of circumstances, is whether there was a " 'formal arrest or restraint of freedom of movement of the degree associated with a formal arrest.' " *Id.* at 338, 543 S.E.2d at 827 (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275, 1279 (1983); *see also Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394 (1995)); *Stansbury v. California*, 511 U.S. 318, 322, 128 L. Ed. 2d 293, 298 (1994) (holding that the "ultimate inquiry" in determining whether a person is in custody for purposes of *Miranda* is whether there was a "formal arrest or restraint on freedom of movement associated with a formal arrest"). The Court stated that unlike the "free to leave" test, which has consistently been applied for determining whether a person has been seized for Fourth and Fourteenth Amendment purposes, the "formal arrest" test applies to "Fifth Amendment custodial inquiries and requires circumstances which go beyond those supporting a finding of temporary seizure and create an objectively reasonable belief that one is actually or ostensibly "in custody." *Id.* at 339, 543 S.E.2d at 828.

Accordingly, the Supreme Court concluded that the trial court's application of the broader "free to leave" test was error and thus the Court remanded the matter to the trial court for a determination of

whether the statement should be suppressed under the narrower "formal arrest" test. *Id.* at 339, 543 S.E.2d at 828.

In the instant case, the trial court, in denying defendant's motion to suppress, applied the "free to leave" test and determined that defendant was not in custody when he confessed to the crimes charged. As announced by our Supreme Court in *Buchanan*, the "free to leave" test is less restrictive than the newly articulated "formal arrest test." Since the trial court determined that under the less restrictive "free to leave" test that defendant's statement should not be suppressed, it follows that an application of the more restrictive "formal arrest" test would yield the same conclusion, that, "defendant was not in custody" for purposes of *Miranda.* Thus, we hold that any error in the trial court's application of the "free to leave" test did not prejudice defendant. This assignment of error is overruled.

[2] In his second assignment of error, defendant contends that the trial court erred in failing to instruct the jury on voluntary intoxication and second-degree murder. We disagree.

It is "well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages or controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992). Evidence of mere intoxication is not enough to meet defendant's burden of production. *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). Before the trial court will be required to instruct on voluntary intoxication, defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried " 'defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.' " *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978)).

In support of an instruction of voluntary intoxication, defendant attempts to rely on his statement given to Captain Askew wherein he stated that he was "drunk and high from smoking [cocaine]" and that he was "coming down" from the night before. While he may have consumed these controlled substances prior to the murder, there is no evidence to suggest that he was intoxicated at the time he committed the murder. In fact, in his statement given to Captain Askew, defend-

ant remembered specific details surrounding the murder including the clothes he was wearing and the conversation he had with Min prior to the murder. After leaving the store, defendant disposed of the murder weapon and the bags of stolen property. Such behavior is clearly indicative of a capacity to form premeditation and deliberation. Under the facts of this case, we cannot conclude that defendant produced sufficient evidence from which a jury could find that defendant was so intoxicated that he was "utterly incapable" of forming the specific intent to commit first-degree murder.

[3] Defendant further argues that the trial court erred in failing to instruct the jury on second-degree murder. We disagree.

First-degree murder is defined as "the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). Second-degree murder is defined as "the unlawful killing of a human being with malice, but without premeditation and deliberation." *Id.* "A defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support that lesser-included offense." *Id.* Our Supreme Court has stated that the test for determining whether an instruction on second-degree murder is required is as follows:

> "The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder."

State v. Gary, 348 N.C. 510, 524, 501 S.E.2d 57, 66-67 (1998) (quoting *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds*, 317 N.C. 193, 344 S.E.2d 775 (1986)).

The State's evidence tended to show that defendant killed Min with premeditation and deliberation. Defendant went to Lexton's with a gun. At one point, Min turned around and defendant pointed a gun at his head; however, defendant did not fire a shot. When Min turned around the second time, defendant shot Min in the back of the head.

After killing Min, defendant proceeded to steal items from the store including cash, clothing, and jewelry. The evidence is clearly sufficient to establish every element of the offense of first-degree murder. Thus, the trial court was not required to instruct the jury on second-degree murder. This assignment of error is therefore overruled.

[4] By his next assignment of error, defendant contends that the trial court erred in its instructions to the jury on flight. At trial, defendant did not object to the instruction given by the trial court. Having failed to object at trial, defendant now assigns plain error to the trial court's instruction to the jury.

To find plain error, the error in the trial court's jury instruction must be " 'so fundamental as to amount to a miscarriage of justice' " in that a different verdict probably would have been reached by the jury. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (quoting *State v. Bagley*, 321 N.C. 201, 213, 262 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)). "Only in a 'rare case' will an improper instruction 'justify reversal of a criminal conviction when no objection has been made in the trial court.' " *State v. Weathers*, 339 N.C. 441, 454, 451 S.E.2d 266, 272 (1994) (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983)).

A flight instruction is appropriate where "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime[.]" *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). "The relevant inquiry concerns whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990).

In the present case, the evidence revealed that defendant fled the scene after committing the crimes charged. Upon leaving the store, defendant discarded the murder weapon and the bags of stolen items. We hold the evidence sufficient for an instruction on flight. This assignment of error is overruled.

[5] In his last assignment of error, defendant contends that the trial court erred in denying his motion to dismiss based on the State's use of the short-form indictment. This argument is without merit.

The indictment in the present case charged that defendant "unlawfully, willfully and feloniously did of malice aforethought kill and murder Byon Kook Min" in violation of N.C. Gen. Stat. § 14-17. Defendant's arguments were expressly rejected in *State v. Wallace*,

351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43 (holding that indictments based upon N.C. Gen. Stat. § 15-144 are in compliance with both the North Carolina and United States Constitution), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001); and *State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (2000) (holding that "premeditation and deliberation need not be separately alleged in the short-form indictment"), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). In light of the recent decisions of the Supreme Court, we overrule this assignment of error.

No error.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. JIMMY HARRIS

No. COA00-899

(Filed 19 March 2002)

1. **Evidence— prior crimes or bad acts—stale conviction—felony aggravated battery**

The trial court erred in a first-degree murder prosecution by permitting the State to cross-examine defendant under N.C.G.S. § 8C-1, Rule 609 about his 1984 conviction in Florida for felony aggravated battery, because: (1) the stale conviction sheds no light on defendant's veracity, but instead characterizes defendant as a woman abuser and a violent person who would have been likely to hit the victim in the head with a hammer; (2) there is a strong possibility that the introduction of this prior conviction caused the jury to find defendant guilty of first-degree murder rather than a lesser crime; and (3) the substantial likelihood of prejudice outweighed the minimal impeachment value of the evidence.

2. **Evidence— prior crimes or bad acts—ball bat incident—assault**

The trial court did not abuse its discretion in a first-degree murder prosecution by admitting evidence under N.C.G.S. § 8C-1, Rule 404(b) concerning a "ball bat incident" between defendant

and the victim, including testimony that defendant pushed and shoved the victim while she begged defendant to leave her alone, because: (1) this evidence of defendant's prior assault on the victim tends to establish malice, premeditation, deliberation, intent, and ill-will on the part of defendant; (2) the evidence is relevant to an issue other than defendant's character; and (3) the incident was not too remote in time as to run afoul of the balancing test since the incident occurred only a few months prior to the victim's death and tended to show a common plan or scheme, absence of accident, and tended to negate self-defense.

Appeal by defendant from judgment entered 19 November 1999 by Judge Hollis M. Owens, Jr. in Graham County Superior Court. Heard in the Court of Appeals 6 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Rudolf Maher Widenhouse & Fialko, by Andrew G. Schopler, for defendant-appellant.

CAMPBELL, Judge.

At approximately nine o'clock on the night of 31 October 1998, Benita Gregory ("Benita") went to visit defendant (who lived a few houses away from Benita) while her brother babysat Benita's seven-year-old disabled son, Nathaniel. When two hours had passed and Benita had not returned home, Benita's brother took Nathaniel over to defendant's house. Upon entering defendant's house, Nathaniel found his mother drinking and arguing with defendant. Benita told Nathaniel to leave the room in which she and defendant were arguing and to go into the kitchen. The argument continued and ultimately resulted in Benita falling to the floor. In the course of these events Benita received a severe head injury. Although Benita was bleeding and had difficulty talking or getting up from the floor, she indicated she did not want anyone to call for help.[1]

Defendant took Benita to the hospital at approximately eight o'clock the next evening (1 November 1998). Defendant told medical personnel that Benita had fallen and hit her head. The initial examination at the hospital revealed that Benita had suffered "an acute

1. There was some evidence that Benita may have been afraid the Department of Social Services might take Nathaniel away from her if they discovered that she had been drinking.

cerebral event." Over the next several hours, Benita's condition quickly deteriorated and she soon became unresponsive. She was eventually declared dead on 3 November 1998.

The police began their investigation on 2 November 1998 when medical personnel reported that Benita was in critical condition. Nathaniel was the first person interviewed. At that time, Nathaniel stated that he saw his mother arguing and wrestling with defendant just before she fell, hitting her head on a heater in defendant's living room. However, when the police interviewed Nathaniel again on 4 November 1998, he said that defendant had hit his mother in the head with a hammer. Nathaniel also said that he was scared of defendant and was afraid that defendant would do something to him if he talked about the incident.

Defendant fully cooperated with the police investigation, which included consenting to interviews, searches, and agreeing to tests. Defendant was first questioned by the police on 2 November 1998 and, consistent with Nathaniel's original statement, he also said that Benita had fallen and hit her head on a kerosene heater. When the police went to defendant's house two days after the incident, they found no signs of cleanup. Blood was still on the floor and on defendant's mattress. A hammer with some blood and a strand of hair on it was also found on the floor. Laboratory analysis later confirmed that the blood on the floor and the mattress belonged to Benita. The blood on the hammer belonged to defendant, but the strand of hair was consistent with Benita's hair. There were no fingerprints on the hammer. No blood or hair was found on the heater.

A warrant was issued for defendant's arrest on 3 November 1998 for first-degree murder of Benita. Defendant promptly surrendered himself upon being informed about the warrant. In a statement made following his arrest, defendant said that Benita had threatened to hit him with a tequila bottle on the night of 31 October 1998 and that he had swung his walking stick at Benita in self-defense causing her to fall. Defendant assumed that he had hit her in the head. However, when a detective reminded defendant that in an earlier statement he had said that Benita fell on a heater, he replied, "I don't know. I was scared."

During his pre-trial incarceration, defendant was afflicted with severe psychiatric and physical health issues. During all times to this action, defendant was on disability and received medica-

tions for a serious heart problem and brain damage with partial paralysis, which required him to use a walking stick. Prior to trial, defendant was hospitalized on three occasions. Nevertheless, he was declared competent to stand trial after receiving the necessary medication.

The day before opening arguments, defendant was rushed to the hospital for treatment of high blood pressure and apparent over-medication. Although defense counsel informed the trial court of defendant's overmedication, the presiding judge, Judge Hollis M. Owens, Jr. ("Judge Owens"), did not hold a competency hearing. A similar situation arose in the middle of the trial.

During the trial, the State called Nathaniel as one of its witnesses. Nathaniel testified that he never actually saw defendant pick up a hammer. However, he did see defendant hit Benita in the head with a hammer as defendant said, "You f—king bitch, I'm going to kill you."

Following Nathaniel's testimony, the State moved under Rule 404(b) of the Rules of Evidence ("Rule 404(b)") to introduce evidence from three witnesses concerning the nature of the relationship between defendant and Benita. Over defendant's objections, Judge Owens admitted this evidence as tending to show a common scheme, as well as the absence of an accident and a negation of self-defense. Thereafter, the witnesses (Cathy Lane, Geraldine Jordan, and Diane Hall) testified about an argument between Benita and defendant that took place approximately three months prior to her death. Even though none of the witnesses saw the beginning of this argument, they each testified to seeing defendant push and shove Benita several times during the argument. They also saw a baseball bat which, during the course of the argument, was in the possession of each party and was used by each party to hit defendant's vehicle. Finally, all three witnesses testified that they had not seen Benita act aggressively towards or threaten defendant during this incident or any other.

Dr. John Butts ("Dr. Butts"), Chief Medical Examiner for the State of North Carolina, testified as a medical expert for the State. Dr. Butts had performed Benita's autopsy on 5 November 1998. The autopsy revealed that swelling and bruising of Benita's brain had prevented the flow of blood to her brain, which caused brain damage and an acute stroke to the right side of her brain. In Dr. Butts' opinion, the swelling and bruising of Benita's brain was caused by a blunt force

impact to the right side of her head. He also opined that the bruise pattern was consistent with a blow from a hammer and not a heater. However, a neurologist testified that there was a small possibility that a stroke of this type could have been caused by Benita's history of diabetes, obesity, and heart disease.

Defendant testified that he had known Benita for no more than five months before her death and had not had a romantic or sexual relationship with her during that time (although Benita had told her friends otherwise). As to the circumstances surrounding Benita's death, defendant testified as follows: On the night of 31 October 1998, Benita arrived at defendant's house by herself sometime after 9:30 p.m. and had three or four shots of tequila. When Nathaniel arrived at defendant's house two hours later, defendant asked Benita to leave. She became very upset and tried to hit defendant with a tequila bottle. Defendant knocked the bottle out of her hand with his walking stick. Benita, appearing both upset and drunk, turned to leave, but stumbled sideways. She fell over and hit her head on a kerosene heater. Benita told defendant she was alright, but was tired and did not want to go home. Defendant reluctantly let her spend the rest of the night on his floor. Defendant did not see any blood until the next afternoon when he splashed water on Benita's face to wake her up. Defendant took Benita to the hospital a few hours later.

Prior to defendant's cross-examination, Judge Owens ruled that the State could impeach defendant with a 1984 conviction in Florida for felony aggravated battery against his then wife by the use of a bullwhip. This conviction was defendant's only prior conviction and was more than ten years old. Judge Owens admitted this evidence under Rule 609 of the Rules of Evidence ("Rule 609") on the grounds that the old conviction combined with other evidence demonstrated a pattern of behavior and that defendant's credibility was central to the resolution of his case. Defense counsel timely objected and excepted to the court's ruling.

On 19 November 1999, a jury returned a verdict of guilty of first-degree murder. Judge Owens sentenced defendant to life imprisonment without parole. Defendant appeals this judgment.

[1] By defendant's first assignment of error he argues the trial court committed reversible error by permitting the State to cross-examine him about his 1984 conviction in Florida for felony aggravated battery. We agree.

Rule 609 allows for the impeachment of a witness during cross-examination by offering evidence of that witness' prior criminal conviction(s). *See* N.C. Gen. Stat. § 8C-1, Rule 609(a) (1999). Rule 609 also states:

> Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

§ 8C-1, Rule 609(b).

A defendant's prior criminal convictions "are not to 'be considered as substantive evidence that [defendant] 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. Carter*, 326 N.C. 243, 250, 388 S.E.2d 111, 116 (1990) (quoting *State v. Tucker*, 317 N.C. 532, 543, 346 S.E.2d 417, 423 (1986)). In fact, our Supreme Court has held that "[t]he only 'legitimate purpose' for admitting a defendant's past convictions is to cast doubt upon his veracity[.]" *Id.* Thus, the most probative type of prior conviction admissible for impeachment purposes is "an offense that indicates a lack of veracity, such as fraud, forgery or perjury." *United States v. Beahm*, 664 F.2d 414, 418-19 n.6 (4th Cir. 1981) (citations omitted).

During the trial, the court allowed the State to cross-examine defendant about his more than ten-year-old conviction for felony aggravated battery. After a careful review of the record and transcript, it appears highly probable that the jury would have found sufficient evidence to convict defendant of Benita's murder without evidence of the 1984 conviction having been introduced. However, since this stale conviction sheds no light on defendant's veracity, but instead characterizes defendant as a woman abuser and a violent person who would have been likely to hit Benita in the head with a hammer, there is a strong possibility that the introduction of this prior conviction caused the jury to find defendant guilty of first-degree murder rather than a lesser crime. Therefore, we conclude that the evidence of defendant's conviction in 1984 should not have been admitted because the substantial likelihood of prejudice outweighed the minimal impeachment value of the evidence.

[2] Despite our decision to grant defendant a new trial based on his first assignment of error, we also address defendant's second assignment of error because of the likelihood of it becoming an issue in a retrial. Defendant argues that the trial court's decision to admit evidence concerning the "ball bat incident" between him and Benita violated Rule 404(b). We disagree.

Rule 404(b) governs the admissibility of a defendant's prior bad acts. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). This rule states, in part, that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Id.

In applying Rule 404(b), our Supreme Court has consistently held "that a defendant's prior assaults on the victim, for whose murder defendant is presently being tried, are admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim." *State v. Alston*, 341 N.C. 198, 229, 461 S.E.2d 687, 703 (1995) (citations omitted). In the case *sub judice*, evidence of the "ball bat incident" provided by the witnesses included testimony that defendant pushed and shoved Benita while she begged him to leave her alone. This evidence of defendant's prior assault on Benita, likewise tends to establish malice, premeditation, deliberation, intent and ill will on the part of defendant. Thus, the evidence is relevant to an issue other than defendant's character. We therefore hold that evidence of the "ball bat incident" was admissible under Rule 404(b).

Furthermore, this Court has held that "[w]hen prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). Admission of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court. Abuse will only be found where the trial court's ruling is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned

decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993).

The trial court in the present case made no specific finding that the probative value of evidence relating to the "ball bat incident" outweighed its prejudicial effect. However, as long as the procedure followed by the trial court demonstrates that a Rule 403 balancing test was conducted, a specific finding is not required. *See State v. Washington*, 141 N.C. App. 354, 367, 540 S.E.2d 388, 397-98 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). Here, the record and trial transcript indicate that the court determined the "ball bat incident" was not too remote in time as to run afoul of the balancing test because the incident occurred only a few months prior to Benita's death and tended to show a common plan or scheme, absence of accident, and tended to negate self-defense. Therefore, the trial court did not abuse its discretion in admitting evidence of the "ball bat incident" because the evidence was more probative than prejudicial.

Since we reverse the trial court for the improper admission of the stale conviction, we see no need to address defendant's third assignment of error regarding whether the court erred in not holding a hearing to determine his competency since the circumstances would likely be entirely different on a retrial. However, for the reasons stated, we reverse the trial court and grant defendant a new trial.

New trial.

Judges GREENE and McCULLOUGH concur.

LEROY E. TUCKETT, PLAINTIFF v. JERRY U. GUERRIER D/B/A THE ATEPA GROUP, P.A., AND/OR ANY PERSONS DOING BUSINESS FOR OR AS THE ATEPA GROUP, P.A., DEFENDANTS

No. COA01-348

(Filed 19 March 2002)

1. Appeal and Error— appealability—partial summary judgment—risk of inconsistent verdicts

An appeal from a partial summary judgment for defendants on claims concerning ownership of an architectural firm was

interlocutory but involved a substantial right in the risk of inconsistent verdicts where there was a remaining claim for wrongful eviction.

2. Corporations— stock certificate—transfer—delivery—issue of fact

In an action involving the transfer of a security certificate in registered form, there was a genuine issue of material fact regarding delivery where defendant pointed to records of the conveyance in the stock ledger and in the registered transaction, while plaintiff produced the certificate, which did not contain his signature, and contended that he had never relinquished possession because negotiations were ongoing.

3. Corporations— stock certificate—denial of transfer—estoppel not applicable

The doctrine of estoppel did not operate to bar plaintiff from denying the validity of a stock certificate transfer. Estoppel cannot arise if the transfer is invalid and the transaction void; on the other hand, estoppel would not be reached if the certificate was delivered.

Appeal by plaintiff from preliminary injunction dated 23 November 1999 by Judge Knox V. Jenkins, Jr., from order dated 4 February 2000 by Judge Ronald L. Stephens, from order filed 13 September 2000 by Judge J.B. Allen, Jr., and from order filed 28 November 2000 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 19 February 2002.

Michaux & Michaux, P.A., by Eric C. Michaux and Saroya L. Powell, for plaintiff-appellant.

The Banks Law Firm, P.A., by Sherrod Banks and John Roseboro, for defendant-appellees.

GREENE, Judge.

Leroy E. Tuckett (Plaintiff) appeals an order dated 23 November 1999 dissolving a temporary restraining order against L.E. Tuckett Architect Group, P.A. (the Firm), Jerry U. Guerrier (Guerrier) d/b/a The Atepa Group, P.A., and or any persons doing business for or as The Atepa Group, P.A. (collectively Defendants) and granting

Defendants a preliminary injunction against Plaintiff,[1] an order dated 4 February 2000 denying Plaintiff's motions to add a necessary party and to amend the preliminary injunction, an order filed 13 September 2000 allowing Defendants' motion to dismiss Plaintiff's fraud claim, and an order filed 28 November 2000 granting Defendants' motion for partial summary judgment and a declaratory judgment that Guerrier "is the sole and exclusive owner of the [Firm]."[2]

On 10 November 1999, Plaintiff filed a complaint requesting a temporary restraining order and a preliminary injunction against Defendants seeking a declaration as to the ownership of the Firm. The trial court issued a temporary restraining order *ex parte*. On 16 November 1999, Plaintiff filed a motion to amend the temporary restraining order and obtained a supplemental order to the temporary restraining order *ex parte*.

Defendants filed an answer and counterclaim dated 19 November 1999. After a hearing was held in respect to Plaintiff's motion for a preliminary injunction, the trial court dissolved the temporary restraining order and issued a preliminary injunction in Defendants' favor. On 20 December 1999, Plaintiff filed a response to Defendants' counterclaim. On 2 February 2000, after being granted leave to amend, Plaintiff filed an amended complaint for a declaratory judgment and injunctive relief and a motion to amend the preliminary judgment. The amended complaint included six new causes of action: wrongful eviction, wrongful conversion, tortious interference with contract and business relations, wrongful interference with future relations and/or prospective advantage, forgery, and fraud. The trial court denied Plaintiff's motion to amend the preliminary injunction on 4 February 2000. Defendants filed an amended answer and counterclaim dated 6 March 2000 to which Plaintiff filed a reply on 6 April 2000. On 13 September 2000, the trial court allowed: (1) Plaintiff's motion filed 31 July 2000 for leave to amend his answer to Defendants' counterclaim and (2) Defendants' motions dated 1 September 2000 to amend its answer to add the defense of equitable

1. In his brief to this Court, Plaintiff states the two-prong test under which the trial court was permitted to grant Defendants a preliminary injunction and concedes that "[i]n this matter[,] both of those requirements have been met." Plaintiff's appeal as it relates to the grant of a preliminary injunction to Defendants is thus abandoned.

2. In his brief to this Court, Plaintiff did not discuss the trial court's denial of Plaintiff's motion to add a necessary party or the trial court's dismissal of Plaintiff's fraud claim. Accordingly, these arguments are deemed abandoned. N.C.R. App. P. 28(a).

estoppel and to dismiss Plaintiff's fraud claim. The trial court denied Plaintiff's motion for summary judgment.

In a motion dated 27 October 2000, Defendants sought partial summary judgment as to Plaintiff's claims for wrongful conversion, tortious interference with contract and business relations, tortious interference with future relations and/or prospective advantage, and forgery. In an order filed 28 November 2000, the trial court granted Defendants' motion for partial summary judgment. Plaintiff filed a notice of appeal on 20 December 2000.

The pleadings and discovery submitted to the trial court reveal that in 1990, Plaintiff, an established architect, met Guerrier, an architectural intern working toward his professional license, in New York. In February 1995, after having worked together on several projects in New York, Plaintiff inquired if Guerrier would help him establish the Firm in North Carolina, and Guerrier agreed. They decided to name the Firm after Plaintiff as the Firm would benefit from Plaintiff's contacts and experience. In return for Guerrier assuming the management and operation of the Firm, Plaintiff offered Guerrier ownership of the Firm at some future point in time after Guerrier became licensed.

On 29 June 1995, Plaintiff executed documents to create the Firm, listing himself as the sole director and incorporator. The articles of incorporation authorized one hundred shares of capital stock, all of which Plaintiff issued to himself. Plaintiff's one hundred percent stock ownership of the Firm was evidenced by a security certificate (Security Certificate No. 1). Security Certificate No. 1 named Plaintiff as the holder of the stock and stated it was "transferrable only on the books of the [Firm] by the holder [t]hereof in person or by Attorney upon surrender of this Certificate properly endorsed." The space on the reverse side of Security Certificate No. 1 served to document any future transfer of the one hundred shares by Plaintiff to another person.

The articles of incorporation were subsequently filed with the North Carolina Secretary of State. On 27 September 1995, Guerrier received his New York architecture license, and Plaintiff and Guerrier began discussions of making Guerrier the sole owner of the Firm. During these discussions, Plaintiff stated he wanted to see a more long-term commitment from Guerrier before he transferred ownership of the Firm to him.

In January 1996, the Firm was refused a business loan due to Plaintiff's poor credit history. Because Guerrier had a good credit history, Plaintiff and Guerrier decided to present to the bank that Guerrier was the owner of the Firm. In accordance with this agreement, they asked the Firm's accountant to list Guerrier as the sole owner and one hundred percent shareholder of the Firm on all relevant corporate documents. Accordingly, from that point forward, all tax filings for the Firm reflected Guerrier as the sole owner.

On 1 January 1997, a meeting was held between Guerrier, Plaintiff, and the Firm's attorney Larry Hall (Hall). During that meeting, Guerrier claims he and Plaintiff "elected to go ahead and do the full one hundred percent sharehold[er] transfer," conveying complete ownership of the Firm to Guerrier. Guerrier's deposition testimony indicates they added Guerrier's name to the reverse side of Security Certificate No. 1 as transferee of the one hundred shares issued to Plaintiff and also recorded the transaction in the Firm's stock ledger. Plaintiff, however, did not sign the back side of Security Certificate No. 1. Plaintiff also claims he never delivered Security Certificate No. 1 to Guerrier. A copy of the registered transaction of Security Certificate No. 1 was submitted into evidence. This document indicates Security Certificate No. 1 was transferred by Plaintiff to Guerrier on 1 January 1997, at which time a new security certificate (Security Certificate No. 2) was issued to Guerrier.

Guerrier stated the transaction "finally culminated in July of 1997" during a meeting between him, Plaintiff, and Hall. At this time, Guerrier signed Security Certificate No. 2, which specifies Guerrier as the new holder of the one hundred shares of the Firm's stock. Guerrier claims Plaintiff then brought Security Certificate No. 2 to the corporate secretary to obtain her signature. Afterwards, Plaintiff placed the security certificate in the corporate record book. Plaintiff, on the other hand, asserts the stock transfer never took place. In support of his position, Plaintiff submitted into evidence Security Certificate No. 1 stating that it had never left his possession.

On 6 November 1999, Guerrier sent Plaintiff a letter informing him that he, Plaintiff, was no longer a member of the board of directors, no longer held a position with the Firm, would have to vacate his office immediately, and the Firm's name would be changed to The Atepa Group, P.A.

The record on appeal does not reflect who leased the office space in which the Firm is located. During oral arguments, Plaintiff's coun-

sel conceded the lease is in the Firm's name and not signed by Plaintiff in his individual capacity.

The dispositive issue is whether the trial court erred in granting Defendants' motion for partial summary judgment because it determined Guerrier to be the sole owner of the Firm based on either (I) a valid stock transfer of one hundred percent of the Firm's stock from Plaintiff to Guerrier, or (II) the doctrine of estoppel operating to bar Plaintiff from denying the validity of the stock transfer.

[1] We first note Plaintiff's appeal is interlocutory because the trial court did not dismiss all claims against Defendants, leaving the wrongful eviction action to be decided. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 4, 362 S.E.2d 812, 815 (1987). Plaintiff, however, has met his burden of showing that a substantial right will be implicated if this Court does not hear this appeal. Plaintiff conceded during oral argument before this Court that the lease in issue for Plaintiff's remaining wrongful eviction claim was signed in the name of the Firm. While the record does not include a copy of the lease and Defendants were silent on the issue of the lease during oral argument, a risk of inconsistent verdicts remains because the question of ownership will also likely decide Plaintiff's wrongful eviction action.[3] *Id.* at 7, 362 S.E.2d at 816. As to the merits of this case, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1999).

I

Stock Transfer

[2] Under Article 8 of the Uniform Commercial Code, as codified in Chapter 25 of the North Carolina General Statutes, a valid transfer of a certificated security requires both the indorsement and delivery of the certificate by its holder to the transferee. *See* N.C.G.S. §§ 25-8-301 (1999), 25-8-304 (1999). " 'Indorsement' means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the pur-

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3. The issue of ownership was determinative to the trial court's order granting Defendants' motion for partial summary judgment.

pose of assigning, transferring, or redeeming the security[.]" N.C.G.S. § 25-8-102(a)(11) (1999). An indorsement made on the security certificate "does not constitute a transfer until delivery of the certificate on which it appears." N.C.G.S. § 25-8-304(c) (1999). Delivery, in turn, "occurs when: (1) [t]he purchaser acquires possession of the security certificate; [or] (2) [a]nother person . . . acquires possession of the security certificate on behalf of the purchaser[.]" N.C.G.S. § 25-8-301(a)(1)-(2) (1999). As against the transferor, however, "[i]f a security certificate in registered form has been delivered to [the] purchaser without a necessary indorsement . . . , a transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied." N.C.G.S. § 25-8-304(d) (1999). A registered form is defined as "a form in which: (i) [t]he security certificate specifies a person entitled to the security; and (ii) [a] transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states." N.C.G.S. § 25-8-102(a)(13) (1999).

In this case, Security Certificate No. 1 names Plaintiff as the holder and states that it is "transferrable only on the books of the [Firm] by the holder [t]hereof in person or by Attorney upon surrender of this Certificate properly endorsed." Thus, we are presented with a security certificate in registered form. Accordingly, we need only consider whether the facts of this case present a genuine issue of material fact of whether Plaintiff delivered Security Certificate No. 1 to Guerrier.

As evidence of a valid delivery and transfer under N.C. Gen. Stat. §§ 25-8-301(a)(2) and 304(d), Guerrier points to the copy of the registered transaction of Security Certificate No. 1 as well as the Firm's stock ledger, both of which record a conveyance of Security Certificate No. 1 from Plaintiff to Guerrier. At trial, Plaintiff produced Security Certificate No. 1, which did not contain his signature, and claimed he had never relinquished possession of the certificate as the negotiations between Guerrier and him were still ongoing. As such, there was a genuine issue of material fact regarding delivery and the trial court erred in granting Defendants partial summary judgment on the basis of a valid stock transfer.[4]

4. Defendants assert Plaintiff brought Security Certificate No. 2 to the corporate secretary for her to sign and then placed the certificate in the corporate record book, thus delivering the security certificate to Guerrier. Because only delivery of Security Certificate No. 1 could convey title of the one hundred shares of the stock issued to Plaintiff, we reject this argument.

II

Estoppel

[3] "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). A trial court may only grant a summary judgment motion based on the doctrine of estoppel "[w]here there is but one inference that can be drawn from the undisputed facts of a case." *Keech v. Hendricks*, 141 N.C. App. 649, 653, 540 S.E.2d 71, 75 (2000) (quoting *Creech v. Melnik*, 347 N.C. 520, 528, 495 S.E.2d 907, 913 (1998)). If, however, "the evidence raises a permissible inference that the elements of . . . estoppel are present, but where other inferences may be drawn from contrary evidence, estoppel is a question of fact for the jury." *Id.* at 653-4, 540 S.E.2d at 75.

Estoppel cannot arise until the instrument creating the estoppel has become effective. *Levi v. Mathews*, 145 F. 152, 157 (4th Cir. 1906) (citing *Smith v. Ingram*, 130 N.C. 100, 40 S.E. 984 (1902) and *Drake v. Howell*, 133 N.C. 163, 45 S.E. 539 (1903)); *Ingram*, 130 N.C. at 106, 40 S.E. at 986 (estoppel cannot arise where deed is void); *see* 28 Am. Jur. 2d *Estoppel and Waiver* § 7 (1966) (a void deed may not be made the basis of an estoppel).[5]

In this case, without a valid transfer of Security Certificate No. 1, the transaction between Plaintiff and Guerrier is void, leaving no room for the doctrine of estoppel to operate. On the other hand, if Plaintiff delivered Security Certificate No. 1 to Guerrier, the issue of estoppel would not be reached. Thus, the application of estoppel is inappropriate here.

Summary

Because there are genuine issues of material fact regarding delivery of Security Certificate No. 1, the trial court erred in finding Guerrier to be the sole owner of the Firm and in granting partial summary judgment for Defendants. This case is therefore remanded for trial on the merits as to Plaintiff's claims for a declaratory judgment

5. While estoppel cannot arise if a transfer is *void*, it may, however, operate to enforce an otherwise *unenforceable* agreement. *See B & F Slosman v. Sonopress Inc.*, — N.C. App. —, —, 557 S.E.2d 176, 179 (2001) ("in appropriate cases, equitable estoppel may override the statute of frauds so as to enforce an otherwise unenforceable agreement").

on the ownership of the Firm, wrongful conversion, tortious interference with contract and business relations, tortious interference with future relations and/or prospective advantage, forgery, and wrongful eviction.

Reversed and remanded.

Judges McGEE and THOMAS concur.

STATE OF NORTH CAROLINA v. KENNETH WEBSTER WOOD

No. COA01-373

(Filed 19 March 2002)

1. **Homicide— murder—instruction on involuntary manslaughter refused**

The trial court did not err in a prosecution which resulted in a second-degree murder conviction by denying defendant's requested instruction on the lesser included offense of involuntary manslaughter. Several witnesses observed the altercation between defendant, another man, and the victim; one witness watched defendant "stomp" the victim in the face; another testified that he saw defendant kick the victim in the head and stomach; and this witness also testified that defendant and the other man danced around after the beating as if they were happy, giving each other a high five. This evidence is wholly inconsistent with a killing resulting from culpable negligence or an act not amounting to a felony.

2. **Homicide— heat of passion—instruction refused**

The trial court did not err in a first-degree murder prosecution (which resulted in a second-degree murder conviction) by refusing defendant's requested instruction on heat of passion where the prosecution arose from the beating of a man who allegedly attempted to abduct a child. A significant amount of time passed following the attempted abduction and defendant's evidence indicates that he was capable of cool reflection during the confrontation.

3. Homicide— self-defense—instruction on aggressor—evidence sufficient

The trial court did not err in its instruction on self-defense in a prosecution resulting in a second-degree murder conviction where the court instructed the jury that defendant would lose the benefit of self-defense if the jury determined that defendant was the aggressor where there was more than sufficient evidence that defendant could have been the aggressor.

4. Discovery— threat made by defendant—timely furnished

The trial court did not err in a first-degree murder prosecution (which resulted in a second-degree murder conviction) by denying defendant's motion to suppress evidence of a threat allegedly made by defendant where defendant contended that the State failed to provide timely discovery, but the State received the report on 22 May and supplied it to defendant on 23 May, nearly three weeks before the trial began.

5. Appeal and Error— constitutional objection—not raised at trial

The Court of Appeals did not consider a defendant's argument that the court unconstitutionally charged on first-degree murder where defendant did not object at trial on constitutional grounds.

Appeal by defendant from judgment entered 16 June 2000 by Judge L. Oliver Noble, Jr., in Cleveland County Superior Court. Heard in the Court of Appeals 31 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Thomas J. Pitman, for the State.

Rudolf Maher Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

SMITH, Judge.

Defendant was indicted on 21 February 2000 for first degree murder and felonious breaking or entering. Following a trial, defendant was convicted by a jury of second degree murder and felonious breaking or entering. The trial court entered judgments on the verdicts, and defendant appeals.

The evidence at trial tended to show that on 21 August 1998, defendant was at a game room shooting pool and drinking alcoholic

beverages with a friend, Michael Pasour. The game room was located at the apartment building where Pasour lived with Tina Padgett and her six year old son, Joshua. A stranger drove up outside the game room and allegedly attempted to persuade Joshua to get inside the vehicle. Defendant saw the driver motion to Joshua. After the stranger drove away, Joshua told Pasour and defendant that the stranger had tried to pick him up. They informed the boy's mother, who called 911. Officer Christopher Moore arrived on the scene around 7:20 p.m. He reported that defendant was angry. In his typewritten report, Moore stated that he heard defendant say "he would kick" the stranger's "ass." Defendant admitted at trial that he recalled saying to the officer that such a person deserved to have his "tail beat." Defendant was able to identify the vehicle the stranger drove, and provided a partial license plate number.

After the officer left, defendant also left in his red truck. On the way home, defendant observed the vehicle driven by the stranger. He returned to Padgett's apartment and called for Pasour. The two men then went in search of the alleged perpetrator. Defendant drove to an apartment complex where Roger Dale McDaniel lived. Roxanne Bell, who was washing her car outside the complex, observed a red truck pull into the parking lot and two men get out "in a rage." Bell heard defendant say that McDaniel was a pervert. Defendant and Pasour knocked on the door to McDaniel's apartment. They also beat and kicked on the door, which eventually broke free and opened. Pasour looked inside the apartment for McDaniel but found no one. The men began walking toward defendant's truck. McDaniel then emerged from behind the apartment building. Defendant, Pasour, and McDaniel approached each other. McDaniel reached inside his shirt to retrieve a handgun. Defendant testified that he wrestled McDaniel in an attempt to disarm him; he claimed that Pasour struck McDaniel in the face and that McDaniel dropped the gun and fell to the ground. Defendant admitted that he kicked the weapon several feet away from the place where McDaniel fell. Witnesses testified that defendant and Pasour then struck McDaniel with their fists and kicked him as he lay on the ground. Roxanne Bell testified that she saw defendant kick McDaniel in the head.

An autopsy revealed that McDaniel had bruises on his face, neck, and body. He also had blood in his lungs and stomach. The pathologist testified that the victim died from an injury to his spinal cord and from the aspiration of blood.

I.

[1] Defendant first alleges the trial court erred in denying defendant's requested instruction on the lesser included offense of involuntary manslaughter. We disagree.

The trial court "has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence." *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982) (citing *State v. Ward*, 300 N.C. 150, 266 S.E.2d 581 (1980)).

> The purpose of a charge is to give a clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and in reaching a correct verdict.

Id. (citation omitted). Nevertheless, a trial court "is not required to submit lesser included offenses for a jury's consideration when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence related to any element of the crime charged." *State v. Washington*, 142 N.C. App. 657, 660, 544 S.E.2d 249, 251, *disc. review denied*, 353 N.C. 532, 550 S.E.2d 165 (2001) (citation omitted). In fact, "[t]he mere possibility that a jury might reject part of the prosecution's evidence does not require submission of a lesser included offense." *State v. Hamilton*, 132 N.C. App. 316, 321, 512 S.E.2d 80, 84 (1999).

Involuntary manslaughter is "the unlawful and unintentional killing of another human being, without malice, which proximately results from an unlawful act not amounting to a felony . . . or from an act or omission constituting culpable negligence." *State v. Wallace*, 309 N.C. 141, 145, 305 S.E.2d 548, 551 (1983). Culpable negligence is "such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others." *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977).

In this case, the trial court instructed the jury on the elements of first degree murder, second degree murder, and voluntary manslaughter, which is the unlawful killing of a human being without malice, premeditation, or deliberation. *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983). As mentioned above, several witnesses observed the altercation between defendant, Michael Pasour, and the victim, Roger Dale McDaniel. In fact, Kristy Harbison testified that she

watched defendant "stomp" the victim in the face. Chris James testified that he observed the attack and saw defendant kick the victim in the head and stomach. James also testified that after the beating the men pranced around as if they were happy, and "they gave each other a high five." This evidence is wholly inconsistent with involuntary manslaughter, which involves a killing resulting from culpable negligence or from an act not amounting to a felony. Defendant's assignment of error to the contrary is overruled.

II.

[2] Defendant next argues the trial court erred in denying defendant's request for an instruction that defendant's actions were brought about by heat of passion. Heat of passion is a killing done without premeditation and under the influence of a " 'sudden passion.' " *State v. Davis*, 77 N.C. App. 68, 72, 334 S.E.2d 509, 512 (1985) (citation omitted). Heat of passion has been defined by our Supreme Court as "any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection." *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 450 (1970) (citations omitted). As explained above, the trial court is obliged to instruct the jury on the "essential features of the case embraced within the issue and arising on the evidence." *Harris*, 306 N.C. at 727, 295 S.E.2d at 393. Defendant contends that the deadly assault resulted from the heat of passion aroused by the victim's alleged attempt to abduct the six-year-old boy.

In the case *sub judice*, the testimony presented at trial indicates that a significant amount of time passed following the attempted abduction. First, there was the arrival of Officer Moore. Next, on his way home after the attempted abduction, defendant observed the alleged abductor's car, drove back to the apartment building where Michael Pasour lived, and defendant and Pasour went in search of the man. After breaking into McDaniel's apartment, the two men walked back to defendant's truck, ostensibly to leave the apartment complex. Witnesses then observed the altercation involving defendant, the victim, and Pasour. As mentioned above, Kristy Harbison saw defendant "stomp" the victim in the face. Chris James observed the attack and saw defendant kick the victim in the head and stomach. This evidence of the time and acts involved does not support a jury instruction on the heat of passion brought about by a sudden provocation which would " 'naturally and reasonably arouse the passions of an ordinary man beyond his power of control.' " *State v. Mathis*, 105 N.C. App. 402, 406, 413 S.E.2d 301, 304 (1992) (citation omitted).

By contrast, defendant testified that following the attempted abduction, he was upset but "not furious." After failing to find McDaniel in his apartment, defendant and Pasour attempted to return to defendant's truck when McDaniel appeared from behind the apartment building and approached the two men. According to defendant, when McDaniel went for a weapon under his clothing, the two men grabbed him and tried to separate him from the handgun. Once the weapon was free, defendant admitted that he kicked the gun "at least six" times to remove it from the immediate vicinity of the altercation. He claimed he purposefully did not pick up the weapon because he had a criminal record and did not want his fingerprints on the gun. Defendant then claims he turned and noticed Pasour hitting and kicking McDaniel, and he persuaded Pasour to stop the attack because he "did not want the man to die." He testified that he rolled McDaniel onto his stomach because he heard him choking and apparently wanted to help him breathe more easily until the authorities arrived. This evidence indicates that defendant was capable of cool reflection during the confrontation which ended in McDaniel's death. The trial court did not err in refusing defendant's requested instruction on heat of passion.

III.

[3] Defendant next argues the trial court erred in overruling defendant's objections to an instruction that defendant would lose the benefit of self-defense if the jury determined that he was the aggressor in bringing on the fight resulting in McDaniel's death. The trial court instructed the jury that defendant would be excused from murder or manslaughter based on self-defense,

> if he was not the aggressor in bringing on the fight, and did not use excessive force under the circumstances. If the Defendant voluntarily and without provocation entered the fight, he would be considered the aggressor.

Self defense completely excuses a defendant for the killing of another person if four conditions are met:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Maynor, 331 N.C. 695, 699, 417 S.E.2d 453, 455 (1992) (citations omitted). If only the first two elements of self defense are met, the defendant loses the right to perfect self defense but may nevertheless be entitled to imperfect self defense and in that case would be guilty of at least voluntary manslaughter. *State v. Wilson*, 304 N.C. 689, 285 S.E.2d 804 (1982). In *State v. Temples*, 74 N.C. App. 106, 109, 327 S.E.2d 266, 268, *disc. review denied*, 314 N.C. 121, 332 S.E.2d 489 (1985), this Court held that it was error for the trial court to instruct the jury on entering a fight voluntarily when "there is no evidence from which the jury could find that defendant voluntarily entered a fight with the deceased." In the instant case, however, more than sufficient evidence was presented to indicate that defendant could have been the aggressor in the fight resulting in the victim's death. Defendant admitted to Officer Moore minutes after the attempted abduction that a person who would try to pick up a young child deserved to have his "tail beat." As he was driving home, he observed the car driven by the alleged abductor, returned to pick up Michael Pasour, and the two men drove to the victim's apartment. The men pounded and kicked on the door to McDaniel's apartment until the lock on the door broke. Roxanne Bell testified that, moments later, when McDaniel approached the two men outside the apartment building, defendant and Pasour "started walking up on him," and that defendant called McDaniel a "pervert." McDaniel then reached for his handgun and the two men grabbed him and subsequently disarmed him; both men, according to Bell, then struck McDaniel with their fists and kicked him. On this evidence, the jury could find that defendant was the aggressor or voluntarily entered the fight resulting in the death of McDaniel. Thus the trial court's jury instruction on the issue of self defense was not error.

IV.

[4] Defendant next contends the trial court erred in denying his motion to suppress evidence of a threat that defendant allegedly made because the State failed to provide timely discovery of the statement. We disagree.

> On motion of a defendant, the trial court must order the State:
>
> To divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, 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). In *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994), the Supreme Court held it was error for the trial court to fail to find that the State violated the discovery statute regarding the disclosure of a statement made by the defendant. In *Patterson*, the State did not disclose the statement until the trial was underway. *Id.* In spite of this violation, the Supreme Court held that the trial court's failure to find the State in violation of the discovery statutes was harmless error.

In the present case, however, the State provided defendant with a copy of the typewritten report by Officer Christopher Moore on 23 May 2000, *nearly three weeks* before the trial began on 12 June 2000. The State received this report from Officer Moore on or around 22 May 2000, and supplied defendant with a copy the following day. We cannot say the disclosure of Officer Moore's typewritten report twenty days prior to trial violated the statutory requirement of timely discovery. Defendant's assignment of error is overruled.

V.

[5] Finally, defendant argues the trial court unconstitutionally instructed the jury on the offense of first degree murder. Defendant specifically alleges that all the evidence showed that defendant responded to an armed attack by the victim and that he thus could not be found guilty of first degree murder.

We note that defendant did not object to the first degree murder instruction on constitutional grounds during the trial, and that we are therefore not required to consider defendant's assignment of error. *See State v. Wilkinson*, 344 N.C. 198, 221, 474 S.E.2d 375, 387 (1996) (holding that a reviewing court "is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court"). Thus, the assignment of error is overruled.

Defendant has offered no argument in support of the remaining assignments of error in the record. Therefore they are deemed abandoned. N.C.R. App. P. 28(b)(5).

No error.

Judges TIMMONS-GOODSON and BRYANT concur.

STATE OF NORTH CAROLINA v. JESS PAUL PAYNE, JR., DEFENDANT

No. COA01-207

(Filed 19 March 2002)

1. **Arson— fraudulently burning a dwelling—sufficiency of evidence—defendant's proximity**

   The trial court did not err by denying defendant's motion to dismiss a charge of fraudulently burning a dwelling where defendant argued that there was no evidence that he was within the temporal and physical proximity of the house when the fire commenced, but temporal and physical proximity is not the only way to determine that defendant is the perpetrator.

2. **Sentencing— insurance fraud and fraudulently burning building—aggravating factor—amount of monetary damages**

   The trial court did not err in a prosecution for insurance fraud and fraudulently burning a dwelling by finding as an aggravating factor for both charges that the acts involved an attempted and actual taking of property of great monetary value. The amount of monetary damages is not an element of either offense.

Appeal by defendant from judgments entered 27 July 2000 by Judge W. Erwin Spainhour in Iredell County Superior Court. Heard in the Court of Appeals 6 December 2001.

Attorney General Roy Cooper, by Assistant Attorney General Stewart L. Johnson, for the State.

Osborn & Tyndall, P.L.L.C., by J. Kirk Osborn and Amos Granger Tyndall, for defendant-appellant.

BRYANT, Judge.

Defendant Jess Paul Payne owned and lived in a house located at 118 Country View Road in Statesville, North Carolina. Sometime immediately prior to 2:41 a.m. on 1 February 1997, a fire raged through defendant's house resulting in substantial damage to the front right portion of the structure. According to the State's expert in the cause and origin of fires, the fire originated in the living room and was started by use of an ignitable accelerant.

At 9:15 a.m. on the same date, defendant filed a report with the Iredell County Sheriff's Department claiming that firearms and a 1987 Chevrolet Silverado Doolie pickup truck with an enclosed trailer that contained various engines and car parts were stolen from his residence. Defendant claimed that on 31 January 1997, he purchased the Doolie pickup truck and enclosed trailer for $30,000.

Defendant claimed that on the same date, he used a vehicle other than the Doolie pickup truck to drive the seller and a second man to Virginia, stopped to buy a lottery ticket at 11:39 p.m., and then proceeded to take the two men to Roanoke, Virginia. Defendant however claimed that he could not recall the seller's name, nor the name of the man accompanying the seller. Defendant alleged that he then made the return trip to North Carolina and arrived at a friend's home around 3:00 a.m. or 4:00 a.m. on 1 February 1997.

Defendant had an insurance policy with the North Carolina Grange Mutual Insurance Company which covered the house structure for $79,000 and defendant's personal property and house contents for $39,500. Defendant filed insurance claims for the fire damage sustained to the house and the contents of the house. He also filed an insurance claim for the theft of the firearms, the Doolie pickup truck with enclosed trailer, and the various engine and car parts contained inside the trailer. An investigation concerning the fire and alleged theft commenced shortly thereafter.

Investigators were unable to find any evidence that someone forcibly entered the house in order to start the fire. At the scene of the fire, investigators could find no evidence of a number of items defendant claimed were destroyed in the fire. Specifically, they could find no evidence regarding a large number of videotapes and linens the defendant claimed were lost in the fire. Investigators were unable to find any evidence that pictures were hanging on the house walls at the time of the fire. In addition, investigators were unable to find any

articles of clothing in the house except for one set of men and women's clothing.

Further investigation disclosed that the defendant was delinquent in his mortgage payments. It was also discovered that the lottery ticket defendant claimed he purchased in Galax, Virginia at 11:39 p.m. on 31 January 1997—evidence which might support defendant's alibi that he was in Virginia at the time of the fire—was actually purchased at a different location and on a different date than defendant claimed.

The insurance company ultimately denied defendant's fire and theft claims. However, the insurance company did pay $57,196.74 to mortgage company American General Finance for the fire damage sustained to the house. Defendant was subsequently arrested and indicted for fraudulently burning a dwelling and for insurance fraud.

Upon defendant's arrest, a box of videotapes was discovered in defendant's new house, along with several family pictures displayed on the house walls and in the master bedroom. A photograph was taken of the box containing the videotapes. The movie titles visible from the photograph were compared to an inventory list of videotapes defendant claimed were destroyed in the fire. Several of the visible movie titles matched movie titles of videotapes that were allegedly destroyed in the fire.

This matter initially came to jury trial at the 24 January 2000 criminal session of Iredell County Superior Court with the Honorable Michael H. Helms presiding. Due to defense counsel's illness, a mistrial was declared on 27 January 2000. This matter again came to jury trial at the 24 July 2000 criminal session of Iredell County Superior Court with the Honorable W. Erwin Spainhour presiding.

At trial, one of defendant's neighbors testified that she did not see a Doolie pickup truck in defendant's yard on 31 January 1997. She also testified that defendant usually kept several cars and car parts in the yard, but on the day before the fire, the yard had been cleared. Other witnesses testified to seeing defendant in Statesville during times when defendant claimed to be in Virginia.

One witness testified that subsequent to the fire incident, defendant told him that the witness need not appear at trial. The witness testified that subsequent to the fire incident, defendant stated that the only way for defendant to be found guilty is if someone saw him start

the fire. In addition, the witness testified that subsequent to the fire incident, defendant suggested to the witness how to start a fire without leaving evidence.

Defendant was found guilty of both offenses with judgments entered on 27 July 2000. The trial judge found there was an aggravating factor that outweighed the mitigating factors in this case. Defendant was sentenced to active terms of ten to twelve months for each offense, with the sentences running consecutively. Defendant gave notice of appeal on 3 August 2000.

I.

[1] Defendant presents two arguments on appeal. First, defendant argues that the trial court erred in denying his motion to dismiss the charge of fraudulently burning a dwelling. We disagree.

"In reviewing a motion to dismiss, 'the trial court must determine whether there is substantial evidence: (a) of each essential element of the offense charged or of a lesser included offense, and (b) substantial evidence of defendant being the perpetrator of the offense.' " *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001). In reviewing challenges to the sufficiency of evidence, the evidence must be viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455, *cert. denied by Fritsch v. North Carolina*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

The elements for the charge of fraudulently burning a dwelling include that the accused was the owner or occupier of a building that was used as a dwelling house and the accused either set fire to, burned, or caused the dwelling to be burned for a fraudulent purpose. *See* N.C.G.S. § 14-65 (1999); *State v. James*, 77 N.C. App. 219, 221, 334 S.E.2d 452, 453 (1985). For the burning of a dwelling to be a willful and wanton burning, it must be shown that the act was done intentionally, without legal excuse or justification, and with knowledge of or reasonable grounds to believe that the act would endanger the rights or safety of others. *State v. Brackett*, 306 N.C. 138, 142, 291 S.E.2d 660, 662-63 (1982).

The evidence in the instant case shows that the defendant was the owner of the dwelling house that was damaged by fire. The fire started in the living room by use of an ignitable accelerant. Mortgage company American General Finance had an interest in the house. In addition, there was no evidence of forcible entry into the house.

Two eyewitnesses testified to seeing defendant in Statesville the day of the fire and at times when defendant claimed to be in Virginia. One of defendant's neighbors testified that normally several cars and car parts would be in defendant's yard. The day before the fire, however, defendant's yard was cleared.

At the scene of the fire, investigators could find no evidence of a number of items defendant claimed were destroyed in the fire. Upon defendant's arrest, a box of videotapes was discovered that contained several of the same movie titles of videotapes that defendant claimed were destroyed in the fire. Investigators were unable to find evidence of pictures hanging in defendant's old house at the time of the fire, however, pictures were found displayed on the walls and in the master bedroom of defendant's new house. Moreover, evidence was discovered that defendant was delinquent in his mortgage payments and the proceeds from the insurance claims would have been sufficient to settle defendant's mortgage debt.

Notwithstanding the abovementioned evidence, defendant argues that no evidence was presented that would demonstrate that he was within the temporal and physical proximity of the house when the fire commenced. Defendant argues that insufficient evidence therefore existed to prove that he was the perpetrator of the fire. We disagree.

Evidence that the defendant was within the temporal and physical proximity of the dwelling when the fire commenced may serve as a basis for establishing whether the defendant was the perpetrator of the crime charged. *See, e.g., State v. James*, 77 N.C. App. 219, 334 S.E.2d 454 (1985) (stating that a witness saw the defendant at the house approximately one to one-and-one-half minutes before the witness saw smoke coming from the house); *State v. Smith*, 74 N.C. App. 514, 328 S.E.2d 877 (1985) (stating that defendant was seen coming from behind the house minutes before the house fire started); *State v. Caron*, 288 N.C. 467, 219 S.E.2d 68 (1975); *cert. denied*, 425 U.S. 971, 48 L. Ed. 2d 794 (1976) (stating that defendant was at the scene of the fire approximately thirty to forty-five minutes before the fire started).

Evidence of temporal and physical proximity, however, is not the only manner in which it can be determined that a defendant was the perpetrator of the crime charged. *See, e.g., State v. Brackett*, 55 N.C. App. 410, 285 S.E.2d 852, *rev'd on other grounds by* 306 N.C. 138, 291 S.E.2d 660 (1982) (finding that evidence that defendant had previ-

ously secured fire insurance for her house was admissible to show defendant's motive although she was not tried for fraudulently burning her house); *State v. Harrell*, 20 N.C. App. 352, 201 S.E.2d 716, *cert. denied by* 284 N.C. 619, 202 S.E.2d 275 (1974) (stating that evidence of defendant's financial obligations and pending lawsuits against defendant was relevant and material evidence in defendant's prosecution for felonious burning and presenting a false insurance claim); *State v. Edmonds*, 185 N.C. 721, 117 S.E. 23 (1923) (noting that motive may serve as evidence of the culprit's identity).

In the instant case, evidence was presented that showed defendant was delinquent in his mortgage payments and the proceeds from the insurance policy would have been sufficient to cover defendant's mortgage debt. Evidence was presented that contradicted defendant's accounts of his whereabouts the day of the fire. Evidence was presented that showed there was no forcible entry to the house and that the fire was intentionally started inside the house. Items were cleared from defendant's yard immediately preceding the fire. Moreover, several items that defendant claimed to have been destroyed in the fire were found in defendant's new house. We find that there existed sufficient evidence to sustain the charge against defendant of fraudulently burning a dwelling. The trial court therefore did not err in denying defendant's motion to dismiss this charge.

II.

[2] Defendant next argues that the trial court erred in finding as an aggravating factor for both charges that the acts involved an attempted and actual taking of property of great monetary value. Specifically, defendant argues that it was error for an aggravating factor to be based on circumstances that are an element of the crimes. We disagree.

As previously stated, the elements for the charge of fraudulently burning a dwelling include that the accused was the owner or occupier of a building that was used as a dwelling house and the accused either set fire to, burned, or caused the dwelling to be burned for a fraudulent purpose. *See* N.C.G.S. § 14-65; *James*, 77 N.C. App. at 221, 334 S.E.2d at 453.

The elements for insurance fraud include that the accused presented a statement in support of a claim for payment under an insurance policy, that the statement contained false or misleading infor-

mation concerning a fact or matter material to the claim, that the accused knew that the statement contained false or misleading information, and that the accused acted with the intent to defraud. *See* N.C.G.S. § 58-2-161 (1999).

With regard to both offenses—fraudulently burning a dwelling and insurance fraud—the amount of monetary damages sustained is not an element of the offense charged. Our Court has previously upheld the finding of an aggravating factor based on the determination that the crime involved an attempted or actual taking of property of great monetary value, when there existed evidence in addition to that which was necessary to establish the crime. *See State v. Coleman*, 80 N.C. App. 271, 277, 341 S.E.2d 750, 753-54 (1986); *State v. Hughes*, 136 N.C. App. 92, 100, 524 S.E.2d 63, 68 (1999), *rev. denied by* 351 N.C. 644, 543 S.E.2d 878 (2000); *State v. Hendricks*, 138 N.C. App. 668, 672, 531 S.E.2d 896, 899 (2000). Because the amount of monetary damages sustained is not an element of either crime upon which defendant was convicted, we find that the trial court did not err in finding as an aggravating factor for both charges that the acts involved an attempted and actual taking of property of great monetary value.

NO ERROR.

Judges McGEE and HUNTER concur.

PATRICIA CHILDRESS COLE, PLAINTIFF v. EDDY DEAN COLE, DEFENDANT

No. COA01-284

(Filed 19 March 2002)

Child Support, Custody, and Visitation— support—modification of temporary amount

The trial court did not err in a child support case by awarding plaintiff mother child support from the date of the filing of plaintiff's complaint even though defendant husband contends the 3 June 1999 consent order constituted a prior child support order and could not be modified retroactively absent a finding by the trial court that a sudden financial emergency existed requiring plaintiff to expend sums in excess of the existing child support

order, because: (1) the trial court's consent order was not intended as a final determination on the issue of child support, but merely set a temporary amount of child support that was consented to by the parties in contemplation of setting a different amount at a later time after a hearing; (2) the order's temporary nature made it subject to subsequent modification; and (3) as no final determination on the merits of the issue of child support had previously been made and no hearing on the issue of child support had previously been held, the trial court was required under N.C.G.S. § 50-13.4(c) to apply the child support guidelines in awarding prospective child support as of 8 February 1999, the time plaintiff's complaint for child support was filed.

Appeal by defendant from orders entered 22 December 2000 and 25 January 2001 by Judge V. Bradford Long in District Court, Randolph County. Heard in the Court of Appeals 30 January 2002.

William H. Heafner, for the plaintiff-appellee.

Stephen S. Schmidly, for the defendant-appellant.

WYNN, Judge.

Defendant appeals from the trial court's entry of a child support order on 22 December 2000, as amended by a subsequent order filed on 25 January 2001. Defendant argues that the trial court impermissibly awarded plaintiff a retroactive increase in the amount of a pre-existing child support obligation. We disagree.

Plaintiff and defendant were married on 14 September 1975 and separated on 4 January 1999. Four children were born of the marriage, including three children who were minors as of the date of the parties' separation. On 8 February 1999, plaintiff filed an action for custody and support of the minor children. Defendant answered, and on 1 June 1999 the parties filed a Memorandum of Order whereby defendant agreed to pay plaintiff $125.00 per week for child support beginning on 4 June 1999. On 3 June 1999, the trial court, per Judge William M. Neely, entered a Consent Order providing in part as follows:

[I]t . . . appearing to the Court that the Plaintiff and Defendant having settled all current issues for hearing as shown in the attached Memorandum of Order and based upon said Memorandum of Order and the pleadings in this case, the

Court enters the following Order by and with the consent of the parties:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. This Order is temporary and entered without prejudice to either party.

. . .

4. The Defendant shall pay One Hundred Twenty-Five Dollars ($125.00) per week for child support beginning on Friday, June 4, 1999. The payments shall be made into the Office of the Clerk of Superior Court of Randolph County.

. . .

7. The Court reserves the right to modify this Order based upon the future circumstances of the parties.

Subsequently, Judge Neely entered an Inactive Order on 27 June 2000 providing as follows:

It appearing to the undersigned that this is a domestic relations case in which a Temporary Order has been entered and the parties continue to function under said Temporary Order and do not appear at this time to desire a final hearing on the merits.

It is now therefore ordered that this case be placed on the inactive docket and removed from the ready calendar.

On 22 December 2000, the trial court, per Judge V. Bradford Long, entered a Child Support Order providing in part as follows:

THIS MATTER, coming on to be heard before the Honorable V. Bradford Long, District Court Judge presiding in Judicial District 19B, and being heard in Randolph County, North Carolina, on December 1, 2000 upon the complaint of the Plaintiff for child support filed in this matter on February 8, 1999. . . . .

The Court makes the following findings of fact by the greater weight of the evidence based upon the matters established of record and the stipulations of the parties.

. . .

4. That the plaintiff filed a complaint on February 8, 1999, which was served upon the defendant on February 8, 1999 . . . . This

complaint, in part, prayed the court to enter an award of child support in favor of the plaintiff against the defendant for the use and benefit of the minor children of the parties.

5. That the parties entered into a memorandum of judgment contained on AOC Form CV220, which was filed in this matter on June 1, 1999. . . . Judge Neely indicated by his notation on the order that he did not examine the parties in open court as to their understanding of the memorandum. . . . .

6. In paragraph 1 of the memorandum of judgement it is noted:

> "1. This order is temporary and entered without prejudice to either party."

The order further recites in paragraph 4:

> "4. The Defendant shall pay $125.00 per week for child support beginning on Friday, June 4, 1999. The payments shall be made through the office of the Clerk of Superior Court of Randolph County."

7. The parties at this [1 December 2000] hearing, stipulated to the amount of support due from the defendant to the plaintiff under the North Carolina Child Support Guidelines. A copy of worksheet A, which is stipulated to by both the plaintiff and the defendant, is attached to this order and incorporated by reference . . . herein.

8. The parties further stipulate neither the plaintiff nor the defendant have made any motion to deviate from the North Carolina Child Support Guidelines.

9. The parties stipulate the only issue to be determined by the Court is the effective date of the application of the guidelines amount of child support.

> A. The defendant contends: The holdings of Fuchs v[.] Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963), and Biggs v. Greer, 136 N.C. App. 294, 524 S.E.2d 577 (2000), control so that the support sought by the plaintiff from the date of the filing of the complaint through the date of the entry of the [3 June 1999 temporary consent] order is retrospective support because of the entry of the temporary child support order.
>
> B. The plaintiff contends that the holding in State ex. rel. Fisher v. Lukinoff, 131 N.C. App. 642, 507 S.E.2d 591 (1998),

> control[s] so that the child support requested since the filing of the complaint [on 8 February 1999] through the date of the entry of the [3 June 1999 temporary consent] order is prospective support and the Court is bound to order this support as there has not been a motion to deviate from the guidelines.

10. The Court takes judicial notice that the common standard and practice in Judicial District 19-B is that parties enter a temporary order prior to the Court hearing any evidence, which typically provides for some form of support for minor children from parents not living in the home with their children and some form of time sharing or visitation between minor children and both parents. These orders are entered without the Court making any findings of fact and are entered without prejudice to either party[,] . . . [t]hus allowing the parties to ask the Court to enter an initial award without showing a substantial change of circumstances. This temporary order was entered with regard to: children's primary residence, child support, visitation with defendant and counseling for minor children.

11. . . . This court determines as a matter of law that the child support order should be entered prospectively from the date of the filing of the complaint and that the entry of the temporary child support order is not a bar to this court entering the initial child support order on December 1, 2000, prospectively from the filing of the complaint [on 8 February 1999].

12. The parties further stipulate at the time the temporary child support order was entered the child support guidelines were not applied.

Based upon these findings, the trial court concluded that defendant's ongoing child support obligation, under North Carolina's Child Support Presumptive Guidelines, 2002 Ann. R. N.C. 33 (Guidelines), is $824.00 per month. The trial court further concluded:

> 3. The temporary order entered June 1, 1999, was not an initial child support award and was entered without prejudice to either party and is not a bar to the court awarding child support prospectively from the date of the filing of the complaint.
>
> 4. The Court is required to run the child support obligation prospectively from the date of the filing of the complaint under

the holding of the State ex. rel[.] Fisher v. Lukinoff, 131 N.C. App. 642, 507 S.E.2d 591 (1998) case.

5. The application of the . . . Guidelines since the date of the filing of the Complaint through the date of the hearing requires a total amount of support to be paid in the amount of $18,264.20.

6. The defendant is entitled to a credit for support paid under the Temporary Support Order in the total amount of $9,750.00.

7. The defendant's arrearage, after giving credit for support paid under the temporary order upon prospective application of the . . . Guidelines is $8,514.20.

Accordingly, the trial court ordered defendant to pay plaintiff child support in the ongoing amount of $842.00 monthly beginning as of the date plaintiff filed her complaint, 8 February 1999. The trial court also established defendant in arrears in the amount of $8,514.20 as of 1 December 2000, and ordered defendant to pay an additional $150.00 monthly until such time as the $8,514.20 arrearage is reduced to zero. Defendant subsequently moved to amend the 22 December 2000 order, and on 25 January 2001 the trial court filed an order amending the 22 December 2000 order by adding a finding of fact and conclusion of law that there had been no extraordinary sudden financial emergency between the entry of the temporary support order and the 1 December 2000 hearing. Defendant appeals.

Defendant brings forth six assignments of error on appeal. However, defendant has abandoned his first assignment of error by failing to argue it in his brief. *See* N.C.R. App. P. 28(b)(6) (2002).

The remainder of defendant's assignments of error are encompassed in the single argument in his brief contending that the trial court "erred in awarding the plaintiff retroactive child support from the date of the filing of the plaintiff's complaint[.]" The basis for defendant's contention is that the 3 June 1999 consent order "constituted a prior child support order" and could not be modified retroactively absent a finding by the trial court that a "sudden financial emergency existed" requiring plaintiff to expend sums in excess of the existing child support order. *See Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963). Defendant's contention is without merit.

In *Sikes v. Sikes*, 330 N.C. 595, 411 S.E.2d 588 (1992), our Supreme Court held that a district court may enter an interim order

for child support wherein it contemplates entering a permanent order at a later time. The Court further held that the interim child support order could be modified later because no *final* determination of the proper amount of child support had previously been made. The *Sikes* Court held that *Fuchs* (barring courts from ordering retroactive increases in child support without some evidence of an emergency situation) and *Ellenberger v. Ellenberger*, 63 N.C. App. 721, 306 S.E.2d 190 (requiring a showing of a change in circumstances before child support payments may be changed), *aff'd in part and rev'd in part*, 309 N.C. 631, 308 S.E.2d 714 (1983), do not apply until a determination on the merits of the issue of child support is first made.

In *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 507 S.E.2d 591 (1998), this Court noted that "for purposes of computing child support, the portion of the award 'representing that period from the time a complaint seeking child support is filed to the date of trial,' is 'in the nature of prospective child support.' " *Id.* at 646-47, 507 S.E.2d at 595 (citations omitted). As "prospective child support is to be awarded for the time period between the filing of a complaint for child support and the hearing date, [N.C. Gen. Stat. §] 50-13.4(c) [1999] applies and *requires* application of the Guidelines with respect to that period[.]" *Id.* at 647, 507 S.E.2d at 595 (citations omitted) (emphasis added).

Construing *Sikes* and *Lukinoff* together, we hold that trial courts *must* apply G.S. § 50-13.4(c) in determining the amount of *prospective* child support payments, which generally includes the period between the filing of the complaint for child support and the hearing date. Furthermore, in entering a *prospective* child support order, the trial court need not take any evidence or make findings of fact or conclusions of law, so long as it imposes the presumptive amount of child support pursuant to the Guidelines. *See Biggs*, 136 N.C. App. at 297, 524 S.E.2d at 581. On the other hand, *retroactive* child support (consisting of either (1) child support awarded prior to the date a party files a complaint therefor, or (2) a retroactive increase in the amount provided in an existing support order) is *not* based on the presumptive Guidelines, *see Luckinoff*, and is subject to the constraints of *Fuchs* and *Ellenberger*. *See Sikes*.

In the instant case, as in *Sikes*, it is clear that the trial court's 3 June 1999 Consent Order was not intended as a final determination on the issue of child support. Rather, it set a temporary amount of child support that was consented to by the parties, in contemplation

of setting a different amount at a later time after a hearing. As the 3 June 1999 order was not a determination following a hearing on the merits of the issue of child support, it was temporary in nature and therefore subject to subsequent modification. *See Sikes*. Furthermore, as no final determination on the merits of the issue of child support had previously been made, and no hearing on the issue of child support had previously been held, the trial court was required, under G.S. § 50-13.4(c), to apply the child support Guidelines in awarding *prospective* child support as of 8 February 1999, the time plaintiff's complaint for child support was filed. *See Lukinoff*, 131 N.C. App. at 647, 507 S.E.2d at 595 ("prospective child support is to be awarded for the time period between the filing of a complaint for child support and the hearing date").

As the trial court awarded prospective child support according to the Guidelines as of the date plaintiff filed her complaint for child support, the award of such support was not retroactive in nature and this Court's holding in *Biggs* is therefore inapplicable. Accordingly, the trial court's 22 December 2000 child support order, and 25 January 2001 order amending same, is,

Affirmed.

Judges HUDSON and THOMAS concur.

STATE OF NORTH CAROLINA v. MONICA YVETTE TERRY

No. COA01-641

(Filed 19 March 2002)

1. Probation and Parole— revocation hearing—opportunity to cross-examine

The trial court did not err in a probation revocation proceeding by not giving defendant the opportunity to cross-examine a professor who had told defendant's probation officer that defendant did not have a mandatory Saturday class where defendant had testified under oath that she had a mandatory Saturday class which interfered with her weekend sentence. Evidence that defendant did not report to the detention center on four occasions and that her stated reason for not reporting was unfounded

was sufficient to satisfy the State's burden. The communication with defendant's professor served merely to confirm what had already been presented, and defendant did not at any time request that the professor be subpoenaed. Moreover, defendant admitted to having been untruthful about having a mandatory Saturday class.

2. Contempt— criminal—untruthfulness during hearing—opportunity to be heard

The trial court did not err by summarily punishing defendant for direct criminal contempt during a probation revocation proceeding where defendant recanted her testimony and does not dispute that she had not been truthful. Defendant's conduct took place in the trial court's presence, she had ample opportunity to present the trial court with reasons for not being found in contempt, and her conduct was punished promptly. N.C.G.S. § 5A-14.

Appeal by defendant from order and judgment entered 9 February 2001 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 13 February 2002.

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

Robert W. Ewing for defendant-appellant.

WALKER, Judge.

Defendant appeals from an order finding her in direct criminal contempt and from a judgment revoking her probation. The relevant facts are as follows: On 12 December 2000, defendant pled guilty to driving while impaired and driving with a revoked license for which she received a minimum sentence of two years. The trial court suspended the sentence and placed defendant on intensive supervised probation for a period of thirty-six months. As a condition of her probation, defendant was required to serve thirty consecutive weekends in the Forsyth County Detention Center (detention center) beginning 15 December 2000. Defendant was to voluntarily report to the detention center by 6:00 p.m. on Friday and was to remain in custody until 6:00 p.m. on Sunday.

On 22 January 2001, defendant filed a motion for appropriate relief requesting that the trial court modify the conditions of her pro-

bation. In her motion, defendant alleged she was a graduate student and had a "mandatory class" which met on Saturdays from 10:00 a.m. until 1:00 p.m. Defendant further stated that if she missed one of these classes, she would not be permitted to graduate in May. She requested that her probation be modified by allowing her to report to the detention center on Saturday evenings or by starting her active weekend sentence following her graduation.

In the meantime, defendant had been attending her Saturday class rather than reporting to the detention center. Consequently, upon determining that she did not have a mandatory Saturday class, defendant's probation officer filed a report alleging she had violated the conditions of her probation.

On 9 February 2001, the trial court heard defendant's motion and received evidence as to her probation violation. During the hearing, defendant's probation officer testified that, in January of 2000, officials at the detention center informed him that she had failed to report for four separate weekends beginning 29 December 2000 and continuing through 26 January 2001. When he discussed the matter with defendant, she told him that she was unable to report due to her mandatory class. However, following this discussion, the probation officer contacted defendant's graduate professor who informed him that defendant did not have a mandatory Saturday class. The professor further informed him that Saturday classes were by appointment only and that defendant had never been required to attend classes or meetings on Saturdays.

Following this testimony, defendant, while under oath, testified that she had a mandatory Saturday class which had interfered with her ability to serve her weekend sentence. She also provided the trial court with a class syllabus which stated that she had "[m]andatory lab meetings every Saturday from 10:00 a.m.-1:00 p.m." She further stated that her professor had just recently changed the Saturday class from "mandatory" to "by appointment" and presented a second class syllabus which reflected this change. The trial court then inquired of defendant whether she had a letter from her professor supporting her allegations. Defendant replied that she did not have a letter; however, she indicated that the professor's telephone number appeared on the second class syllabus.

The trial court instructed the probation officer to contact the professor who confirmed that defendant had never been required to attend Saturday classes and that such classes were by appointment

only. Nevertheless, defendant continued to insist that she had a mandatory class on Saturday which prevented her from reporting to the detention center. Only after the trial court admonished defendant for being untruthful did she admit that her Saturday class was not mandatory.

The trial court then denied defendant's motion, adjudged her to be in violation of the terms of her probation, and ordered her to serve the two-year sentence. The trial court also found that she had committed perjury, amounting to direct criminal contempt, and ordered that she be held in custody for a period not to exceed thirty days.

[1] Defendant first contends the trial court erred in failing to provide her with an opportunity to cross-examine her professor. She maintains that since the professor had provided damaging information regarding a crucial element of her case, she had a constitutional and statutory right to cross-examine him as an adverse witness.

In support of her contention, defendant cites *Gagnon v. Scarpelli* in which the United States Supreme Court held that due process entitles a defendant involved in a probation revocation hearing to confront and cross-examine adverse witnesses, unless the trial court finds good cause for not allowing confrontation. *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L. Ed. 2d 656 (1973). Defendant also cites N.C. Gen. Stat. § 15A-1345(e), which states in pertinent part:

> At the [probation revocation] hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation.

N.C. Gen. Stat. § 15A-1345(e) (1999).

However, defendant's contention fails to consider the nature of a probation revocation hearing and the requisite burdens of proof. Our appellate courts have consistently held that proceedings to revoke probation are informal in nature such that the trial court is not bound by the strict rules of evidence. *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967); *State v. Young*, 21 N.C. App. 316, 204 S.E.2d 185 (1974); *State v. Tennant*, 141 N.C. App. 524, 540 S.E.2d 807 (2000). Additionally, once the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent

evidence an inability to comply with the terms. *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985). If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation. *State v. Seay*, 59 N.C. App. 667, 298 S.E.2d 53 (1982), *disc. rev. denied*, 307 N.C. 701, 301 S.E.2d 394 (1983) (citations omitted).

Here, through the testimony of defendant's probation officer, the State presented competent evidence establishing that defendant had failed to report to the detention center on four separate occasions and that her stated reason for failing to report (i.e. a mandatory Saturday class) was unfounded. This evidence alone was sufficient to satisfy the State's burden of showing that defendant had violated an important condition of her probation. Only after defendant insisted that she had a mandatory class and presented the trial court with a class syllabus did the trial court contact her professor. Thus, the communication with defendant's professor served merely to confirm what had already been presented to the trial court through competent evidence. Defendant did not at any stage in the proceedings request that her professor be subpoenaed nor did she suggest that he had any information other than what he had reported to the probation officer.

Moreover, the fact that defendant admitted to having been untruthful about having a mandatory Saturday class renders meritless her contention that she had a right to cross-examine her professor as any error the trial court may have committed was harmless. *See Delaware v. Van Arsdall*, 475 U.S. 673, 682, 89 L. Ed. 2d 674, 685 (1986) ("the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case"); *see also State v. Autry*, 321 N.C. 392, 403, 364 S.E.2d 341, 348 (1988) (holding overwhelming evidence of a defendant's guilt may render constitutional error harmless).

After a careful review of the record, we conclude the trial court properly applied the statutory requirements by apprising defendant of the evidence against her, permitting her to present relevant information, and offering her the opportunity to cross-examine the probation officer. Accordingly, we conclude defendant was not denied her constitutional and statutory rights and overrule this assignment of error.

[2] Defendant next contends the trial court erred when it summarily punished her for direct criminal contempt. Specifically, defendant

maintains the trial court failed to provide defendant with notice and an opportunity to respond to its charge that she had committed perjury.

Pursuant to N.C. Gen. Stat. § 5A-14(a):

> The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.

N.C. Gen. Stat. § 5A-14(a) (1999). However,

> Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt.

N.C. Gen. Stat. § 5A-14(b) (1999). The Official Commentary to the statute notes that it:

> was intended not to provide for a hearing, or anything approaching that, in summary contempt proceedings, but merely to assure that the alleged contemnor *had an opportunity to point out instances of gross mistake about who committed the contemptuous act or matters of that sort.*

N.C. Gen. Stat. § 5A-14 (Official Commentary 1999) (emphasis added).

This Court has previously held that "[n]otice and a formal hearing are not required when the trial court promptly punishes acts of contempt in its presence." *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 595, *aff'd*, 350 N.C. 656, 517 S.E.2d 605 (1998). In *Owens*, a television news reporter had been subpoenaed to testify regarding information she had obtained during a criminal investigation. On direct examination, the reporter refused to answer questions, asserting a qualified privilege under state and federal constitutions. The trial court directed the reporter to answer the questions and warned her that if she did not, she would be held in contempt. When the reporter again refused to answer any questions, the trial court summarily found her in contempt and sentenced her to thirty days in custody. *Id.* at 579-80, 496 S.E.2d at 593-94. Citing the Official

Commentary to N.C. Gen. Stat. § 5A-14, we noted that the "requirements of the statute are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction." *Id.* at 581, 496 S.E.2d at 594. We then concluded that the reporter had such an opportunity and affirmed the finding of contempt.

Similar to *Owens*, defendant's contemptuous conduct took place in the trial court's presence and was promptly punished. Likewise, defendant was provided ample opportunity to present the trial court with reasons why she should not be found in contempt. The record clearly shows that, after taking an oath to give truthful testimony, defendant testified that she had a mandatory Saturday class. When confronted, defendant recanted this testimony. She does not dispute that she had been untruthful to the trial court and that this conduct amounts to direct criminal contempt. Therefore, we conclude the trial court did not err when it summarily punished defendant for conduct amounting to direct criminal contempt.

Affirmed.

Judges HUNTER and BRYANT concur.

TOMMY L. SIMPSON, PLAINTIFF v. ROSEMARY RUFFO SIMPSON, A/K/A ROSEMARY LITKA, DEFENDANT

No. COA01-603

(Filed 19 March 2002)

Child Support, Custody, and Visitation— custody—modification—substantial change in circumstances of parent's lifestyle

The trial court did not err in a child custody case by modifying the order and awarding custody of the minor child to defendant mother based on a substantial change of circumstances in defendant's lifestyle, because: (1) the trial court's modification order does not rely solely on defendant's success in overcoming her drug dependency, but viewed her drug-free state as the catapult for a wide array of changes in defendant's life; and (2) the trial court's findings reflect that defendant's life significantly changed when she overcame her drug dependency and remarried,

defendant paid great attention to her minor child, the minor child developed a close relationship with defendant's husband and the child's half brother, and a doctor testified that placement with defendant would be relatively better for the child's growth and well-being.

Appeal by plaintiff from order filed 20 October 2000 by Judge Nathan Hunt Gwyn, III in Stanly County District Court. Heard in the Court of Appeals 19 February 2002.

Helms, Henderson & Porter, P.A., by Christian R. Troy, for plaintiff-appellant.

Currie Law Office, by Lisa W. Currie, for defendant-appellee.

GREENE, Judge.

Tommy L. Simpson (Plaintiff) appeals a custody modification order filed 20 October 2000 awarding custody of his daughter Shelby Lynn Simpson (Shelby) to her mother, Rosemary Ruffo Simpson a/k/a Rosemary Litka (Defendant).

On 25 January 1996, the parties, who had been married since 25 January 1992, were granted a divorce and Plaintiff was awarded custody of their two-year-old daughter Shelby. An order dated 25 January 1996 provided that Defendant is "neither an unfit parent nor is she a bad person" and determined that Plaintiff and Defendant "shall have shared parental responsibility of [Shelby]." The trial court further ordered that Defendant would be allowed visitation "only if [she] undert[ook] monthly drug screening tests for 'all drugs.' "

On 12 August 1999, Defendant filed a motion for an immediate *ex parte* custody order and for a change of custody based on a substantial change of circumstances in her lifestyle. The matter was reviewed by the trial court on 19 August 1999. The trial court ordered that Shelby be placed in the temporary custody of her paternal grandmother and that Plaintiff submit to a psychological evaluation. Upon completion of the psychological evaluation, Defendant's motion to modify custody was tried on 25 and 26 September 2000. In a custody modification order filed 20 October 2000, the trial court found in pertinent part that:

10. [A]t the time [the initial] custody order awarded primary custody [of Shelby] to Plaintiff, [the trial court] perceived and contemplated that Defendant suffered from a dependency upon

illegal drugs[] and accordingly made Defendant's visitation rights contingent upon refraining from the use of all drugs.

11. [F]rom the testimony presented, Defendant has refrained from the use of all drugs for at least five (5) years prior to seeking a modification of custody, and that as a result[,] the quality of Defendant's life and those around her has improved significantly.

12. Defendant re[]married on September 14, 1996; . . . her husband, Rick Litka[,] is a person she has known for fifteen (15) years previously; . . . together Defendant and her husband have a three[-]year[-]old son, "Kolby."

13. [N]ow drug[-]free, re[]married, and the mother of a second child, Defendant has re[]connected with her parents and the other members of her family, visiting in her parents['] home one to three times a week.

14. Defendant and her husband now live in a two-bedroom home with a carport, living room, kitchen, and yard for children to play in. Their home is within walking distance of nearby schools . . . . Defendant and her husband . . . are current on their rent.

15. Defendant presently enjoys a stable work history . . . . Defendant earns $9.00 an hour[] and has held this same job for several years.

. . . .

17. [W]hile Defendant had visitation with [Shelby] from May 27, 2000 till July 29, 2000, Defendant and her husband established a daily routine for Shelby that consisted of her brushing her teeth and hair in the morning, spending time with her maternal grandparents, setting the dinner table, eating together as a family, doing the dishes, playing outdoors, bathing afterwards, watching television, saying her prayers, [and] then going to bed. While with Defendant and Defendant's husband over the summer, Shelby was made to follow rules of the house.

18. Shelby grew attached to her three[-]year[-]old [half] brother Kolby over her summer's visitation . . . .

19. Defendant's neighborhood offers Shelby an opportunity of playing and interacting with other children her age.

20. [W]hile with Defendant, Defendant's husband and Shelby developed a close relationship.

21. [W]hile with Defendant, Shelby was included in a number of family activities, including coloring, bicycling and playing on swings together.

22. Defendant and her husband . . . included Shelby in church activities . . . this past summer.

23. [B]y virtue of her re[]marrying, Defendant now has the benefit of having another adult in the home to help in the running of the house and the raising of a family, whereas before she was by herself.

24. [F]rom the testimony presented, Defendant is now more self-reliant and more financially responsible than before . . . .

25. Defendant has invested in and involved herself in community and neighborhood activities.

26. Defendant keeps and makes available to her children a variety of educational materials in her home. While her child visited with her over the summer, Defendant read to Shelby from these educational materials often.

. . . .

28. [W]hen [Shelby] arrived . . . for her visitation with Defendant this past summer, Shelby was clothed in "toddler[-]sized" clothes despite being seven (7) years of age; also . . . when she arrived she did not yet know how to wipe herself after using the bathroom in a manner appropriate for young girls so as to not have her underwear soiled.

29. [A]t the hearing of this action[,] Defendant called as a witness Dr. Jonathan Gould, Ph.D. [(Dr. Gould)], a child psychologist and certified custody evaluator. . . . [T]he [trial] court received Dr. Gould without objection by . . . Plaintiff as an expert in the field of forensic and clinical psychology. . . . Dr. Gould testified and the Court finds . . . as follows:

> a. Dr. Gould interviewed Defendant in October 1990 [sic] for a total of five hours. . . . [D]uring his interview of Defendant[,] he observed the interactions of Defendant and her daughter Shelby through a one-way mirror unbeknownst to Defendant and [Shelby]. . . . [A]s he did so, Dr. Gould observed "a high level of energy" between Defendant and Shelby, a playfulness, ease, and flexibility that were impressive to Dr. Gould. . . . Dr.

> Gould conducted a similar observation of Plaintiff and Shelby[] and did not note the high degree of interaction between Plaintiff and Shelby as he did between Defendant and Shelby. . . . [I]nstead Plaintiff appeared tired, and Shelby played by herself rather than with her father.
>
> b. [A]ccording to the most recent IQ testing of Plaintiff, [he] has an IQ of 78, which shows borderline intellectual functioning according to Dr. Gould. . . . [T]his level of intellectual functioning adversely impacts Plaintiff's abilities as a parent in terms of his "planfulness[,]" being able to anticipate, and being able to provide educational opportunities for Shelby to grow beyond his own level of intellectual functioning, according to Dr. Gould.
>
> c. [Shelby] has experienced some difficulties in progressing past kindergarten. . . . [S]he has in the past been prescribed Ritalin while in school. . . . Dr. Gould recommended a Pediatric Neurologist be consulted to determine whether Shelby suffers from Attention Deficit Disorder[] or is simply showing symptoms of the underlying stresses of separation and divorce conflict.
>
> d. [B]ased on his findings, Dr. Gould could not and did not offer an opinion as to which parent, Plaintiff or Defendant, would be "absolutely best" for Shelby to live with. Dr. Gould did[,] however[,] testify that based on the relative emotional, social and intellectual functioning of the parties[] and the quality of interaction between parents, that placement with Defendant would be "relatively" better for Shelby's growth and well-being.

The trial court then concluded that:

> 4. [T]here have been substantial changes of circumstances in the life of Defendant since custody was first litigated, in that Defendant has become drug[-]free for over five years, has remarried, has had a second child, has re[]connected herself to her family and community, and now has a stable home and work life.
>
> 5. [T]hese changes . . . benefit [Shelby's] well-being emotionally, physically, intellectually and medically, as well as in other ways.

As a result, the trial court modified the original custody order by awarding custody of Shelby to Defendant.

The issue is whether the trial court's findings support the conclusion that Defendant's changed lifestyle constitutes a substantial change in circumstances benefitting Shelby, thus warranting a modification of the original custody order.

An order pertaining to the custody of a minor child is not a final determination of the rights of the parties as to custody. *See Teague v. Teague*, 272 N.C. 134, 137, 157 S.E.2d 649, 651 (1967). When a substantial change in circumstances affecting the best interest of the child is properly established, the order may be modified. *Pulliam v. Smith*, 348 N.C. 616, 618-19, 501 S.E.2d 898, 899 (1998). "[B]oth changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child" must be considered. *Id.* at 619, 501 S.E.2d at 899. Thus, the reformed lifestyle of a parent who was not originally awarded custody of the child can form the basis of a modification of custody. *Metz v. Metz*, 138 N.C. App. 538, 540, 530 S.E.2d 79, 81 (2000).

Plaintiff first asserts the trial court erred in relying on Defendant's success in overcoming her drug dependency as this was a requirement to visitation in the initial custody order and therefore could not constitute a change in circumstances for purposes of custody modification. The trial court's custody modification order does not rely solely on this issue. More accurately, the trial court viewed Defendant's drug-free state as the catapult for a wide array of changes in Defendant's life. Thus, we reject Plaintiff's argument.

Plaintiff next contends the trial court's findings are insufficient to support the conclusion that the changes in Defendant's lifestyle are beneficial to Shelby. *See Best v. Best*, 81 N.C. App. 337, 343, 344 S.E.2d 363, 367 (1986) (findings of fact must support conclusions of law in modification of custody decree). We disagree.

As the trial court's findings reflect, Defendant's life changed significantly when she overcame her drug dependency and remarried: she became very focused on her family and even had another child; she found stable employment; and she attended church regularly. When Shelby came to visit in the summer, Defendant paid great attention to Shelby's needs, involving her in family activities and helping Shelby with her schooling. As a result, there is a "high level of energy" between Defendant and Shelby that does not exist

between Plaintiff and Shelby, as noted by Dr. Gould. Shelby also developed a close relationship with Defendant's husband and her half brother Kolby.

In contrast, while in the care of Plaintiff, seven-year-old Shelby was still wearing toddler-sized clothes and had not yet learned proper hygiene in that she did not know how to properly wipe herself when using the bathroom. Furthermore, Plaintiff had placed Shelby on Ritalin without first having Shelby tested for attention deficit disorder. Finally, Dr. Gould testified "that based on the relative emotional, social and intellectual functioning of the parties[] and the quality of interaction between the parents . . . placement with Defendant would be 'relatively' better for Shelby's growth and well-being." These findings were sufficient to justify the trial court's conclusion that a substantial change in circumstances had occurred in Defendant's life which served to benefit Shelby "emotionally, physically, intellectually and medically." Accordingly, the trial court committed no error.

Affirmed.

Judges McGEE and THOMAS concur.

DARYL HOPKINS AND DANNY RAY PEELE, PETITIONERS-APPELLANTS v. NASH COUNTY AND THE NASH COUNTY BOARD OF ADJUSTMENT, RESPONDENTS-APPELLEES

No. COA01-378

(Filed 19 March 2002)

Zoning— special use permit—stump dump—whole record test—use not in harmony with surrounding area

The trial court did not err by applying the whole record test and denying petitioners' application for a special use permit for a stump dump because even though the land is zoned for such use, respondent county board of adjustment has met its burden of showing that the development will not be in harmony with the surrounding area since the area has become residential and the proposed site would bring additional traffic, noise, and dust directly into the residential area.

Appeal by petitioners from order entered 10 January 2001 by Judge Cy A. Grant, Sr., in Nash County Superior Court. Heard in the Court of Appeals 31 January 2002.

The Brough Law Firm, by Robert E. Hornik, Jr., for petitioners-appellants.

Poyner & Spruill L.L.P., by Richard J. Rose and Gregory S. Camp, for respondents-appellees.

BRYANT, Judge.

This is the case of a stump dump denied. Petitioners, Daryl Hopkins and Danny Ray Peele, applied for a special use permit from the Nash County Board of Adjustment (Board) to use land zoned for A-1 agricultural purposes as a clay borrow pit and land clearing and inert debris [LCID] landfill. The function of a clay borrow pit is to mine clay from the pit and move it to an off-site location. The pit can then be filled with tree stumps and limbs (thus, a "stump dump"). These are permissible uses for land zoned A-1 for agricultural purposes.

The Board denied the permit on 28 August 2000 after finding that, although there was evidence that the application must be granted, there was rebuttal evidence that the application should be denied because the development would more probably than not: 1) materially endanger the public health or safety; 2) substantially injure the value of adjoining or abutting property; and 3) fail to conform with the land development plan. Petitioners filed a Petition for Writ of Certiorari in the Nash County Superior Court on 13 October 2000. The Superior Court granted certiorari and on 10 January 2001 affirmed the Board's denial of the permit. Petitioners appeal.

Petitioners claim, inter alia, that the Board's findings in support of its decision to deny the application for a special use permit were not supported by substantial evidence in the record.

I. Standard of Review

When reviewing the trial court's decision, this Court must determine: 1) whether the trial court used the correct standard of review; and, if so, 2) whether it properly applied this standard. *C.C. & J. Enters. v. City of Asheville*, 132 N.C. App. 550, 512 S.E.2d 776 (1999). When the Superior Court grants certiorari to review a decision of the Board, it functions as an appellate court rather than a trier of fact. *See*

Sun Suites Holdings, LLC v. Bd. of Aldermen, 139 N.C. App. 269, 533 S.E.2d 525 (2000).

Our Supreme Court has established the following guidelines for reviewing special zoning request decisions:

> (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.

Jennewein v. City Council of City of Wilmington, 62 N.C. App. 89, 92-93, 302 S.E.2d 7, 9 (1983).

The standard of review depends on the nature of the error of which the petitioner complains. If the petitioner complains that the Board's decision was based on an error of law, the superior court should conduct a de novo review. *C.C. & J. Enters.*, 132 N.C. App. at 552, 512 S.E.2d at 769. If the petitioner complains that the decision was not supported by the evidence or was arbitrary and capricious, the superior court should apply the whole record test. *Id.* The whole record test requires that the trial court examine all competent evidence to determine whether the decision was supported by substantial evidence. *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 347, 543 S.E.2d 169, 174 (2001).

II. Substantial Evidence

In this case, petitioners complain that the Board's findings in support of its decision to deny petitioners' application for a special use permit were not supported by substantial evidence in the record. When addressing this argument, the Superior Court should have applied the whole record test. The 10 January 2001 Order of the Superior Court states that the whole record test should be applied to issues of whether the Board's decision was supported by substantial evidence. Because the Superior Court used the correct test, we next determine whether the trial court properly applied the whole record test.

The Order states that the trial court reviewed petitioners' petition for a special use permit, the Record of the proceedings, oral argument of counsel for both sides and the briefs submitted by both sides. The

trial court then determined that there was "competent, material, and substantial evidence" in the record to support the Board's findings. "Substantial evidence" must be "more than a scintilla or a permissible inference." *Wiggins v. N.C. Dep't of Human Resources*, 105 N.C. App. 302, 306, 413 S.E.2d 3, 5 (1992) (citing *Thompson v. Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977)). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849 (1997) (citing *CG & T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992)).

Subsection 4-7.5(H) of the Nash County Uniform Development Ordinance states:

> (H) Subject to (I), the Board of Adjustment or the Board of Commissioners, respectively, *shall* approve the requested [special use] permit *unless* it concludes, based upon the information submitted at the hearing, that:
>
> (1) The requested permit is not within its jurisdiction according to the Table of Permissible Uses; or
>
> (2) The application is incomplete; or
>
> (3) If completed as proposed in the application, the development will not comply with one or more requirements of this Ordinance.

Nash County, N.C., Uniform Development Ordinance art. 4, § 4-7.5(H) (1998) (emphases added). Subsections 4-7.5(I)(1) through (3) state:

> (I) Even if the permit-issuing board finds that the application complies with all other provisions of this Ordinance, it may still deny the permit if it concludes, based upon the information submitted at the hearing, that if completed as proposed, the development, more probably than not:
>
> (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 the area in which it is to be located . . . .

Nash County, N.C., Uniform Development Ordinance art. 4, § 4-7.5(I)(1) to (3) (1998) (emphases added). Because of the disjunctive conjunction, "or," the Board need only find one basis for denying the permit. *See Howard v. City of Kinston*, 148 N.C. App. 238, 558 S.E.2d 221. Finally, subsection 4-7.5(J) states:

> (J) The burden of persuasion on the issue of whether the development, if completed as proposed, will comply with the requirements of this Ordinance remains at all times on the applicant. The burden of persuasion on the issue of whether the application should be turned down for any of the reasons set forth in Subsection (I) rests on the party or parties urging that the requested permit should be denied.

Nash County, N.C., Uniform Development Ordinance art. 4, § 4-7.5(J) (1998). We are not persuaded that respondent has met its burden of showing that the development will materially endanger the public health or safety, or will substantially injure the value of nearby property. However, because we find that respondent has met its burden of showing that the development will not be in harmony with the surrounding area, we address only that issue.

III. Harmony With the Area

Petitioners argue that the record of proceedings before the Board did not establish "more probably than not" that petitioners' proposal would not be in harmony with the area in which the LCID and clay borrow pit is located. Specifically, petitioners argue that "the inclusion of a use as a conditional use in a particular zoning district establishes a *prima facie* case that the permitted use is in harmony with the general zoning plan." This is a true statement. Petitioners argue that the proposed use is in harmony with the area and that the respondents have not shown by competent evidence in the record that the permit should be denied. While petitioners are correct that there is established a *prima facie* case that the permitted use is in harmony with the general zoning plan, the trial court found and we agree that respondents have presented competent evidence to sustain their burden of showing that the proposed use will not be in harmony with the surrounding area.

In *Vulcan Materials Co. v. Guilford County Bd. of County Comm'rs.*, 115 N.C. App. 319, 444 S.E.2d 639 (1994), Vulcan Materials Company [Vulcan] sought a special use permit to operate a stone quarry. Vulcan's land was zoned agricultural, which permitted the operation of a stone quarry. The Guilford County Board of County

Commissioners denied the permit after finding in part that there was no credible evidence that using the land for a rock quarry would be in harmony with the area in which it was located. The Superior Court reversed after finding that the denial of the permit was not based on material, competent and substantial evidence. In its argument to this Court, Vulcan argued that because "quarrying" is a permitted use within the context of the zoning ordinance, it necessarily is in "harmony with the area." *Id.* 324, 444 S.E.2d at 642. This Court disagreed, holding that if "competent, material, and substantial evidence reveals that the use contemplated is not in fact in 'harmony with the area in which it is to be located' the Board may so find." *Id.* at 324, 444 S.E.2d at 643.

In the case at bar, petitioners raise the same argument as Vulcan. Petitioners argue that the land they want to develop is zoned as an A-1 Agricultural District, which permits land demolition and construction debris landfills (disposal sites for stumps, limbs, leaves, concrete, brick, wood and uncontaminated earth); therefore, the use is in harmony with the general zoning plan. Our review of the record, however, reveals competent, material, and substantial evidence that this use is not in harmony with the surrounding area, which is also zoned A-1.

Thirty-five adjoining property owners were represented by counsel at the 18 August 2000 Board meeting. Testimony in the record reveals the following salient facts: Union Hope Community has existed for at least 200 years; it was once agricultural in nature, but is now residential; there are several residences across the street from the proposed site, and many single-family residences up and down NC 97 for one-half mile in each direction. One resident testified that Union Hope Community was a farming community "until it went residential;" there are numerous residences adjacent to the proposed site; between thirty and forty trucks per day would enter and exit the proposed site; the site would be open from 6 a.m. to 8 p.m., and would constantly bring additional traffic, noise and dust directly into a residential area. We find this to be competent, material, and substantial evidence that the LCID and clay borrow pit are not in harmony with the surrounding area, despite being in compliance with zoning ordinances. Because those opposing the granting of the permit met their burden of persuasion, this assignment of error is overruled.

Affirmed.

Judges TIMMONS-GOODSON and SMITH concur.

IN THE MATTER OF: TAMMY RUTH MATHERLY

No. COA01-580

(Filed 19 March 2002)

Termination of Parental Rights— findings—insufficient

The trial court erred in a termination of parental rights order by not stating that its findings were made by clear, cogent and convincing evidence. Furthermore, the court's findings as to respondent's financial and employment abilities do not evidence an appropriate consideration of respondent's age, there was no finding that respondent was emancipated and legally competent to establish her own residency, and it was not apparent in the order that the issue of "willfulness" was adequately addressed.

Appeal by respondent from judgment entered 23 October 2000 by Judge Ernest J. Harviel in Alamance County District Court. Heard in the Court of Appeals 9 January 2002.

Alamance County Guardian ad Litem Elisa A. Chinn-Gary for Petitioner-Appellee.

Walker & Bullard, by Daniel S. Bullard, for respondent-appellant.

THOMAS, Judge.

Respondent, Lynette Matherly, appeals from an order entered by the trial court terminating her parental rights to Tammy Ruth Matherly. Because the trial court did not specify what standard it used in making findings of fact, and because those findings were insufficiently detailed as to respondent's willfulness and capability, we reverse and remand.

The facts are as follows: Respondent was fourteen years old when she gave birth to Tammy on 3 April 1997. Approximately fifteen months later, respondent, then living in Arizona, allowed Tammy to go on an extended trip with respondent's father and stepmother. The trip ended in a motel room in July 1998 when the Alamance County Department of Social Services (DSS) found Tammy and seven of respondent's siblings in a state of neglect. Respondent's stepmother, the only adult present in the motel room, was charged with eight counts of child abuse and jailed.

Tammy was immediately placed in the custody of DSS, and after a hearing on 3 and 4 November 1998, was adjudicated neglected and dependent. Among its findings, the trial court determined that Tammy had been improperly fed, suffered from head lice, and did not have a stable residence. The trial court also found that Tammy had been in the custody of her step-grandmother at the time of DSS's intervention, but the step-grandmother was in jail because of the child abuse charges. At disposition, the trial court ordered Tammy's custody to remain with DSS. Respondent was not present at either the adjudicatory or dispositional hearings.

In February 1999, respondent, who turned sixteen years old on 16 December 1998, moved to North Carolina and began working with DSS in an effort to reunify with Tammy. Her efforts were not long-lasting or consistent. Respondent set up an appointment with a therapist and began the sessions, but she stopped prior to being released. She began visits with Tammy, but often failed to keep the appointments. Respondent attended four parenting classes, but then failed to appear for two additional ones or for a second set that had been recommended by petitioner, the guardian *ad litem*.

On 1 March 2000, petitioner filed for the termination of respondent's and the putative father's parental rights. Respondent was seventeen years old and was appointed an attorney and guardian *ad litem*. The paternity of the father still had not been established, with service on him being accomplished by publication.

The petition alleges, *inter alia*, that: (1) respondent failed to attend eleven out of sixteen regularly scheduled visits with Tammy during 1999 and 2000; (2) respondent failed to advise her social worker of her whereabouts during a three-week period; (3) respondent failed to establish and maintain a stable residence; (4) respondent failed to comply with court directives concerning financial support; (5) respondent left Tammy in foster care or placement outside the home for more that twelve months without showing the court that she has made reasonable progress toward correcting the conditions that led to Tammy's removal; (6) respondent failed to obtain and maintain permanent employment; and (7) Tammy was born out of wedlock and has not been legitimated.

There is a two-step process in a termination of parental rights proceeding. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). In the adjudicatory stage, the trial court must find that at least one ground for the termination of parental rights listed in N.C. Gen. Stat.

§ 7B-1111 exists. N.C. Gen. Stat. § 7B-1109 (1999). The petitioner has the burden throughout the adjudicatory stage to prove by clear and convincing evidence that facts establishing the grounds for termination exist. *See* N.C. Gen. Stat. § 7B-1111(b). Once one or more of the grounds for termination are established, the trial court must proceed to the dispositional stage where the best interests of the child are considered. There, the court shall issue an order terminating the parental rights, unless it further determines that the best interests of the child require otherwise. N.C. Gen. Stat. § 7B-1110(a) (1999). *See also In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001).

In the instant case, the termination grounds found by the trial court were: (1) that respondent had willfully left the child in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made to correct the conditions leading to the child's removal; (2) that respondent had willfully failed to pay a reasonable portion of the child's costs for a continuous period of six months preceding the petition, although respondent was physically and financially able to do so; (3) the child was born out of wedlock and the putative father had not judicially established paternity nor legitimated the child by marrying respondent or by providing support to the child or respondent; and (4) that respondent is incapable of providing proper care for the child and there is a reasonable probability that such incapacity will continue for the foreseeable future based on the mother's present circumstances. *See* N.C. Gen. Stat. §§ 7B-1111 (a) (2), (3), (5) and (6) (1999).

The trial court, however, did not state that the findings as to any of the grounds were made by "clear, cogent and convincing evidence." This Court has held that the trial court must recite the standard of proof in the adjudicatory order and that a failure to do so is error. *See In re Lambert-Stowers*, 146 N.C. App. 438, 552 S.E.2d 278 (2001); *In re Church*, 136 N.C. App. 654, 657, 525 S.E.2d 478, 480 (2000). We thus reverse and remand the matter to the trial court with instructions to determine whether the evidence in the adjudicatory hearing satisfies the required standard of proof.

Further, we note that the trial court's written findings as to respondent's financial and employment abilities do not evidence an appropriate consideration of respondent's age. She was fifteen years old when DSS first took custody of Tammy and was seventeen when

the petition to terminate her parental rights was filed. Throughout the trial court's involvement, respondent herself was a juvenile, an unemancipated minor, under N.C. Gen. Stat. § 7B- 101(14).

A careful evaluation of the facts by the trial court here is critical, particularly after this Court's opinion, affirmed by our Supreme Court, to hold grandparents responsible for the support of the offspring of their minor child. *See Whitman v. Kiger*, 139 N.C. App. 44, 533 S.E.2d 807 (2000), *aff'd*, 353 N.C. 360, 543 S.E.2d 476 (2001). In *In re Ballard*, our Supreme Court held that a "finding that a parent has [the] ability to pay support is essential to termination for nonsupport on this ground." *In re Ballard*, 311 N.C. 708, 716-17, 319 S.E.2d 227, 233 (1984). Additionally, there was no finding that respondent was emancipated and legally competent to "establish" her own residency when respondent was only sixteen years old. DSS's "care plan" had included an objective that she do so.

Additionally, there must be a proper application of the words "willfully" in grounds (2) and (3) and "incapable" in ground (6) under N.C. Gen. Stat. § 7B-1111. This Court has had numerous occasions to consider the meaning of willfulness as used in statutes such as these. The word 'imports knowledge and a stubborn resistance . . . one does not willfully fail to do something which it is not in his power to do.' " *In re Moore*, 306 N.C. 394, 411, 293 S.E.2d 127, 137 (1982) (Carlton, J., dissenting) (citations omitted), *appeal dismissed*, 459 U.S. 1139, 74 L. Ed. 2d 987 (1983). Evidence showing a parents' ability, or capacity to acquire the ability, to overcome factors which resulted in their children being placed in foster care must be apparent for willfulness to attach. *In re Wilkerson*, 57 N.C. App. 63, 291 S.E.2d 182 (1982). In the instant case, it is not apparent from the trial court's order that "willfulness" was adequately addressed.

The trial court must make specific findings of fact showing that a minor parent's age-related limitations as to willfulness have been adequately considered. *See generally*, N.C. Gen. Stat. § 7B-1110(b) (1999). Likewise, the juvenile court is under a duty to make findings as to whether a minor parent's inevitable move into adulthood is likely to cure what would otherwise form the basis of an incapability under section 7B-1111(a)(6).

Accordingly, we remand this issue as well to the trial court with instructions to make appropriate findings as to respondent's willfulness and capability consistent with this opinion. The trial court may take additional evidence in its discretion.

REVERSED AND REMANDED.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. ROBERT WILLIAM TEW

No. COA01-454

(Filed 19 March 2002)

1. Criminal Law— joinder—purposeful circumvention—no evidence

The prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury did not violate statutory joinder requirements where defendant was originally indicted for attempted murder, defendant requested that the court charge on assault with a deadly weapon inflicting serious injury, the court denied that request and defendant was convicted of attempted second-degree murder, that conviction was vacated pursuant to a ruling that the crime of attempted second-degree murder did not exist, and defendant was then charged with assault with a deadly weapon with intent to kill inflicting serious injury. There is no evidence that the State withheld the charge to circumvent joinder requirements. N.C.G.S. § 15A-926(c)(2).

2. Criminal Law— collateral estoppel—attempted murder—assault with a deadly weapon with intent to kill inflicting serious injury—issue of intent

The State was not collaterally estopped from prosecuting defendant for assault with a deadly weapon with intent to kill inflicting serious injury because defendant was originally convicted of attempted second-degree murder in a prosecution for attempted first-degree murder and that conviction was vacated. Although defendant argued that this verdict resolved the issue of intent to kill in his favor, a rational jury could have grounded its verdict on the absence of premeditation and deliberation.

3. Constitutional Law— double jeopardy—attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury

Defendant was not subjected to double jeopardy where he was originally prosecuted for attempted first-degree murder, convicted of attempted second-degree murder, that judgment was vacated on appeal pursuant to a ruling that attempted second-degree murder is not a crime, and defendant was then prosecuted for assault with a deadly weapon with intent to kill inflicting serious injury. The assault charge requires proof of use of a deadly weapon, an element not required for attempted murder, while malice, premeditation, and deliberation are required for attempted first-degree murder but not for assault with a deadly weapon with intent to kill inflicting serious injury.

Appeal by defendant from judgment dated 8 September 2000 by Judge Stafford G. Bullock in Alamance County Superior Court. Heard in the Court of Appeals 19 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

Christopher T. Watkins, for defendant-appellant.

GREENE, Judge.

Robert William Tew (Defendant) appeals a judgment dated 8 September 2000 entered consistent with a jury verdict finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury.

Defendant was indicted on 9 March 1998 by the Alamance County Grand Jury for attempting to murder Mary Josephine Tew (Tew). A jury trial was held and prior to the trial court charging the jury, Defendant requested the trial court "consider charging on assault with a deadly weapon inflicting serious bodily injury." The trial court denied Defendant's request because assault with a deadly weapon inflicting serious bodily injury is not a lesser-included offense of attempted first-degree murder or attempted second-degree murder. The trial court instructed the jury on attempted first-degree murder and attempted second-degree murder. With respect to attempted first-degree murder, the trial court instructed that in order to find Defendant guilty, the jury had to find Defendant "intended to unlawfully kill [Tew] with malice and with premeditation and deliberation."

In regard to attempted second-degree murder, the trial court instructed that in order to find Defendant guilty of that crime, the jury had to find Defendant "intended to unlawfully kill [Tew] with malice." On 8 October 1998, the jury found Defendant guilty of attempted second-degree murder.

On appeal to this Court, in an unpublished decision, this Court found no error in Defendant's trial. *State v. Tew*, 136 N.C. App. 669, 530 S.E.2d 366 (unpublished), *reversed*, 352 N.C. 362, 544 S.E.2d 557 (2000). On discretionary review to the North Carolina Supreme Court, Defendant's conviction of attempted second-degree murder was vacated pursuant to the Supreme Court's 7 April 2000 decision in *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000) that the crime of attempted second-degree murder did not exist. *State v. Tew*, 352 N.C. 362, 544 S.E.2d 557 (2000).

On 30 May 2000, the Alamance County Grand Jury issued an indictment charging Defendant with the assault of Tew with a deadly weapon with intent to kill inflicting serious injury. Defendant moved to dismiss the charge on 29 August 2000, arguing: he had previously been placed in jeopardy for the same offense; prior to his previous trial, he had requested the State to charge him with the statutory offense of assault with a deadly weapon with intent to kill inflicting serious injury; assault with a deadly weapon with intent to kill inflicting serious injury is a joinable offense under N.C. Gen. Stat. § 15A-926; during the charge conference at his attempted murder trial, Defendant requested the trial court instruct the jury on assault with a deadly weapon with intent to kill inflicting serious injury, but the trial court declined to do so; prior to Defendant's conviction being vacated on 2 June 2000, the State obtained an indictment for the offense of assault with a deadly weapon with intent to kill inflicting serious injury; the State was "collaterally estopped from relitigating the issue where the State has elected its reme[]dy"; and an "issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of . . . Defendant in a prior prosecution between the parties." Defendant requested the trial court dismiss with prejudice the charge of assault with a deadly weapon with intent to kill inflicting serious injury.

At a hearing on Defendant's motion on 5 September 2000, the trial court denied Defendant's motion to dismiss. Subsequently, a jury trial was held and Defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury.

The issues are whether: (I) Defendant's trial on the charge of assault with a deadly weapon with intent to kill inflicting serious injury violated the criminal joinder requirements; (II) the State was collaterally estopped from litigating the issue of intent to kill; and (III) Defendant was twice placed in jeopardy for the same offense.

I

[1] Defendant argues the trial court erred in denying his motion to dismiss because the State failed to join the charge of assault with a deadly weapon with intent to kill inflicting serious injury with the attempted murder charges. We disagree.

"A defendant who has been tried for one offense may thereafter move to dismiss a charge of a joinable offense." N.C.G.S. § 15A-926(c)(2) (1999). Joinable offenses include "felonies or misdemeanors or both, [which] 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.G.S. § 15A-926(a) (1999). In order for there to be joinable offenses, a defendant must have been charged with the crimes at the outset. *State v. Cox*, 37 N.C. App. 356, 361, 246 S.E.2d 152, 154, *disc. review denied*, 295 N.C. 649, 248 S.E.2d 253 (1978), *cert. denied*, 440 U.S. 930, 59 L. Ed. 2d 487 (1979). In other words, if a defendant is tried on one indictment and a second indictment is issued subsequent to his trial on the first indictment, section 15A-926(a) does not apply. *Id.*; *State v. Warren*, 313 N.C. 254, 260, 328 S.E.2d 256, 261 (1985); *State v. Furr*, 292 N.C. 711, 724, 235 S.E.2d 193, 201, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977). "If a defendant shows[, however,] that the [State] withheld indictment on additional charges solely in order to circumvent the statutory joinder requirements, the defendant is entitled under N.C.G.S. [§] 15A-926(c)(2) to a dismissal of the additional charges." *Warren*, 313 N.C. at 260, 328 S.E.2d at 261. The defendant bears the burden of persuasion in showing the prosecution withheld the additional indictment for purposes of circumventing the joinder statute. *Id.*

In this case, at the time Defendant was tried for attempted murder, the prosecution had neither sought nor obtained an indictment for assault with a deadly weapon with intent to kill inflicting serious injury. Defendant argues he requested the State charge him with assault with a deadly weapon with intent to kill inflicting serious injury prior to the first trial and the State withheld such an indict-

ment. Even assuming Defendant requested such a charge, there is no evidence in the record to this Court showing the State denied such a request for purposes of circumventing the joinder requirement. As Defendant has not met his burden of persuasion on this issue, the State's prosecution of Defendant on the assault with a deadly weapon with intent to kill inflicting serious injury charge did not violate the statutory joinder requirements.

II

[2] Defendant next contends the jury in his previous trial resolved the issue of intent to kill in his favor and therefore the State is collaterally estopped from prosecuting him for assault with a deadly weapon with intent to kill inflicting serious injury. We disagree.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 25 L. Ed. 2d. 469, 475 (1970). "When raising a claim of collateral estoppel, the defendant bears the burden of showing that the issue he seeks to foreclose was *necessarily* resolved in his favor at the prior proceeding." *Warren*, 313 N.C. at 264, 328 S.E.2d at 263. "Where a previous judgment of acquittal was based upon a general verdict" of guilty or not guilty, the trial court must " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than' " one necessary for resolving the pending case. *Ashe*, 397 U.S. at 444, 25 L. Ed. 2d. at 475-76 (citation omitted).

Defendant argues that because the jury acquitted him of attempted first-degree murder, it necessarily resolved the issue of intent to kill in his favor. An individual is guilty of attempted first-degree murder "if he specifically intends to kill another person unlawfully; he does an overt act calculated to carry out that intent, going beyond mere preparation; he acts with malice, premeditation, and deliberation; and he falls short of committing the murder." *State v. Cozart*, 131 N.C. App. 199, 202-03, 505 S.E.2d 906, 909 (1998), *disc. review denied*, 350 N.C. 311, 534 S.E.2d 600 (1999).

In this case, a jury previously acquitted Defendant of attempted first-degree murder. A rational jury could have grounded its verdict on the absence of premeditation and deliberation, and not on whether

Defendant had the intent to kill Tew. Consequently, the issue of intent was not necessarily resolved in Defendant's favor.

III

[3] Defendant finally contends he was twice placed in jeopardy for the same offense. We disagree.

"The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against multiple punishments for the same offense." *State v. Washington*, 141 N.C. App. 354, 368, 540 S.E.2d 388, 398 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). This provision is violated if " 'the evidence required to support the two convictions is identical.' "[1] *Id.* (citation omitted). Where " 'proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.' " *State v. Fernandez*, 346 N.C. 1, 19, 484 S.E.2d 350, 361 (1997) (citation omitted).

Assault with a deadly weapon with intent to kill inflicting serious injury requires proof of the use of a deadly weapon, an element not required for attempted murder. *Washington*, 141 N.C. App. at 369, 540 S.E.2d at 398; *Coble*, 351 N.C. at 453, 527 S.E.2d at 49 ("assault with a deadly weapon with intent to kill requires proof of an element not required for attempted murder—use of a deadly weapon"). Similarly, malice, premeditation, and deliberation are elements of attempted first-degree murder but not of assault with a deadly weapon with intent to kill inflicting serious injury. *Washington*, 141 N.C. App. at 369, 540 S.E.2d at 398. Accordingly, since assault with a deadly weapon with intent to kill inflicting serious injury requires proof of an additional element not required in attempted murder, Defendant was not subjected to double jeopardy.

Affirmed.

Judges McGEE and THOMAS concur.

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1. In addition, double jeopardy bars "additional punishment where the offenses have the same elements or when one offense is a lesser-included offense of the other." *State v. McAllister*, 138 N.C. App. 252, 255, 530 S.E.2d 859, 862, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000).

STATE OF NORTH CAROLINA v. JAMES MARVIN NAPIER, SR.

No. COA01-236

(Filed 19 March 2002)

Firearms and Other Weapons— possession of a firearm by a felon—justification not a defense

The trial court did not abuse its discretion by denying defendant's request for a jury instruction stating that justification is a defense for possession of a firearm by a felon under N.C.G.S. § 14-415.1, because: (1) defendant's case does not fit within the statute's exception limiting its applicability to the confines and privacy of the convicted felon's own premises since defendant was not within his own premises; and (2) North Carolina courts have not recognized justification as a defense to a charge of possession of a firearm by a felon, and the instruction is not justified in this case since the evidence does not support a conclusion that defendant was under a present or imminent threat of death or injury.

Appeal by defendant from judgment entered 4 January 2000 by Judge Michael E. Beale in Richmond County Superior Court. Heard in the Court of Appeals 22 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

Noell P. Tin for defendant-appellant.

EAGLES, Chief Judge.

James Marvin Napier, Sr., ("defendant") appeals from the trial court's judgment entered on a jury verdict finding him guilty of possession of a firearm by a felon. On appeal, defendant's sole assignment of error is that the trial court erred in denying his request for a jury instruction stating that justification is a defense for possession of a firearm by a felon. After careful review of the record, briefs, and arguments of counsel, we find no error.

The evidence tends to show the following. Defendant, a convicted felon, was involved in an on-going feud with his neighbor, Robert Ford, and his neighbor's son, Brandon ("Brad") Ford. On or about 30 June 1999, Brad Ford began shooting a shotgun in the air over defend-

ant's property. During the next few days, Brad Ford continued to shoot over defendant's property. At approximately 8:00 p.m. on 3 July 1999, defendant, with a holstered 9 millimeter handgun attached to his hip, walked across the street to Robert Ford's premises. Neither Robert Ford nor Brad Ford was armed at the time.

Once defendant arrived on Robert Ford's premises, defendant "walked up to [Robert Ford and Brad Ford]" and admittedly stated "[i]f I'm bothering y'all with this gun or I'm scaring you or defending [sic] y'all with this, I'll take it back to the house." Defendant and Robert Ford then discussed the neighbor's situation. Brad Ford left the two men in the yard and entered the residence. After several hours, the conversation between defendant and Robert Ford escalated into a physical altercation. Upon seeing the altercation, Brad Ford came out of the residence and joined the fight. Eventually, someone called 9-1-1 and law enforcement officers arrived on the scene. After the officers restored order and left the scene, defendant fired a gun from his property and hit Brad Ford in the arm.

Defendant was tried before a jury during the 13 December 1999 Criminal Session of Richmond County Superior Court on charges of (1) discharging a firearm into occupied property, (2) assault with a deadly weapon with intent to kill inflicting serious injury, (3) conspiracy to discharge a firearm into occupied property, (4) conspiracy to commit an assault with a deadly weapon, (5) possession of a firearm by a felon on 4 July 1999, and (6) possession of a firearm by a felon on 3 July 1999. At the conclusion of the trial, the jury deadlocked on the first two charges, and the trial court declared a mistrial as to those counts. Additionally, the jury found defendant not guilty on the conspiracy and the 4 July 1999 possession charges, and the jury found defendant guilty of the 3 July 1999 possession of a firearm by a felon charge. The trial court entered judgment and sentenced defendant to a term of imprisonment of 25 to 30 months. Defendant appeals.

On appeal, defendant argues that the trial court abused its discretion in denying his request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. We disagree.

In North Carolina, requests for special jury instructions are allowable pursuant to G.S. §§ 1-181 and 1A-1, Rule 51(b). It is well settled that the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence. *See*

Roberts v. Young, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995). "The proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case." *State v. Scales*, 28 N.C. App. 509, 513, 221 S.E.2d 898, 901 (1976). "However, the trial court may exercise discretion to refuse instructions based on erroneous statements of the law." *Roberts*, 120 N.C. App. at 726, 464 S.E.2d at 83 (citation omitted).

Here, defendant was charged with possession of a firearm by a felon in violation of G.S. § 14-415.1. Pursuant to § 14-415.1(a), it is unlawful "for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches . . . ." An exception to this offense exists for a felon who possesses a firearm "within his own home or on his lawful place of business." G.S. § 14-415.1(a). In creating this exception, the legislature clearly expressed its intent to limit its applicability to the confines and privacy of the convicted felon's own premises, over which he has dominion and control to the exclusion of the public. *See State v. McNeill*, 78 N.C. App. 514, 516, 337 S.E.2d 172, 173 (1985). Here, defendant was not within his own premises. Thus, defendant's case does not fit within this exception.

At trial, defendant requested an instruction on justification, and the court denied the request. We note that the courts of this State have not recognized justification as a defense to a charge of possession of a firearm by a felon. However, North Carolina has recognized the defense of necessity in limited circumstances. *See State v. Thomas*, 103 N.C. App. 264, 405 S.E.2d 214 (1991). "Necessity excuses otherwise criminal behavior which was reasonably necessary to protect life, limb, or health, and where no other acceptable choice was available." *State v. Haywood*, 144 N.C. App. 223, 234-35, 550 S.E.2d 38, 45, *disc. review denied*, 354 N.C. 72, 553 S.E.2d 206 (2001). Nevertheless, we are unable to find any case law in our State supporting the proposition that necessity is available as a defense to a charge of possession of a firearm by a felon. In fact, defendant concedes that "[n]o reported opinions from this state specifically address the application of the necessity defense to possession of a firearm by a convicted felon."

Accordingly, defendant asks this Court to expand the necessity defense and "adopt the test for justification as set out by the Eleventh Circuit" in *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir.), *cert. denied*,

530 U.S. 1264, 147 L. Ed. 2d 988 (2000). Under the test set out in *Deleveaux*, a defendant must show four elements to establish justification as a defense to a charge of possession of a firearm by a felon:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;
>
> (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
>
> (3) that the defendant had no reasonable legal alternative to violating the law; and
>
> (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Deleveaux, 205 F.3d at 1297. Significantly, we note that the *Deleveaux* court limited the application of the justification defense to 18 U.S.C. § 922(g)(1) cases (federal statute for possession of a firearm by a felon) in "only extraordinary circumstances." *Id.*

Assuming, without deciding, for purposes of this appeal that the *Deleveaux* rationale applies in North Carolina, the evidence here does not support a conclusion that defendant was under a present or imminent threat of death or injury. Regardless of the evidence of Brad Ford's drug and alcohol use, Brad Ford's threats, and Brad Ford's recent shooting over defendant's property, the evidence shows that defendant, while armed, voluntarily walked across the street and onto Robert Ford's premises; defendant asked Robert Ford and Brad Ford if they wanted him to take the gun home; and defendant, while armed, stayed on Robert Ford's premises for several hours talking to Robert Ford before the fight ensued.

Without ruling on the general availability of the justification defense in possession of a firearm by a felon cases in North Carolina, we conclude that under the facts of this case defendant was not entitled to a justification instruction. *See U.S. v. Crittendon*, 883 F.2d 326 (4th Cir. 1989). Since the evidence here does not support the justification instruction, the trial court did not abuse its discretion in denying defendant's request.

In sum, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and SMITH concur.

ALLSTATE INSURANCE COMPANY, SUBROGEE OF WILLIAM A. COOPER v. CHARLES F. OXENDINE AND JAMIE LOCKLEAR

No. COA01-167

(Filed 19 March 2002)

Negligence— land damaged by fire—licensee—nuisance—summary judgment

The trial court did not err in a negligence case by granting summary judgment in favor of defendant for a subrogation claim for damages arising out of an incident where fire from trash burning activities of a third person on defendant's land damaged a neighbor insured's home, because: (1) a landowner is not liable for injury caused by the acts of a licensee, unless such acts constitute a nuisance which the owner knowingly suffers to remain; and (2) although it is permissible to infer in the instant case that the conduct of a third party was a proximate cause of plaintiff's injury, there is no evidence of burning activities by the third party of such duration or in such a manner as to amount to a nuisance, or that defendant with knowledge of such conduct permitted it to continue.

Appeal by plaintiffs from judgment entered 30 September 1999 by Judge Jack Thompson in Scotland County Superior Court. Heard in the Court of Appeals 5 December 2001.

Evans & Co., by Robert G. McIver, attorney for plaintiffs-appellants.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P, by John H. Anderson, attorney for defendant-appellee.

THOMAS, Judge.

Plaintiff, Allstate Insurance Company, appeals the trial court's grant of summary judgment in a subrogation claim for damages against defendant Charles F. Oxendine (Oxendine). A home of plain-

tiff's insured, William A. Cooper (Cooper), burned when a fire originating on Oxendine's land got out of control. Based on the reasoning herein, we affirm.

The facts are as follows: Oxendine owns land adjacent to Cooper's. He and his wife live there in one residence while defendant Jamie F. Locklear (Locklear) and Oxendine's daughter live together in a separate residence on the property. Oxendine's daughter financed the home and the couple pays no land rent.

In January, 1995, Oxendine utilized three fifty-five gallon drums for burning trash between his trips to a landfill. In a deposition, Oxendine stated that he never left the area around the drums when a fire was still burning and kept a water hose within reach. He further said Locklear and his daughter were given the privilege of using the drums "any time they wanted to." Locklear and Oxendine's daughter had resided there for several years prior to 1995, and by the time of the lawsuit in 1998, were married with children.

On the morning of 21 January 1995, Locklear burned a bag full of trash in one of the drums while Oxendine was asleep. In a deposition, Locklear said that he stayed with the fire until it was "just smoking a little bit," and then did yard work and washed two cars. He returned to his residence only after being outside for several hours. During the afternoon, however, while Oxendine was at work, the fire escaped the drum, spread to the ground, and raced toward Cooper's property. It eventually engulfed part of his home.

Plaintiff paid Cooper $47,304.72 under his homeowner's policy for the damage and then proceeded against Oxendine and Locklear. In the complaint, plaintiff alleged joint negligence and charged defendants with failing to keep a proper lookout, failing to take adequate precautions to protect against the spread of fire, and failing to ensure that the fire was extinguished after their trash burning activities concluded.

Oxendine moved for summary judgment as to the claim against him, which was allowed. Plaintiff appealed to this Court in *Allstate Ins. Co. v. Oxendine*, 134 N.C. App. 376, 526 S.E.2d 217 (1999), but the appeal was ruled interlocutory and dismissed. Plaintiff then successfully moved for summary judgment against Locklear. In its order, the trial court found that Locklear was negligent in failing to keep a proper lookout and awarded plaintiff $47,554.74, which included a $250.00 deductible, plus interest and costs.

Plaintiff again appeals the earlier grant of summary judgment in favor of Oxendine. His sole assignment of error is that the trial court erred in granting summary judgment.

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. Gen. Stat. § 1A-1, Rule 56(c) (1999). The record is 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, 378, 218 S.E.2d 379, 381 (1975).

In general, summary judgment is not appropriate where issues of negligence are involved. *Sink v. Andrews*, 81 N.C. App. 594, 596, 344 S.E.2d 831, 832 (1986). "However, if the evidentiary forecasts establish either a lack of any conduct on the part of the movant which could constitute negligence, or the existence, as a matter of law, of a complete defense to the claim, summary judgment may be properly allowed." *Id.* Thus, summary judgment is proper in negligence actions where there can be no recovery even if the facts as claimed by plaintiff are true. *Kiser v. Snyder*, 17 N.C. App. 445, 450, 194 S.E.2d 638, 641, *cert. denied*, 283 N.C. 257, 195 S.E.2d 689 (1973).

As a general rule, a landowner is not liable for injury caused by the acts of a licensee, unless such acts constitute a nuisance which the owner knowingly suffers to remain. *Benton v. Montague*, 253 N.C. 695, 702, 117 S.E.2d 771, 776 (1961). The rule derives from the following doctrine:

> In case of work done by a licensee, the work is done on the licensee's own account, as his own business, and the profit of it is his. It is not a case, therefore, where the thing which caused the accident is a thing contracted for by the owner of the land, and for which he may be liable for that reason.

Id. (*citing Brooks v. Mills Co.*, 182 N.C. 719, 722, 110 S.E. 96, 97 (1921) (*quoting Rockport v. Granite Co.*, 58 N.E. 1017, 1018 (Mass. 1901)). *Benton* further provides a two-prong test for imposing liability on an occupier of land for negligence in failing to control the activities of a third person on his land:

> It is not enough here, of course, to show that the third person's conduct foreseeably and unreasonably jeopardized plaintiff. Plaintiff must also show that the occupier (a) had knowledge or

> reason to anticipate that the third person would engage in such conduct upon the occupier's land, and (b) thereafter had a reasonable opportunity to prevent or control such conduct.

Benton, 253 N.C. at 703, 117 S.E.2d at 777 (*quoting* 2 Harper and James, *The Law of Torts* § 27.19, at 1526 (2d ed. 1956)). Although our Supreme Court abolished the tri-partite distinction between invitees, licensees, and trespassers in premises liability cases, the term "licensee," as used in *Benton*, remains relevant here. *See Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). A licensee is defined as "one who enters onto another's premises with the possessor's permission, express or implied, solely for his own purposes rather than the possessor's benefit." *Id.* at 617, 507 S.E.2d 883 (*quoting Mazzacco v. Purcell*, 303 N.C. 493, 497, 279 S.E.2d 583, 586-87 (1981)).

Oxendine permitted Locklear to have free and reasonable use of the property, including the use of the drums to burn trash. Locklear's conduct then caused plaintiff's subrogee to suffer damages. Therefore, the law of landowner liability as set forth in *Benton* applies. *See Sexton v. Crescent Land & Timber Corp.*, 108 N.C. App. 568, 571, 424 S.E.2d 176, 177 (applying the law set forth in *Benton* in a wrongful death action against a property owner where a person on neighboring property died from injuries inflicted by a gunshot fired during target practice on defendant's property), *disc. review denied*, 333 N.C. 464, 427 S.E.2d 624 (1993).

In the present case, as in *Benton*, it is permissible to infer that the conduct of the third party, Locklear, was a proximate cause of plaintiff's injury. In fact, the trial court entered summary judgment against Locklear on the issue of negligence. Among its findings, the trial court determined that, "Defendant Locklear did not maintain a proper lookout in connection with his burning activity, and failed to ensure that the trash fire was extinguished before he left the scene," and, "Locklear was the proximate and legal cause of damages suffered by [plaintiff]."

However, at the time of the injury, Locklear's conduct had not been sufficiently continuous and of such duration to amount to a nuisance. *See Benton*, 253 N.C. at 703, 117 S.E.2d at 777. Furthermore, even "if the existence of a nuisance is assumed, the evidence is insufficient to fix defendant with knowledge and to show that defendant knowingly suffered it to continue." *Id.* at 703-04, 117 S.E.2d at 777. There was no evidence, or even forecast of evidence, of any earlier negligent use of the drums by Locklear which would have alerted

Oxendine. Locklear stated in his deposition that he burned trash on Oxendine's property a couple of times a month and always made sure the bag was completely inside the drum. On 21 January 1995, he burned the bag in a drum, watched the fire until there was only smoke, and then did other outdoor chores. Oxendine was asleep in the morning and at work during the afternoon when Locklear failed to keep a proper lookout.

There is no evidence of burning activities by Locklear of such duration or in such a manner as to amount to a nuisance. There is no evidence that Oxendine, with knowledge of such conduct, permitted it to continue.

Accordingly, we reject plaintiff's assignment of error and affirm the order of the trial court.

AFFIRMED.

JUDGES WYNN and WALKER concur.

NANCY GIBBY, INDIVIDUALLY, RUSSELL GIBBY, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF JOSHUA J. GIBBY, PLAINTIFFS v. AARON LINDSEY, JASON HUSKEY, AND JOSH MCHAN, DEFENDANTS

No. COA01-173

(Filed 19 March 2002)

1. Process and Service— dwelling or usual place of abode— officer's return of summons—default judgment

The trial court did not err in a wrongful death action by denying defendant's motion to set aside a default judgment in the amount of $3,000,000 even though defendant alleges there was insufficient service of process based on his mother's residence no longer being his dwelling house or usual place of abode when plaintiffs served the summons and complaint by leaving it with defendant's mother on 26 August 1999, because: (1) the officer's return of the summons indicates legal service under N.C.G.S. § 1A-1, Rule 4(j)(1)a, thus giving rise to a presumption of valid service of process; and (2) the evidence failed to establish clearly and unequivocally that defendant had assumed a new dwelling or usual place of abode by 26 August 1999.

2. Judgments— default—motion to set aside

The trial court did not err in a wrongful death action by denying defendant's motion under N.C.G.S. § 1A-1, Rule 60(b)(4) to set aside a default judgment in the amount of $3,000,000, because: (1) the trial court was presented with no factual allegations on the factors of mistake, inadvertence, surprise, or excusable neglect; and (2) defendant's motion to set aside the default judgment did not address the requirements, but merely asserted that defendant had not been served with process.

Appeal by defendant from order filed 15 September 2000 by Judge Dennis J. Winner in Swain County Superior Court. Heard in the Court of Appeals 19 February 2002.

Brown & Moore, P.A., by James H. Moore, Jr., for plaintiff-appellees.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Carolyn Clark, for defendant-appellants.

GREENE, Judge.

Aaron Lindsey (Defendant) appeals an order filed 15 September 2000 denying his motion to set aside a default judgment against him in the amount of $3,000,000.00.

On 28 July 1999, Russell Gibby, individually and as the executor of the estate of Joshua J. Gibby (Joshua), and Nancy Gibby (collectively Plaintiffs) filed a complaint for the recovery of damages for the wrongful death of their son Joshua. On 26 August 1999, the Swain County Sheriff's Department served the summons and complaint on Defendant by leaving a copy of these documents at the residence of Vicki Craig (Craig), Defendant's mother, with whom Defendant was presumed to be living. The return of service noted the summons and complaint had been served "[b]y leaving [them] at the dwelling house or usual place of abode of [Defendant] with a person of suitable age and discretion then residing therein." On 30 September 1999, the clerk of court signed an entry of default against Defendant. The trial court entered a default judgment in the amount of $3,000,000.00 on 9 February 2000, which it signed on 10 March 2000 and filed 22 March 2000. On 9 March 2000, Defendant filed a motion to set aside the default judgment based on N.C. Gen Stat. § 1A-1, Rules 55(d)[1] and

1. Although Defendant cites N.C. Gen. Stat. § 1A-1, Rule 55(d) (permitting entry of default to be set aside upon good cause shown) in his motion to set aside the default

60(b)(1) and (6), alleging Defendant was not served with process. Defendant and Craig submitted to depositions that were subsequently filed with the trial court.

In his deposition, Defendant testified he had moved to South Carolina on or about 1 August 1999 and no longer lived with Craig at the time she accepted the summons and complaint for Defendant at her residence on 26 August 1999. At this time, Defendant was eighteen years old. When Defendant left, he only took some of his clothes with him and did not tell Craig that he was leaving. Defendant stayed in South Carolina with his aunt and uncle and worked at a restaurant before returning to North Carolina several months later to respond to the default judgment against him. Defendant did not have his mail forwarded to South Carolina. In fact, he only received one piece of mail during this time, a birthday card from his grandfather. Defendant did not have a bank account or any bills until November 1999 when he bought a truck. On 24 January 2000, Defendant obtained a South Carolina driver's license, replacing his North Carolina driver's license that listed Craig's address as his residence. Defendant indicated he considered Craig's residence his "home." He also admitted he had no intentions of staying with his relatives in South Carolina for any length of time.

Craig's deposition testimony revealed that when asked by the deputy serving the summons and complaint if her residence was considered Defendant's "primary residence," she responded "yes." The day after the summons and complaint had been left with her, she telephoned the sheriff's department and spoke with Sheriff Bob Ogle (Ogle). Craig told him she was not comfortable having the papers delivered to her because she did not know her son's whereabouts. She asked Ogle what she should do, and Ogle directed her to mail them to the sheriff's department. Craig did not want to mail the papers, so she delivered them personally to the sheriff's department.

On 15 September 2000, the trial court filed an order denying Defendant's motion to set aside the default judgment.

The issues are whether: (I) Defendant presented sufficient evidence to rebut the presumption that he had been served at his "dwelling house or usual place of abode" pursuant to N.C. Gen. Stat.

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judgment, he did not move to set aside the entry of default. Accordingly, we do not review whether entry of default was proper.

§ 1A-1, Rule 4(j)(1)a; and (II) the default judgment should be set aside pursuant to N.C. Gen. Stat. § 1A-1, Rules 60(b)(1) and (6).

I

[1] A defendant may be relieved from a final judgment, including a default judgment, if the judgment is void. N.C.G.S. § 1A-1, Rule 60(b)(4) (1999). "A defect in service of process is jurisdictional rendering any judgment or order obtained thereby void." *Thomas v. Thomas*, 43 N.C. App. 638, 645, 260 S.E.2d 163, 168 (1979) (citing *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974)). Service of process upon a natural person is perfected "[b]y delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." N.C.G.S. § 1A-1, Rule 4(j)(1)a (1999). Defendant contends the default judgment against him is void because service of process was defective in that Craig's residence was no longer his dwelling house or usual place of abode when Plaintiffs served the summons and complaint by leaving it with Craig on 26 August 1999. We disagree.

In this case, the officer's return of the summons indicates legal service under Rule 4(j)(1)a, thus giving rise to a presumption of valid service of process. *Guthrie v. Ray*, 293 N.C. 67, 71, 235 S.E.2d 146, 149 (1977). The burden is on Defendant to rebut this presumption by clear and unequivocal evidence that consists of more than a single contradictory affidavit or the contradictory testimony of one witness. *Id.*

Defendant left without telling Craig where he was going and had only taken along some of his clothes, leaving his remaining possessions behind. Until Defendant obtained a South Carolina driver's license on 24 January 2000, Defendant used his North Carolina driver's license listing Craig's address as Defendant's residence. Defendant did not have his mail forwarded to South Carolina, nor did he have a bank account or any bills until November 1999 when he bought a truck. Even more significantly, Defendant considered Craig's residence his "home" and admitted he had no intentions of staying with his relatives in South Carolina for any length of time. In addition, Craig testified that even though she did not know where her son was at the time she accepted service of process for him at her residence, her home was Defendant's primary residence. As such, the evidence fails to establish clearly and unequivocally that Defendant had assumed a new dwelling house or usual place of abode by 26

August 1999. *See Guthrie*, 293 N.C. at 71, 235 S.E.2d at 149. Because Defendant failed to meet his burden under *Guthrie*, the trial court did not err in denying his motion to set aside the default judgment.

II

[2] Defendant further argues the trial court's 15 September 2000 order completely failed to address Defendant's motion to set aside the default judgment under N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) and (6). Rule 60(b) permits a trial court to relieve a party from a final judgment, order, or proceeding based on "mistake, inadvertence, surprise, or excusable neglect," N.C.G.S. § 1A-1, Rule 60(b)(1) (1999), or "[a]ny other reason justifying relief from the operation of the judgment," N.C.G.S. § 1A-1, Rule 60(b)(6) (1999). In order for a defendant to succeed in setting aside a default judgment under Rule 60(b)(6), he must show: (1) extraordinary circumstances exist, (2) justice demands the setting aside of the judgment, and (3) the defendant has a meritorious defense. *State ex rel. Envtl. Mgmt. Comm. v. House of Raeford Farms*, 101 N.C. App. 433, 448, 400 S.E.2d 107, 117, *disc. review denied*, 328 N.C. 576, 403 S.E.2d 521 (1991).

In this case, the trial court was presented with no factual allegations on the factors of mistake, inadvertence, surprise, or excusable neglect. Defendant's motion to set aside the default judgment also did not address the requirements set out in *House of Raeford Farms*. *See id.* Defendant merely asserted he had not been served with process. As discussed in section I of this opinion, this is an allegation that is properly addressed by a motion under Rule 60(b)(4) and was correctly considered and decided as such by the trial court.

Affirmed.

Judges McGEE and THOMAS concur.

LU ANN FLITT, PLAINTIFF v. BRUCE JAMES FLITT, DEFENDANT

BRUCE JAMES FLITT, PLAINTIFF v. LU ANN FLITT, DEFENDANT

No. COA01-301

(Filed 19 March 2002)

Appeal and Error— appealability—order declining to incorporate separation agreement into divorce judgment—custody reserved

An appeal was dismissed as interlocutory where the parties had entered into a separation agreement which included joint custody of the children, plaintiff's divorce complaint requested that the separation agreement be incorporated into the divorce judgment, defendant had already requested primary custody and support in a separate, pending action, and the trial court declined to incorporate the provisions of the separation agreement, reserved the issues of child support and custody, and granted the divorce. Plaintiff advanced no argument regarding any substantial right which would be lost absent immediate appellate review, and none could be discerned by the Court of Appeals. Moreover, plaintiff appealed from the order declining to incorporate the separation agreement into the final divorce judgment rather than from the final judgment.

Appeal by Bruce James Flitt from order entered 1 December 2000 by Judge Catherine C. Stevens in Gaston County District Court. Heard in the Court of Appeals 10 January 2002.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., and Preston O. Odom, III, for plaintiff appellant Bruce James Flitt.

Whitesides & Kenny, L.L.P., by Terry Albright Kenny, for defendant appellee Lu Ann Flitt.

TIMMONS-GOODSON, Judge.

Bruce James Flitt ("plaintiff") appeals from an order by the trial court declining to incorporate a separation agreement between plaintiff and his former wife, Lu Ann Flitt ("defendant"), into the parties' final divorce judgment. For the reasons stated herein, we determine that plaintiff's appeal is interlocutory, and we accordingly dismiss the appeal.

In his complaint for an absolute divorce filed 21 August 2000 in Gaston County District Court, File Number 00 CVD 3723, plaintiff averred that he and defendant had entered into a separation agreement, a copy of which was attached to plaintiff's complaint. In the separation agreement, plaintiff and defendant agreed to share joint physical and legal custody of their two minor children. Plaintiff's complaint requested that "the separation agreement entered into on August 11, 1999, by the parties should be incorporated in any judgment entered by the Court in this action." Paragraph VII of the separation agreement under the section entitled "Provisions for Nature and Effect of Agreement" states that:

> In the event that a divorce is decreed at any time in any action or proceeding between the parties hereto, this agreement shall be submitted to the Court for its approval for incorporating the provisions related to child custody and child support. That provisions relating to spousal support and property shall not be incorporated.

The complaint further noted that matters concerning child custody and support were pending in a separate action, File Number 00 CVD 505, that was filed by defendant on 4 February 2000. In the pending action for child custody and support, defendant requested primary custody and control of the children. In his answer and counterclaim to defendant's complaint for child custody and support, plaintiff alleged that defendant was "not a fit and proper person to have the care, custody and control of [the] minor children" and requested that the court award plaintiff "permanent and temporary primary legal and physical care, custody and control of the minor children."

On 1 December 2000, the trial court entered an order captioned with both File Numbers 00 CVD 505 and 00 CVD 3723. In the order, the trial court declined to incorporate the provisions of the separation agreement into the final divorce judgment, concluding that "the language of the Separation Agreement does not state that it shall be incorporated into any divorce judgment only, that it shall be submitted to the Court for its consideration." The trial court thereafter ordered that "the parties are entitled to an absolute divorce" and ordered plaintiff's attorney to prepare such judgment. The trial court further ordered that "the issues of child custody and child support and any other remaining issues raised by the parties are hereby reserved." Plaintiff now appeals from the trial court's order.

Plaintiff argues that the trial court erred in declining to incorporate into the divorce decree the provisions of the separation agreement regarding child custody and support. Because plaintiff's appeal is premature, we do not address plaintiff's assignments of error.

Although neither party has addressed the issue of plaintiff's right to appeal, "[i]f 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. Personnel, Inc.*, 294 N.C. 200, 201, 240 S.E.2d 338, 340 (1978) (footnote omitted). 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 rights of all the parties involved in the controversy. *See Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Generally, there is no right to appeal from an interlocutory order. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (1999); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381.

There are two instances, however, where a party may appeal interlocutory orders. The first instance arises when there has been a final determination as to one or more of the claims, and the trial court certifies that there is no just reason to delay the appeal. *See Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). The trial court in the case at bar made no such certification. Thus, plaintiff is limited to the second avenue of appeal, namely where "the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). In such cases, we may review the appeal under sections 1-277(a) and 7A-27(d)(1) of the North Carolina General Statutes. *See id.* The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party. *See Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed. *See Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982); *Buchanan v. Rose*, 59 N.C. App. 351, 352, 296 S.E.2d 508, 509 (1982).

In *Washington v. Washington*, 148 N.C. App. 206, 557 S.E.2d 648 (2001), the defendant-wife appealed from the trial court's judgment granting divorce from bed and board. The trial court's judgment left for further determination issues concerning child custody and sup-

port. Although the *Washington* Court acknowledged that orders granting divorce from bed and board are final orders, it held that, because the language of the order explicitly deferred matters of child custody for further determination, the order was "not a final judicial determination of all the claims raised in the pleadings." *Id.* at 208, 557 S.E.2d at 650. Moreover, the defendant did not argue that delay of her appeal affected any substantial right. The *Washington* Court therefore dismissed defendant's appeal as interlocutory. *See id.*

In the instant case, the trial court's order specifically reserved for further consideration matters of child custody and support. Plaintiff advances no argument regarding any substantial right that would be lost absent immediate appellate review of the trial court's order, nor do we discern such. Furthermore, we note that plaintiff's appeal is from the 1 December 2000 order declining to incorporate the separation agreement into the final divorce judgment. Plaintiff has filed no notice of appeal, however, from the final divorce judgment. The rule against interlocutory appeals "promotes judicial economy by avoiding fragmentary, premature and unnecessary appeals and permits the trial court to fully and finally adjudicate all the claims among the parties before the case is presented to the appellate court." *Jarrell v. Coastal Emergency Services of the Carolinas*, 121 N.C. App. 198, 201, 464 S.E.2d 720, 722-23 (1995). We therefore dismiss plaintiff's appeal.

Appeal dismissed.

Judges MARTIN and BRYANT concur.

BELINDA M. STORCH AND JULIUS CLEMONS STORCH, III, PLAINTIFFS V. WINN-DIXIE CHARLOTTE, INC., DEFENDANT

No. COA01-375

(Filed 19 March 2002)

Alcoholic Beverages— Dram Shop claim—parent of underage impaired driver

The trial court correctly denied defendant's motion for a judgment notwithstanding the verdict in an action under the Dram Shop Act by the parents of an intoxicated eighteen-year-old who died in a single car accident. A parent of an underage person who

dies from injuries proximately resulting from his operation of a motor vehicle while impaired after consuming alcohol negligently sold by a permittee may be included within the class of people known as "aggrieved parties" under N.C.G.S. § 18B-120(1) and may recover damages for his or her "injury," including damages pursuant to N.C.G.S. § 28A-18-2(b).

Appeal by defendant from order entered 4 April 2000, judgment entered 28 July 2000, and order entered 21 September 2000 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 10 January 2002.

Mitchell, Brewer, Richardson, Adams, Burns & Boughman, by Ronnie M. Mitchell and Coy E. Brewer, Jr., for plaintiff-appellees.

Teague, Campbell, Dennis & Gorham, L.L.P., by Dayle A. Flammia and Bryan T. Simpson, for defendant-appellant.

MARTIN, Judge.

Plaintiffs are the parents of Jason Paul Storch, who died in a single car accident on 19 September 1998 in Avery County. Plaintiffs brought this action under Chapter 18B, Article 1A of the North Carolina General Statutes, North Carolina's Dram Shop Act, alleging that Jason, who was eighteen years old at the time of his death, was intoxicated after having consumed alcohol which he purchased from defendant's store in Boone, N.C. prior to the fatal accident. Plaintiffs sued in their individual capacities, alleging they have suffered damages as a result of defendant's negligent sale of alcohol to Jason and are "aggrieved parties" within the meaning of the Act. Defendant filed answer denying it sold or furnished alcohol to Jason and alleging affirmative defenses. Defendant's motion to dismiss and motion for summary judgment were denied, and the issues were tried by a jury. The jury found that plaintiffs were injured as a result of defendant's sale of alcoholic beverages to an underage person and awarded damages in the amount of $50,000 to each plaintiff. The trial court entered judgment on the jury's verdict and denied defendant's motions for judgment notwithstanding the verdict and, alternatively, for a new trial. Defendant appeals.

The sole issue presented by this appeal is whether the parents of an underage person who dies from injuries proximately resulting

from his operation of a motor vehicle while impaired after consuming alcoholic beverages sold or furnished to him in violation of G.S. § 18B-302(a) may be "aggrieved parties" within the meaning of G.S. § 18B-120 *et seq.*, North Carolina's "Dram Shop Act." We answer affirmatively.

Article 1A of Chapter 18B of the North Carolina General Statutes authorizes a claim by an "aggrieved party" for damages for injury proximately caused by the negligent selling of alcoholic beverages to an underage person. G.S. § 18B-121 provides:

> An aggrieved party has a claim for relief for damages against a permittee or local Alcoholic Control Board if:
>
> (1) The permittee or his agent or employee or the local board or its agent or employee negligently sold or furnished an alcoholic beverage to an underage person; and
>
> (2) The consumption of the alcoholic beverage that was sold or furnished to an underage person caused or contributed to, in whole or in part, an underage driver's being subject to an impairing substance within the meaning of G.S. 20-138.1 at the time of the injury; and
>
> (3) The injury that resulted was proximately caused by the underage driver's negligent operation of a vehicle while so impaired.

An "aggrieved party" is defined as "a person who sustains an injury as a consequence of the actions of the underage person, but does not include the underage person . . . ." N.C. Gen. Stat. § 18B-120(1). Because the underage person is expressly excluded from the definition of "aggrieved party" in G.S. § 18B-120(1), his personal representative is also excluded and may not maintain an action for wrongful death under the Dram Shop Act, since the personal representative may only bring a claim which could have been brought by the decedent if he had lived. *Clark v. Inn West*, 324 N.C. 415, 379 S.E.2d 23 (1989).

In *Clark v. Inn West*, *supra*, the question before the Supreme Court was whether the personal representative of the estate of an underage person who died as a result of injuries sustained in an accident caused by his impaired driving after the consumption of alcohol could maintain an action under the Dram Shop Act. As noted above, the Court held that because G.S. § 28A-18-2 provides for the survivor-

ship of claims by a personal representative only if such claim could have been brought by the decedent if he had lived, and the underage person is expressly excluded from the definition of an "aggrieved party" contained in G.S. § 18B-120(1), the personal representative could not maintain an action under G.S. § 18B-121. Notably, however, even though the question of the standing of the parent of an underage person to maintain such an action, individually, was not before the Court, the Court noted that a parent of the underage person is not expressly excluded from the definition of an "aggrieved party." *Clark*, 324 N.C. at 417-18, fn.2, 379 S.E.2d at 24, fn.2. The Court went on to examine the definition of "injury" contained in G.S. § 18B-120(2) and concluded that the statute "does not preclude recovery for *loss of support* by their underage child, if the underage child in fact supported the parents." *Id.* at 418, 379 S.E.2d at 24.

The Court's analysis with respect to the parent's standing to bring the action as individuals was unnecessary to its decision and, as *dictum*, is not binding precedent. *In re University of North Carolina*, 300 N.C. 563, 576, 268 S.E.2d 472, 480 (1980). Nevertheless, such analysis is directly relevant to the issue before us and we adopt it. "A remedial statute must be construed broadly, in light of the evils sought to be remedied and the objectives to be attained." *Wade v. Wade*, 72 N.C. App. 372, 379, 325 S.E.2d 260, 267-68 (1985) (citation omitted), *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Thus, we hold that a parent of an underage driver injured or killed as a result of such underage driver's negligent operation of a motor vehicle due to impairment resulting from the consumption of alcohol may be an "aggrieved party" within the meaning of G.S. § 18B-120(1) so as to have standing to maintain an action under the Dram Shop Act if such parent suffers an *injury* as a proximate result of the negligent selling of alcoholic beverages to the underage person.

The term "injury" under the statute

> includes, but is not limited to, personal injury, property loss, loss of means of support, or death. Damages for death shall be determined under the provisions of G.S 28A-18-2((b). Nothing in G.S. 28A-18-2(a) or subdivision (1) of this section shall be interpreted to *preclude recovery under this Article for . . . death on account of injury to or death of the underage person . . . .*"

N.C. Gen. Stat. § 18B-120(2) (emphasis added). Clearly, under subsection (2), a parent of an underage person killed as a result of his own impaired driving would be an "aggrieved party" to the extent

the parent's automobile was damaged as a consequence of the underage person's impaired driving and would have standing to maintain an action under G.S. § 18B-121. In addition, the last sentence of subsection (2) expressly renders inapplicable the limitation of G.S. § 28A-18-2(a) restricting the right of recovery of damages for death of the underage person to the personal representative. Indeed, as the Supreme Court must have recognized in its analysis of the statute in *Clark*, if the last sentence of subsection (2) were interpreted otherwise, G.S. § 28A-18-2(a) would preclude a parent from recovering for loss of support by the underage child.

Subsection (2) provides that damages for death be determined as directed by G.S. § 28A-18-2(b). As applicable to the parent of the underage person, "injury" would include funeral expenses of the underage person, G.S. § 28A-18-2(b)(3), as well as damages for loss of services, G.S. § 28A-18-2(b)(4)b, society, companionship, etc., G.S. § 28A-18-2(b)(4)c, and loss of support. N.C. Gen. Stat. § 18B-120(2); *Clark, supra.* Thus, even though an action for wrongful death is reserved to the personal representative of the decedent and a parent, individually, may not maintain a wrongful death action for death of his or her child, *Killian v. R.R.*, 128 N.C. 261, 38 S.E. 873 (1901), damages under G.S. § 28A-18-2(b) may be available, in a completely distinct claim under the Dram Shop Act to the parent of an underage child who negligently drove a motor vehicle while impaired by alcohol and died from injuries sustained as a proximate result thereof.

In summary, we hold that a parent of an underage person who dies from injuries proximately resulting from his operation of a motor vehicle while impaired after consuming alcohol negligently sold by a permittee may be included within the class of persons known as "aggrieved parties" under G.S. § 18B-120(1), and may recover damages for his or her "injury," including damages pursuant to G.S. § 28A-18-2(b).

No error.

Judges TIMMONS-GOODSON and BRYANT concur.

YOUNG v. MASTROM, INC.

[149 N.C. App. 483 (2002)]

DAVID A. YOUNG, PLAINTIFF v. MASTROM, INC., DEFENDANT

JOHN R. BEITH, PLAINTIFF v. MASTROM, INC., DEFENDANT

MASTROM, INC., PLAINTIFF v. C. DAVID CARPENTER, DEFENDANT

No. COA-01-459

(Filed 19 March 2002)

Contempt— show cause order—standard

The trial court erred by applying the wrong standard when denying a motion for a show cause order where the court concluded that no showing had been made under N.C.G.S. § 5A-21, but should have determined under N.C.G.S. § 5A-23(a) whether, considering all the facts and circumstances presented, the information in the motion and the record was sufficient to warrant a prudent person to believe that the subject of the order had the present ability to comply.

Appeal by plaintiffs David A. Young and John R. Beith and defendant C. David Carpenter from order filed 12 January 2001 by Judge William M. Neely in Moore County District Court. Heard in the Court of Appeals 12 February 2002.

Cunningham, Dedmond, Petersen & Smith, L.L.P., by Bruce T. Cunningham, Jr., for appellants, plaintiffs Young and Beith and defendant Carpenter.

West & Smith, LLP, by Stanley W. West, for appellee, plaintiff-defendant Mastrom, Inc.

GREENE, Judge.

David A. Young (Young), John R. Beith (Beith), and C. David Carpenter (Carpenter) (collectively, Appellants) appeal an order filed 12 January 2001 denying their motion to order G. Monroe Wilson (Wilson) to show cause why an order of contempt should not be issued against him for refusing to comply with previous orders of the trial court.

In an order filed 21 September 1994, the trial court directed Mastrom. Inc. (Mastrom) and Wilson to transfer a specified amount into the accounts of Appellants. After Wilson and Mastrom repeatedly failed to transfer the amounts, Wilson was found in contempt on 11

October 1996. On behalf of Wilson, Mastrom appealed the 11 October 1996 order to this Court. After finding insufficient evidence to support a finding that Wilson was in contempt of the 21 September 1994 order, this Court reversed the trial court. *Young v. Mastrom*, 129 N.C. App. 425, 502 S.E.2d 437 (1998) (unpublished).

On 19 August 1998 and on 19 February 1999, Appellants filed motions requesting the trial court to issue an order requiring Wilson to appear and show cause why an order for contempt should not be entered against him for failure to comply with the trial court's previous orders. After allowing the parties time to conduct additional discovery, the trial court considered all items of record[1] and concluded "that there [was] no showing, as required by N.C.G.S. [§] 5A-21, that [Wilson] ha[d] the present ability to comply with the order of the [trial] [c]ourt dated September 21, 1994." The trial court denied the motion of Appellants for a show cause order.

The dispositive issue is whether the trial court applied the correct standard in denying Appellants' motion for a show cause order.

Appellants argue "the trial court erred in denying [their] motion for [an] order to show cause due to a failure to satisfy [N.C.G.S. §] 5A-21." We agree.

To initiate a proceeding for civil contempt under N.C. Gen. Stat. § 5A-23(a), an interested party must move the trial court to issue an order or notice to the alleged contemnor "to appear at a specified reasonable time and show cause why he should not be held in civil contempt."[2] N.C.G.S. § 5A-23(a) (Supp. 2000). The order or notice may only "be issued on the motion and sworn statement or affidavit of one with an interest in enforcing [a previous] order . . . and a finding by the judicial official of probable cause to believe there is civil contempt." *Id.* "Probable cause refers to those facts and circumstances within [the judicial official's] knowledge and of which he ha[s] reasonably trustworthy information which are sufficient to warrant a

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1. The items of record included, among other items: a 12 January 2000 deposition of Wilson; an indemnification agreement whereby MI Professional Management of Southern Pines, Inc. agreed to assume responsibility for Mastrom's litigation; and letters sent by Wilson to Young and Beith informing them of their retirement and profit-sharing account balances.

2. A party may also initiate a contempt proceeding "by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether [he] . . . should be held in civil contempt." N.C.G.S. § 5A-23(a1) (Supp. 2000).

prudent man in believing that" the alleged contemnor is in civil contempt. *See State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (defining probable cause in relation to an arrest warrant). Once an order or notice is issued to show cause, the alleged contemnor can only be held in contempt upon a showing, among other things, that he has the present ability to comply with the trial court's order. *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985); N.C.G.S. § 5A-21(a)(3) (1999).

In this case, Appellants moved for an order to be issued to Wilson to appear and show cause why he should not be held in contempt of the 21 September 1994 order. After a hearing on Appellants' motion, the trial court concluded no showing had been made under N.C. Gen. Stat. § 5A-21 and denied Appellants' motion for a show cause order. The trial court, however, was only required to determine, pursuant to section 5A-23(a), whether, considering all the facts and circumstances presented, the information contained in the motion and the record was sufficient to warrant a prudent person to believe Wilson had the present ability to comply with the 21 September 1994 order. Accordingly, as the trial court used the incorrect standard in denying Appellants' motion for a show cause order, this case must be remanded to the trial court to determine, using the standard set out in section 5A-23(a), whether a show cause order should be issued to Wilson.[3]

Reversed and remanded.

Judges McGEE and THOMAS concur.

3. We are not deciding whether there was probable cause to believe Wilson had the ability to comply with the 21 September 1994 order, but remand for the trial court to make that determination.

FAIRFIELD MOUNTAIN PROPERTY OWNERS ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFF v. WILLIAM E. DOOLITTLE, IN HIS CAPACITY AS RUTHERFORD COUNTY TAX ADMINISTRATOR, RUTHERFORD COUNTY, AND THE TOWN OF LAKE LURE, DEFENDANTS

No. COA01-397

(Filed 19 March 2002)

Appeal and Error— appealability—joinder order

An appeal was dismissed as interlocutory where the trial court order required the joinder of necessary parties within 30 days to avoid dismissal with prejudice. The order requires further action by the trial court and does not affect a substantial right. However, a dismissal for failure to join a necessary party is not on the merits and may not be with prejudice.

Appeal by plaintiff from order entered 20 September 2000 by Judge Zoro J. Guice, Jr. in Superior Court, Rutherford County. Heard in the Court of Appeals 13 February 2001.

Dungan & Mitchell, P.A., by Robert E. Dungan and Ted F. Mitchell for plaintiff-appellant.

Nanney, Dalton & Miller, L.L.P., by Walter H. Dalton and J. Christopher Callahan for defendants-appellees.

WYNN, Judge.

Fairfield Mountains Property Owners Association, a homeowners association, brought this tax refund action against the Town of Lake Lure and William E. Doolittle, in his capacity as Rutherford County Tax Administrator, alleging that its properties had been illegally taxed by defendants. On 20 September 2000, the trial court ordered that:

> [T]he plaintiff must join all individuals who were property owners within Fairfield Mountain and members of Fairfield Mountain Property Owners Association, Inc., during the period of time in which Plaintiff seeks a refund of taxes. The Plaintiff is given thirty (30) days from the date of this Order in which to join these necessary parties as Plaintiffs or this matter will be dismissed with prejudice.

Before the trial court dismissed this action, plaintiff brought this appeal. Obviously, this appeal is interlocutory; the order appealed

from is not a final order and requires further action by the trial court. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Moreover, the order does not affect a substantial right. *See* N.C. Gen. Stat. §§ 7A-27(d) and 1-277 (1999); *Blackwelder v. State Dep't of Hum. Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780-81 (1983). Accordingly, we dismiss this appeal.

However, we note that the trial court's order conditionally indicating that the matter would be dismissed if the necessary parties are not joined, erroneously indicates that such dismissal would be *with prejudice*. A "dismissal for failure to join a necessary party is not a dismissal on the merits and may not be with prejudice." *Crosrol Carding Developments, Inc., v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 453, 183 S.E.2d 834, 838 (1971).

> The following language relating to Rule 12(b)(7) of the Federal Rules of Civil Procedure is applicable also to our Rule 12(b)(7):
>
> "When faced with a motion under Rule 12(b)(7), the court will decide if the absent party should be joined as a party. If it decides in the affirmative, the court will order him brought into the action. However, if the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in Rule 19(b), whether to proceed without him or to dismiss the action . . . A dismissal under Rule 12(b)(7) is not considered to be on the merits and is without prejudice." 5 Wright & Miller, Federal Practice and Procedure, s 1359, pp. 628, 631.

Id., 12 N.C. App. at 453-54, 183 S.E.2d at 838.

Dismissed.

Judges TIMMONS-GOODSON and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 MARCH 2002

BABCOCK v. CUMBERLAND CTY. No. 01-449	Cumberland (00CVS107)	Affirmed
BUTLER v. E.I. DuPONT De NEMOURS & CO. No. 01-550	Ind. Comm. (I.C. 746977)	Vacated and remanded
CASKEY v. GREEN No. 01-409	Lincoln (00SP203)	Appeal dismissed
DUNCAN v. DUNCAN No. 01-565	Iredell (99CVD14)	Affirmed
ELLIOTT v. BIRTH No. 01-49	Lee (98CVD473)	Reversed
ELLIOTT v. BIRTH No. 01-50	Lee (98CVD471)	Reversed
GRAVES EVANS ENTERS., INC. v. CHAMBERS No. 01-482	Alamance (98CVD1280)	Affirmed in part, reversed in part and remanded
HILL v. TAYLOR No. 01-555	Carteret (00CVS797)	Appeal dismissed
HOLCOMB v. HOLCOMB No. 01-59	Wake (99CVD2171)	Affirmed
IN RE AMERICA No. 01-180	Harnett (95J17) (95J18) (95J19)	Affirmed
IN RE B.P. No. 01-326	Durham (99J134)	Affirmed
IN RE IRBY No. 01-962	Person (99J98)	Affirmed
IN RE JOHNSON No. 01-294	Alamance (90J113)	Adjudication Order— reversed in part; affirmed in part. Disposition Order— vacated and remanded

IN RE QUICK 01-374	Harnett (97J12) (97J13) (97J14) (97J15) (97J16) (97J17)	Affirmed
IN RE THOMAS No. 01-1017	Mecklenburg (00J105) (00J106)	Affirmed
LE v. HARRIS No. 01-99	Gaston (98CVD2674)	Affirmed
OLVING v. OLVING No. 00-1523	Dare (00CVD398)	Affirmed
PARSONS v. K-MART CORP. No. 01-515	Ind. Comm. (I.C. 725281)	Affirmed
RAETHER v. PELICAN PROPS., INC. No. 00-1512	Onslow (00CVS254)	Affirmed
STATE v. ALSTON No. 01-634	Orange (95CRS13980) (95CRS15816) (98CRS15817)	No error; remanded for resentencing
STATE v. BENFIELD No. 01-780	Iredell (99CRS2507)	No error
STATE v. BUTTS No. 01-737	Harnett (00CRS5573) (00CRS6943)	No error
STATE v. CAMPBELL No. 01-2	Robeson (97CRS22535)	Affirmed
STATE v. CLARK No. 00-1320	Lenoir (98CRS12008)	As to convictions for breaking and entering and larceny after breaking or entering: No error. As to conviction for possession of stolen property: Judgment vacated. Remanded for resentencing.
STATE v. EVERETT No. 00-1443	Wayne (99CRS54892)	No error in part, vacated in part and remanded for resentencing

STATE v. FARRAR No. 00-1238	Guilford (98CRS52504) (98CRS23361)	No error
STATE v. HOLT No. 01-595	Guilford (99CRS23625) (99CRS23626) (99CRS1771) (99CRS1772)	No error
STATE v. HOUT No. 01-518	Guilford (00CRS23384) (00CRS23597)	No error
STATE v. JOHNSON No. 01-526	Cumberland (99CRS71833) (99CRS71834) (99CRS71836)	No error
STATE v. KING No. 01-758	Guilford (00CRS80494) (00CRS80495)	No error
STATE v. LEGGETT No. 00-1533	Columbus (97CRS9062) (97CRS9063)	Affirmed
STATE v. LITTLE No. 01-430	Mecklenburg (97CRS34922)	Judgment arrested and order vacated
STATE v. MARVIN No. 00-1398	Dare (99CRS2022) (99CRS2023) (99CRS2024) (99CRS2025) (99CRS2026)	No error
STATE v. McLEAN No. 01-845	Forsyth (97CRS17129)	Affirmed
STATE v. McMILLIAN No. 01-107	Robeson (98CRS10682)	No error
STATE v. PEARSALL No. 01-665	Wayne (99CRS53487)	No error
STATE v. SPROUSE No. 01-781	Henderson (00CRS2809) (00CRS51991)	No error
STATE v. VELAZQUEZ No. 01-658	Alamance (00CRS53025) (00CRS53027)	No error
TARPLEY v. CONE MILLS CORP. No. 00-1487	Ind. Comm. (I.C. 848309)	Affirmed

WAKE CTY. HUMAN SERVS. v. MORRILL No. 01-141	Wake (00CVD6255)	Appeal dismissed
WARD v. PERRY No. 01-514	Nash (99CVS1464)	No error
WILSON v. TAYLOR No. 01-524	Carteret (00CVS786)	Appeal dismissed

SONOPRESS, INC., PETITIONER-APPELLANT v. TOWN OF WEAVERVILLE, RESPONDENT-APPELLEE

No. COA01-105

(Filed 2 April 2002)

1. Cities and Towns— annexation—reporting requirements—map—police protection—street maintenance—method of financing

The trial court did not err in an annexation case in its findings and conclusions that the town complied with the reporting requirements of N.C.G.S. § 160A-35 except with respect to the plans for providing sanitation services to properties located within the annexed area, because: (1) petitioner offered no specific evidence to rebut the trial court's findings and conclusions regarding the map requirement, other than to argue that the maps were confusing and illegible, and the town did not need to submit a sealed map under N.C.G.S. § 160A-35(1)b since an extension of water and sewer services was not required; (2) the town met the substantive requirements of N.C.G.S. § 160A-35(2) by providing a statement showing the area to be annexed meets the requirements of N.C.G.S. § 160A-36; (3) the town's statement regarding police protection was adequate to satisfy the statutory requirements since town police officers already drive past petitioner's property to patrol the satellite annexation area and the town could reasonably claim that no additional patrol officers would be needed to protect the newly annexed areas; (4) the trial court's conclusion that the town's statement regarding street maintenance satisfied the statutory requirements since the property proposed to be annexed already has the streets maintained by the State; and (5) the trial court's finding that the town does not need to set out a method for financing was supported by competent evidence in the record that no extension of services will be required due to the annexation.

2. Cities and Towns— annexation—sanitation services

The trial court did not err in an annexation case by concluding that the town's failure to comply with N.C.G.S. § 160A-35 on the issue of sanitation services can be remedied upon remand without further public hearing and comment, because: (1) the trial court simply remanded the issue to more fully and adequately explain the town's sanitation policy in accordance with

N.C.G.S. § 160A-35; and (2) petitioner had sufficient notice and an opportunity to be heard at the first public hearing on the issue of sanitation services, and the clarification of the town's policy is not a substantial change since it does not raise new issues not previously addressed by the parties.

3. Cities and Towns— annexation—tax record classifications—use of land

The trial court did not err in an annexation case by finding that the town complied with N.C.G.S. § 160A-36 when it used tax records and land use maps to show the percentage of development of the annexed area, because: (1) both the General Assembly and our Court of Appeals have approved the use of tax records and land use maps as accepted methods designed to provide reasonably accurate results regarding the area to be annexed; (2) the town has met the statutory requirement under N.C.G.S. § 160A-36(c)(1) that at least sixty percent of the total number of lots and tracts are used for residential, commercial, or industrial purposes; and (3) petitioner has failed to provide evidence that the tax record classifications are incorrect or that the parcels are not in fact in use for these purposes.

4. Cities and Towns— annexation—statement of intent to provide services

The trial court did not err in an annexation case by finding that the town complied with N.C.G.S. § 160A-37(e)(2) which requires that an annexation ordinance shall contain a statement of the intent of the municipality to provide services in the area being annexed as set forth in the report required by N.C.G.S. § 160A-35.

5. Cities and Towns— annexation—notice requirements

The trial court did not err in an annexation case by finding that petitioner was not materially prejudiced based on the town's alleged failure to comply with the map requirements under the notice statute of N.C.G.S. § 160A-37 and by refusing to grant petitioner's request for a delay, because: (1) the local newspaper published the public notice of a public hearing on the annexation of petitioner's property on two separate dates prior to the hearing; (2) although the map in the newspaper was deemed illegible, the notice contained a detailed description of the property and identified the owners or former owners of the property being considered for annexation; (3) the public notice stated that the

report required by N.C.G.S. § 160A-35 would be available at the office of the town clerk thirty days prior to the date of the public hearing, and the town clerk certified that the report available to the public included a legible map of the area to be annexed; and (4) although petitioner asked the town to delay the annexation matter, petitioner had sufficient time to review the standards of service report in the town clerk's office and petitioner's needs are not at issue in this annexation proceeding, but rather whether the town complied with all statutory requirements.

Appeal by petitioner from order entered 16 October 2000 by Judge James L. Baker, Jr. in Superior Court, Buncombe County. Heard in the Court of Appeals 29 November 2001.

Dungan & Mitchell, P.A., by Robert E. Dungan, for petitioner-appellant.

Roberts & Stevens, P.A., by Carl W. Loftin and Christopher Z. Campbell, for respondent-appellee.

McGEE, Judge.

The Weaverville Town Council (Town) unanimously adopted an ordinance extending the Town's corporate boundaries to include property owned by Sonopress, Inc. (petitioner) on 18 May 1998. Petitioner filed a Petition of Review and Appeal in Superior Court, Buncombe County on 16 June 1998. The trial court entered an order affirming the annexation on 5 October 1998. Petitioner appealed, and this Court issued an opinion on 1 August 2000 concluding that the trial court applied an improper standard of review, vacating the order of the trial court, and remanding the case for reconsideration under the correct standard of review. *Sonopress, Inc. v. Town of Weaverville*, 139 N.C. App. 378, 533 S.E.2d 537 (2000).

Upon remand, the trial court entered an order dated 16 October 2000 upholding the annexation ordinance, except as to the issue of sanitation services, which the trial court remanded to the Weaverville Town Council. Petitioner appeals this order.

"Where the record upon judicial review of an annexation proceeding demonstrates substantial compliance with statutory requirements by the municipality, the burden is placed on petitioners to show by competent evidence a failure to meet those requirements or an irregularity in the proceedings which resulted in material preju-

dice[.]" *Scoville Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 17-18, 293 S.E.2d 240, 243 (1982), *disc. review denied*, 306 N.C. 559, 294 S.E.2d 371 (1982); *see also*, *Conover v. Newton and Allman v. Newton and In re Annexation Ordinance*, 297 N.C. 506, 256 S.E.2d 216 (1979) (because public officials act in the public interest, there is a rebuttable presumption of regularity, and that presumption will prevail until the petitioner puts forth sufficient evidence to the contrary). When reviewing an annexation ordinance, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if evidence to the contrary exists. *Amick v. Town of Stallings*, 95 N.C. App. 64, 69, 382 S.E.2d 221, 225 (1989) (citing *Hyuck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 609 (1987), *aff'd per curiam*, 321 N.C. 589, 364 S.E.2d 139 (1988)). However, the trial court's conclusions of law based upon these findings are reviewable *de novo*. *Id.*

I.

Petitioner contends by its first assignment of error that the trial court erred in affirming the Town's annexation ordinance because the Town violated N.C.G.S. §§ 160A-35, -36 & -37. Because this assignment of error is simply a summary of petitioner's entire argument, we proceed to petitioner's remaining assignments of error.

II.

[1] By its second assignment of error, petitioner contends that the trial court erred in its findings and conclusion that the Town complied with N.C.G.S. § 160A-35, except with respect to plans for providing sanitation services to properties located within the annexed area.

N.C. Gen. Stat. § 160A-35 (Cum. Supp. 1998), entitled "Prerequisites to annexation; ability to serve; report and plans[,]" requires that prior to annexation a municipality "shall make plans for the extension of services to the area proposed to be annexed and shall . . . prepare a report setting forth such plans to provide services to [the annexed] area." Petitioner argues that the Town failed to meet the report requirements in three ways.

A. Map Requirement

First, petitioner contends the Town failed to comply with the map requirements of N.C.G.S. § 160A-35(1). N.C. Gen. Stat. § 160A-35(1)a., b. (Cum. Supp. 1998) requires that the report shall include

(1) A map or maps of the municipality and adjacent territory to show the following information:

a. The present and proposed boundaries of the municipality.

b. The proposed *extensions* of water mains and sewer outfalls to serve the annexed area, if such utilities are operated by the municipality. The water and sewer map must bear the seal of a registered professional engineer or a licensed surveyor.

(emphasis added).

The trial court's findings of fact included

11. That the report prepared by the Town . . . pursuant to Section 160A-35 with reference to the proposed annexation of the property of [petitioner] and adjacent property, entitled "Standards of Service Report" . . . contained a legible map and legal description of the property to be annexed. The report was amended . . . to include a legible map of the municipal boundaries of the Town . . . as required by G.S. Sec. 160A-35(1).

The trial court concluded that the maps included in the Town's Standards of Service Report adequately complied with the statutory map requirement.

Petitioner argues that the Town failed to meet the "present and proposed boundaries" requirement because "both maps included in the [Standards of Service] report are illegible, defective, and deficient, and that even upon a strained attempt to read the maps, [they] remain illegible[.]"

A review of the maps at issue, as reprinted in the record, shows a map indicating the "Current Town Limits," the "Area of Proposed Annexation" and the "Current Town Limits of Satellite Annexation," as well as major roads and property boundaries clearly marked. Petitioner offers no specific evidence to rebut the trial court's findings and conclusions, other than to argue that the maps were confusing and illegible. The Town complied with the requirements of the statute.

Petitioner also argues the Town did not meet the map requirement because it did not submit a "sealed map from a registered professional engineer or a licensed surveyor showing water mains to serve the annexed area as required by N.C. Gen. Stat. § 160A-35(1)b." This argument also fails because N.C.G.S. § 160A-35(1)b. requires

a sealed map only if a municipality plans to *extend* water and sewer into an annexed area. As the trial court noted in its findings, petitioner already received water from the Town and sewer services from the Metropolitan Sewerage District of Buncombe County. Therefore, the Town did not need to submit a sealed map because an extension of water and sewer services was not required. We agree with the trial court that the Town sufficiently met the statutory map requirement.

B. Statement

Petitioner next contends that the Town failed to meet the requirement of N.C.G.S. § 160A-35(2) that the Town issue a statement showing that the area to be annexed meets the requirements of N.C.G.S. § 160A-36.

The trial court found that the Standards of Service Report "contains a statement showing that the area to be annexed meets the requirements of G.S. Sec. 160A-36." The trial court concluded that this statement was supported by "sufficient data from which these conclusions could be reached."

Petitioner argues that the Town cannot comply with this statutory requirement "simply by reciting the requirements of the applicable statutory language[.]" Instead, petitioner contends the Town must "include specific findings or a showing on the face of the record that the area to be annexed is developed for urban purposes."

As discussed below in Part IV, we agree with the trial court that the Town met the substantive requirements of N.C.G.S. § 160A-36.

C. Extension of municipal services

Petitioner further contends that the Town failed to sufficiently set forth its plans to extend major municipal services to the annexed property. Specifically, petitioner claims that the Town's Standards of Service Report inadequately describes how police protection and street maintenance will be provided, as well as how the municipal services in the newly annexed areas will be financed.

N.C. Gen. Stat. § 160A-35(3)a. (Cum. Supp. 1998) requires that municipalities "[p]rovide for extending police protection, fire protection, solid waste collection and street maintenance services to the area to be annexed . . . on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation." Thus, at a minimum, the

municipality must provide information "sufficient to allow the public and the courts to determine that the Town has committed itself to provide a nondiscriminatory level of services to the annexed area." *Hyuck*, 86 N.C. App. at 23, 356 S.E.2d at 599. This information should include "(1) information with respect to the current level of services within the Town, (2) a commitment to provide substantially the same level of services in the annexation area, and (3) information as to how the extension of services will be financed." *Id.*

1. Police protection

Petitioner argues that the Town's description of police services to be provided to the annexed area is *prima facie* inadequate and the trial court erred in finding the Town's Standards of Service Report complied with the statute. As to police service, the Town's Standards of Service Report states that

> The proposed annexed property will be provided Police Service by the Weaverville Police Department. This annexation will not require additional officers. Currently, this area is protected by the Buncombe County Sheriff Department.
>
> . . .
>
> The Town of Weaverville will begin to provide Police service to the area. While the Town of Weaverville is currently in the process of expanding the Police Department by two officers in FY 1998-1999, we do not anticipate a major increase of police activity due to this annexation.

The trial court found as fact:

> 22. That the Standards of Service Report . . . sets forth . . . plans for extending police protection to the area to be annexed on substantially the same basis and in the same manner as police protection is provided in the Town[.] The "Service Plan" states that police service can be provided by the Town . . . without any additional officers. The "Service Plan" regarding police protection, to be furnished to the annexed area at no additional cost to the Town, meets the requirements of G.S. Sec. 160A-35(3)(a).

The trial court concluded that the Town's statement in the Standards of Service Report regarding police protection was adequate to satisfy the statutory requirements.

Petitioner contends that the statements by the Town in the Standards of Service Report are insufficient to support the findings of the trial court. Petitioner relies on a number of cases where our courts approved annexation reports that included more information than what was provided in this case by the Town in its Standards of Service Report. Petitioner contends that the Town's report is "fatally lacking" simply because our courts have approved annexation reports that give more information than what the statute mandates. Petitioner, however, fails to cite any case law or statute that establishes the minimum requirements for descriptions of how police services will be provided to an annexed area. Our Supreme Court has held that a report is not deficient simply because it fails to specify "the number of additional personnel and the amount of additional equipment which will be required to extend services to the annexed area." *Annexation Ordinance*, 304 N.C. at 554, 284 S.E.2d at 474.

Petitioner also argues that the record contains substantial and competent evidence of a need for greater police protection than what the Town proposed, and this evidence is sufficient to overcome a finding that the Town's plan complies with the statute. Petitioner contends that because it employs 850 people and the Town has only 2,100 residents, that the annexation will increase the "service area" of the Town by thirty-five percent. Petitioner cites no authority for calculating service areas in this manner. To the contrary, the Town stated at oral argument, and the map reprinted in the Standards of Service Report shows, that petitioner's property is actually located between the current Town boundaries and an existing satellite annexation. Because Town police officers already drive past petitioner's property to patrol the satellite annexation area, the Town could reasonably claim in its Standards of Service Report that no additional patrol officers would be needed to protect the newly annexed areas.

As further support for its argument, petitioner cites a fifty-nine percent increase in crime in 1998 from the previous year. The crime statistic which amounts to forty additional crimes within one year is, by itself, insufficient to demonstrate that the Standards of Service Report is not adequate or that the Town did not comply with the statute.

The record before us contains evidence supporting the Town's statement that additional officers are not required due to the proposed annexation, and petitioner has not directed us to evidence in the record that the service would be inadequate. Therefore, we find

the evidence sufficient to support the trial court's conclusion that the Town's statement was adequate.

2. Street maintenance

Petitioner next argues that the Standards of Service Report inadequately describes how street maintenance will be provided in the annexed areas. The report states that "[t]he property proposed to be annexed is located on Alexander Road and Monticello Road, which are State of North Carolina roads with maintenance being provided by North Carolina Department of Transportation. This will not change."

The trial court found that the provision of the Service Plan contained in the Standards of Service Report relating to street maintenance met the provisions of N.C.G.S. § 160A-35(3)a. The trial court then concluded that "[t]here was no necessity for the Town to provide for street maintenance as the roadways serving the property are State maintained."

Petitioner argues that *In re Annexation Ordinance*, 255 N.C. 633, 122 S.E.2d 690 (1961), states that a town has the primary responsibility for street maintenance and that it cannot delegate that duty to the N.C. Department of Transportation (NCDOT). However, in that case, our Supreme Court found that the statute in question required only that the municipality must in good faith provide services "on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation." *Id.* at 645, 122 S.E.2d at 699 (discussing N.C. Gen. Stat. § 160-453.15 which has been repealed and transferred. *See now* N.C. Gen. Stat. § 160A-47 discussing preparation of an annexation report for cities of 5,000 or more). In the case before us, the Standards of Service Report states that NCDOT has and will continue to have responsibility for street maintenance. We find sufficient evidence to support the trial court's conclusion that the Town's statement regarding street maintenance satisfies the statutory requirements.

3. Method of Financing

Further, petitioner argues that the method of financing proposed in the Standards of Service Report is inadequate to meet the statutory requirements. N.C. Gen. Stat. § 160A-35(3)c. (Cum. Supp. 1998) requires that the plan "[s]et forth the method under which the municipality plans to finance *extension* of services into the area to be annexed." (emphasis added). The trial court found as fact:

34. That the Standards of Service Report includes specific findings that additional funding will not be necessary for the annexation of the property of [petitioner] . . . in that the report details the revenue to be realized and shows as follows:

a) Fire service will be extended to the property on substantially the same basis and in the same manner as fire service is provided in the Town . . . at no additional cost to the Town;

b) Police service will be extended to the property on substantially the same basis and in the same manner as police service is provided in the Town . . . at no additional cost to the Town;

c) Water service will be extended to the property on substantially the same basis and in the same manner as water service is provided in the Town . . . at no additional cost to the Town;

d) Sanitation pick-up service will be extended to the property on substantially the same basis and in the same manner as sanitation pick-up service is provided in the Town . . . at no additional cost to the Town;

e) Sewer service will be provided by the Metropolitan Sewerage District of Buncombe County at no cost to the Town; and

f) Street maintenance will be [provided] by the North Carolina Department of Transportation at no cost to the Town.

Therefore, the Town does not need to set forth the method under which the municipality plans to finance the extension of services into the area to be annexed in accordance with G.S. Sec. 160A-35(3)(c). The Town has complied with G.S. Sec. 160A-35(3)(c).

The trial court concluded that the Town "was under no obligation to set forth any method by which it proposed to finance any extension of services into the area since the Town adequately demonstrated that each of the services to be performed could be provided at no additional cost to the Town."

Petitioner argues this conclusion is in error because "the abundance of case law directly contradicts" the trial court's finding that

the Town need not set forth the method by which it plans to finance the extension of services. Further, petitioner argues that it has offered competent and substantial evidence to rebut the Town's claims that there is no need to extend services.

Petitioner contends that by not explaining how the Town will fund extending street and police services into an area as large as the annexed area, relative to the overall size of the Town, without additional funding or additional personnel "defies all mathematical probability" and, therefore, the Town has failed to show any real financing methodology.

We disagree. The trial court's findings that the Town does not need to set out a method for financing is supported by competent evidence in the record that no extension of services will be required due to the annexation. The statute clearly requires a financing statement if there is "extension" of services, and because there is no "extension" in this case, the trial court did not err in finding that no financing statement is required.

The trial court's findings of fact pursuant to N.C.G.S. § 160A-35 are supported by competent evidence in the record and support the trial court's conclusions of law. Petitioner's second assignment of error is overruled.

III.

[2] Petitioner argues by its third assignment of error that the trial court erred in concluding that the Town's failure to comply with N.C.G.S. § 160A-35 on the issue of sanitation services can be remedied upon remand without further public hearing and comment.

In referring to sanitation services, the Standards of Service Report stated incorrectly that "[t]he Town does not provide sanitation services to industrial or commercial properties [anywhere] within the municipal boundaries of the Town." The trial court concluded that:

> [T]he Standards of Service Report and the "Service Plan" contained therein sets forth an incorrect statement regarding the proposed extension of sanitation services into the area to be annexed. The Standards of Service Report does not adequately set forth that the Town would and does pick up garbage and refuse from commercial and industrial establishments provided

> that such refuse is placed in not more than six (6) receptacles or in polyethylene bags[.]

Although the Standards of Service Report "failed to fully set forth the Town's policies regarding sanitation" services, the trial court did not order a new public hearing but instead remanded this issue to the Town "to more fully and adequately set forth the Town's policy regarding sanitation services and the proposed extension of such services into the area of annexation." A municipal governing board has the "authority to amend the report required by G.S. 160A-35 to make changes in the plans for serving the area proposed to be annexed so long as such changes meet the requirements of G.S. 160A-35." N.C. Gen. Stat. § 160A-37(e) (Cum. Supp. 1998). "There is no requirement that a second public hearing be held on an amended annexation proposal, when that amendment is adopted to achieve compliance with G.S. 160A-35[.]" *Gregory v. Town of Plymouth*, 60 N.C. App. 431, 432-33, 299 S.E.2d 232, 234, *disc. review denied*, 308 N.C. 544, 304 S.E.2d 237 (1983). However, if "substantial changes are made in the amended plan that are not a part of the original notice of public hearing and are not provided for in the plans for service[,]" another public hearing is required. *Id.* at 433, 299 S.E.2d at 234.

Petitioner argues that because the Town's original report did not even contemplate providing sanitation services to Petitioner, that any change by the Town upon remand is a "one-hundred-eighty-degree change" and therefore a substantial change to the original annexation ordinance requiring a public hearing. Respondent, on the other hand, contends the trial court did not err in remanding the issue of sanitation services because the amendment is simply a "clarification of the Town's policy" in order to comply with N.C.G.S. § 160A-35.

We agree the trial court did not err in remanding this issue without a new public hearing because it simply remanded the issue to "more fully and adequately" explain the Town's sanitation policy in accordance with N.C.G.S. § 160A-35. The record shows that the issue of sanitation services was included in the original Standards of Service Report, albeit incorrectly, and was referred to in the Notice of Public Hearing. Thus petitioner had sufficient notice and an opportunity to be heard at the first public hearing on the issue of sanitation services, and the clarification of the Town's policy is not a "substantial change" because it does not raise new issues not previously addressed by the parties. Petitioner's third assignment of error is overruled.

IV.

[3] By its fourth assignment of error, petitioner contends the trial court erred in finding that the Town complied with N.C.G.S. § 160A-36 which states that

> [t]he area to be annexed must be developed for urban purposes . . . [which is] defined as: (1) Any area which is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts three acres or less in size.

N.C. Gen. Stat. § 160A-36(c)(1) (Cum. Supp. 1998). Although a town must meet both the "use" and "subdivision" tests in the statute in order to expand its corporate limits, in this case petitioner only disputes the first, or "use" test; therefore we will only address this issue on appeal. *Tar Landing Villas v. Town of Atlantic Beach*, 64 N.C. App. 239, 246, 307 S.E.2d 181, 186 (1983).

The Town stated in its "Determination of Eligibility" report that:

> (1) Sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional, or governmental purposes.
>
> All (100%) [of] the property in the area to be annexed is in use for residential or industrial or commercial use.

The trial court found

> [t]hat the "Determination of Eligibility" set forth in the Standards of Service Report shows that the property to be annexed is developed for urban purposes in that the report contains a specific finding that 100% of the property of the area is in use for residential, industrial or commercial use.

The trial court also found that petitioner "offered no evidence to refute the specific findings, statistics, and information set forth in the 'Determination of Eligibility' portion of the Standards of Service Report." The trial court concluded that the Town properly included a statement that it complied with N.C. Gen. Stat. § 160A-36.

Petitioner argues that the Town did not make specific findings to show its compliance with N.C.G.S. § 160A-36. Specifically, petitioner claims (1) that the Town ordinance failed to refer to the method it used to calculate the percentage of development, (2) the map included in the record failed to show upon which lots or tracts buildings are located, and (3) the map included in the record failed to show acreage computations.

A mere recital of the statutory language by the municipality is insufficient to meet the requirements of N.C.G.S. § 160A-36(c). *Huntley v. Potter*, 255 N.C. 619, 629, 122 S.E.2d 681, 687-88 (1961). Rather, specific findings, a showing on the face of the record as to the method used by the municipality in making its calculations, or a showing as to the present use of a particular tract, is required. *Id.*

In the present case, the Town included in its Standards of Service Report a map of the area to be annexed, as well as the Buncombe County Tax Assessor's records for the properties being annexed. Both the General Assembly and this Court have approved the use of tax records and land use maps as accepted methods designed to provide reasonably accurate results. *See* N.C. Gen. Stat. § 160A-42 (Cum. Supp. 1998) and *Tar Landing Villas*, 64 N.C. App. at 248, 307 S.E.2d at 187. "[I]n order for [a] Town to comply with the statutory requirements, there must exist some 'actual, minimum urbanization' of the proposed annexation property." *American Greetings Corp. v. Town of Alexander Mills*, 128 N.C. App. 727, 731, 497 S.E.2d 108, 110 (1998) (quoting *Thrash v. City of Asheville*, 327 N.C. 251, 257, 393 S.E.2d 842, 846 (1990)).

The Town proposes extending its boundaries to incorporate eight additional lots. The property listed on the tax records as #9733.04-80-8207.000 (Lot 1) is an improved parcel of .30 acres, classified as residential/family with buildings on the parcel valued in 1998 at $73,900. The property listed as #9733.04-80-9435.000 (Lot 2) is an improved parcel of 3.52 acres, classified as residential/family with buildings on the parcel valued in 1998 at $34,900. The property listed as #9733.04-90-4934.000 (Lot 3) is an unimproved parcel of 1.47 acres, classified as commercial vacant with no buildings or structures. The property listed as #9733.04-91-8483.000 (Lot 4) is an improved parcel of 2.25 acres, classified as commercial/parking lots. The property listed as #9733.04-90-1922.000 (Lot 5) is an unimproved parcel of 1.32 acres, classified as commercial vacant with no buildings or struc-

tures. The property listed as #9743.17-01-1671.000 (Lot 6) is an improved parcel of 8.11 acres, classified as industrial/manufacturing with buildings on the parcel valued in 1998 at $726,900. The property listed as #9733.04-81-8552.000 (Lot 7) is an improved parcel of 24.28 acres, also classified as industrial/manufacturing with buildings on the parcel valued in 1998 at $9,510,300. Finally, the property listed as #9733.04-91-6379.000 (Lot 8) is an improved parcel of 6.02 acres, classified as commercial/parking lots.

Despite the fact that the Town's statement in the Standards of Service Report and the trial court's finding relevant to this issue are incorrect, from the record before us, it is readily apparent that the Town has met the statutory requirement that "at least sixty percent . . . of the total number of lots and tracts . . . are used for residential, commercial, [or] industrial . . . purposes[.]" N.C. Gen. Stat. § 160A-36(c)(1) (Cum. Supp. 1998). Of the eight parcels, six, or seventy-five percent, are improved parcels, classified as either commercial/parking lots, industrial/manufacturing or residential/family. Petitioner has failed to produce evidence that the tax record classifications are incorrect or that the parcels are not in fact in use for these purposes; thus, petitioner has failed to carry its burden of demonstrating actual non-compliance and material prejudice or injury.

We find the record contains sufficient evidence to show that the Town has met the statutory requirements. Petitioner's fourth assignment of error is overruled.

V.

[4] By its fifth assignment of error, petitioner contends the trial court committed reversible error in finding that the Town complied with N.C. Gen. Stat. § 160A-37(e)(2) (Cum. Supp. 1998) which requires that an annexation ordinance shall contain "[a] statement of the intent of the municipality to provide services in the area being annexed as set forth in the report required by G.S. 160A-35."

The trial court concluded that the Town "adequately complied with the provisions of G.S. Sec. 160A-35" in its Standards of Service Report and "Service Plan[.]" We have addressed this issue in Part II and hold that the trial court did not err in concluding that the Town complied with the requisites of N.C.G.S. § 160A-35. Petitioner's fifth assignment of error is without merit.

VI.

[5] By its sixth and final assignment of error, petitioner contends the trial court committed reversible error in finding that petitioner was not materially prejudiced due to the Town's failure to comply with N.C.G.S. § 160A-37 which reads in part:

> (b) Notice of Public Hearing.—The notice of public hearing shall:
>
> . . .
>
> (2) Describe clearly the boundaries of the area under consideration, and include a legible map of the area.
>
> . . .
>
> Such notice shall be given by publication . . . in a newspaper having general circulation in the municipality[.]

N.C. Gen. Stat. § 160A-37(b) (Cum. Supp. 1998).

The trial court concluded that "the Town complied with all of the provisions of [N.C.G.S. § 160A-37] except that the map published in the Asheville Citizen-Times with the 'Public Notice' . . . was reduced in size and was illegible." The trial court also concluded that petitioner

> was mailed a copy of the "Public Notice" of such hearing, knew that its property was the subject of annexation, had access to the report required by G.S. Sec. 160A-35 for thirty (30) days prior to the public hearing, sent a representative, a witness, and its attorney to the public hearing and in no way was materially prejudice[d] by the fact that the published map was illegible.

Petitioner does not dispute that its representatives were aware of the public hearing and in fact its president and legal counsel attended the hearing, but contends that because it did not have proper notice of the hearing it was denied "meaningful, proper notice that the Town . . . intended to annex [petitioner's property]." Petitioner further argues that its counsel made a "reasonable request," which was denied, to have the annexation matter tabled until a later date. Petitioner alleges that the Town's failure to comply with the map requirements, coupled with the Town's refusal to grant its request for delay, materially prejudiced petitioner.

We agree with the trial court that petitioner was not materially prejudiced by the Town's failure to comply with the map requirement or denial of its request to delay the hearing. The record shows that the Asheville-Citizen Times published the "Public Notice" of a public hearing on the annexation of petitioner's property on 20 and 27 April 1998. Although the map in the newspaper was deemed illegible, the notice contained a detailed description of the property and identified the owner or former owners of the property being considered for annexation. Also, the "Public Notice" stated that "[t]he report required by G.S. 160A-35 will be available at the office of the Town Clerk 30 days prior to the date of the Public Hearing." The Town Clerk further certified that the report available to the public included "a legible map of the area to be annexed[.]" Finally, although petitioner asked the Town to "table" the annexation matter, petitioner alleges in its brief that this request was made for the purpose of reviewing the Standards of Services Report and "present[ing] . . . some evidence regarding [petitioner's] needs[.]" As we have previously noted, petitioner had sufficient time to review the Standards of Service Report in the Town Clerk's office and petitioner's "needs" are not at issue in this annexation proceeding, but rather whether the Town complied with all statutory requirements.

We find that although the Town did not meet the map requirements, the trial court's findings support its conclusion that petitioner was not materially prejudiced by this error because it had ample notice of the proposed annexation and opportunity to be heard. Petitioner's sixth assignment of error is without merit.

We affirm the order of the trial court.

Affirmed.

Judges HUNTER and BRYANT concur.

FRANK V. SUMMERS, ELEANOR M. SUMMERS, GILBERT E. GALLE, PAMELA N. GALLE, PATRICIA G. SELBY LIVING TRUST, PETER M. DUGGAN, DR. LEE ANN MCGINNIS, AND DR. MARYROSE TURNER, PLAINTIFFS v. CITY OF CHARLOTTE, NORTH CAROLINA, A MUNICIPAL CORPORATION, SOUTHPARK MALL LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP, J.B. IVEY & COMPANY, A NORTH CAROLINA CORPORATION, T.W. SAMONDS, JR., THALHIMER BROTHERS, INCORPORATED, A VIRGINIA CORPORATION, MAY CENTERS ASSOCIATES CORPORATION, A MISSOURI CORPORATION, ROTUNDA BUILDING, L.L.C., A NORTH CAROLINA LIMITED LIABILITY CORPORATION, SEARS, ROEBUCK AND CO., A NEW YORK CORPORATION, BELK CHARLOTTE, INC., A NORTH CAROLINA CORPORATION, AND UNITED STATES STEEL AND CARNEGIE PENSION FUND, A PENNSYLVANIA NON-PROFIT CORPORATION, DEFENDANTS

FRANK V. SUMMERS, ELEANOR M. SUMMERS, GILBERT E. GALLE, PAMELA N. GALLE, PATRICIA G. SELBY LIVING TRUST, PETER M. DUGGAN, DR. LEE ANN MCGINNIS AND DR. MARYROSE TURNER, PLAINTIFFS v. CITY OF CHARLOTTE, NORTH CAROLINA, A MUNICIPAL CORPORATION, SOUTHPARK MALL LIMITED PARTNERSHIP; A NORTH CAROLINA LIMITED PARTNERSHIP, J.B. IVEY & COMPANY, A NORTH CAROLINA CORPORATION; T.W. SAMONDS, JR.; THE MAY DEPARTMENT STORES COMPANY SUCCESSOR BY MERGER TO MAY CENTER ASSOCIATES CORPORATION; A MISSOURI CORPORATION, SEARS, ROEBUCK AND CO., A NEW YORK CORPORATION, BELK, INC., SUCCESSOR BY MERGER TO BELK CHARLOTTE, INC., A NORTH CAROLINA CORPORATION AND UNITED STATES STEEL AND CARNEGIE PENSION FUND, A PENNSYLVANIA NON-PROFIT CORPORATION, DEFENDANTS

No. COA01-748

(Filed 2 April 2002)

1. Zoning— conditional rezoning—legislative act

The trial court did not err in a rezoning case by granting summary judgment in favor of defendants based on its conclusion that a conditional rezoning which does not involve a subsequent permitting process constitutes a legislative rather than a quasi-judicial act, because: (1) the city's decision to adopt two ordinances rezoning the two pertinent parcels of land was a single procedure constituting legitimate conditional zoning and thus was a legislative act; and (2) the city's action was entirely consistent with 2000 N.C. Sess. Laws ch. 84, § 1(e), which grants it the power to engage in conditional zoning as a purely legislative process.

2. Zoning— rezoning ordinances—constitutionality—procedural due process—arbitrary and capricious standard—enabling statute

The trial court did not err by granting summary judgment in favor of defendants based on its conclusion that two rezoning

ordinances were consistent with constitutional and statutory restraints, because: (1) even assuming that plaintiffs have a vested right in the property, adequate procedural due process protection was afforded to them when various community meetings were held after due notice was given to surrounding property owners, the notes and minutes from those community meetings were forwarded to the council to review in making its decision, and the public was allowed to argue for or against the petition during the reserved time allowed by the council at the hearing on the two petitions for rezoning; (2) the council's decision was not arbitrary and capricious since the record shows the decision was based on and consistent with the various reports and recommendations and entered after fair and careful consideration; (3) plaintiffs have made no showing that the ordinances were unduly discriminatory; and (4) it is not necessary that a zoning ordinance accomplish all of the purposes specified in the enabling act so long as the legislative body of the city had reasonable ground upon which to conclude that one or more of those purposes would be accomplished or aided by the amending ordinance, and the council adopted the ordinances in due regard to N.C.G.S. § 160A-383.

Appeal by plaintiffs from order filed 2 February 2001 and from order and judgment filed 21 March 2001 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 February 2002.

Kenneth T. Davies for plaintiff-appellants.

Office of the City Attorney by Senior Assistant City Attorney Robert E. Hagemann, for defendant-appellee City of Charlotte.

Kennedy Covington Lobdell & Hickman, L.L.P., by Roy H. Michaux, Jr. and Samuel T. Reaves, for defendant-appellee SouthPark Mall.

Moore & Van Allen, PLLC, by Andrew S. O'Hara, for defendant-appellee United States Steel and Carnegie Pension Fund.

Assistant City Attorney Karen A. Sindelar for City of Durham, amicus curiae.

Mark C. Cramer for Real Estate and Building Industry Coalition, amicus curiae.

GREENE, Judge.

Frank V. Summers, Eleanor M. Summers, Gilbert E. Galle, Pamela N. Galle, Patricia G. Selby Living Trust, Peter M. Duggan, Dr. Lee Ann McGinnis, and Dr. Maryrose Turner (collectively, Plaintiffs) appeal an order filed 2 February 2001 granting a motion to dismiss in favor of SouthPark Mall Limited Partnership, J.B. Ivey & Company, T.W. Samonds, Jr., Thalhimer Brothers, Incorporated, May Centers Associates Corporation, Rotunda Building, L.L.C., Sears, Roebuck and Co., Belk Charlotte, Inc., (collectively, SouthPark Defendants), and United States Steel and Carnegie Pension Fund (Pension Fund Defendant); the 2 February order further granted the City of Charlotte's (the City) partial summary judgment motion. Plaintiffs also appeal an order and judgment filed 21 March 2001 granting: summary judgment in favor of SouthPark Defendants,[1] except on the issue of Plaintiffs' standing; summary judgment in favor of Pension Fund Defendant; and summary judgment in favor of the City.

Pension Fund Defendant

On 9 November 1999, Pension Fund Defendant filed a rezoning application (Petition No. 2000-51) to have approximately 11.6 acres at the corner of Fairview Road and Assembly Street rezoned from an office-1 district to a Mixed Use Development Optional district (MUDD-O). Petition No. 2000-51 attached a site plan and sought approval for a mixed-use development consisting of office space, ground floor retail space, multi-family residential units, and a hotel. Martin R. Crampton, Jr. (Crampton), director of the Charlotte-Mecklenburg Planning Commission Staff (the Commission), testified his office supported Petition No. 2000-51 after the proposed office space was reduced from 458,000 square feet to 415,764 square feet. After reviewing Petition No. 2000-51 and its attachments, the Commission concluded that the proposed "mixed-use concept [was] consistent with the . . . Small Area Plan," but the "plan [did] not support an increase in office square footage on the site. Accepting the proposed retail, residential, and hotel components, the square footage of offices need[ed] to be reduced by approximately 42,000 square feet (to 415,764 square feet)" in order to be consistent with the SouthPark Small Area Plan (the Small Area Plan). The Charlotte Department of Transportation performed a detailed traffic study in connection with Petition No. 2000-51 and concluded "the develop-

1. We note Thalhimer Brothers, Incorporated and Rotunda Building, L.L.C. were not listed as defendants in the caption of the 21 March 2001 order and judgment.

ment proposed [would] not significantly affect traffic when compared to the development that could occur by existing zoning."

A community meeting was held on 5 September 2000, with approximately thirty people attending, to discuss Petition No. 2000-51. The attendees cited concerns regarding the floor area, building height, open space, traffic, and lighting. In response to comments from the 5 September meeting and other meetings, Pension Fund Defendant made several changes to its site plan, including addressing the design and orientation of site lighting.

SouthPark Defendants

On 31 December 1999, SouthPark Defendants filed a petition (Petition No. 2000-52) to rezone SouthPark Mall Shopping Center (the SouthPark site), approximately 84 acres, from a business-1 shopping center district to a commercial center district. Attached to Petition No. 2000-52 were: a technical data sheet; a schematic site plan; a symphony park concept plan; perspective views of various development elements; a site traffic access and impact study; and development standards. On 27 March 2000, the Charlotte City Council (the Council) adopted the Small Area Plan which provided "a vision of what the SouthPark area could look like in the near future (5-10 years) and contains goals and recommendations for achieving that vision." The goals of the Small Area Plan included: creating a greater mixture of land uses, especially by incorporating more multi-family residential development; identifying and planning for future mass transit service in the SouthPark area; developing a multi-modal transportation system that emphasized pedestrian improvements and linkages to mass transit; developing a public gathering space and a network of green spaces; creating a safe and inviting pedestrian environment; ensuring the long-term viability of neighborhoods and business areas; maintaining a healthy, highly livable natural environment; and establishing ongoing communication linkages between neighborhood residents, businesses, the development community, and local government.

On 6 July 2000, the North Carolina General Assembly enacted Session Law 2000-84 permitting the City to engage in conditional zoning as a legislative process.[2] 2000 N.C. Sess. Laws ch. 84, § 1(e). A "conditional zoning district" is "a zoning district in which the devel-

2. There is no dispute that Session Law 2000-84 applies in this case. We do note, however, that Session Law 2000-84 only applies to conditional zoning petitions filed on or before 31 August 2001. 2000 N.C. Sess. Laws ch. 84, § 2.

opment and use of the property included in the district is subject to predetermined ordinance standards and the rules, regulations, and conditions imposed as part of the legislative decision creating the district and applying it to the particular property." 2000 N.C. Sess. Laws ch. 84, § 1(a).

Following the enactment of Session Law 2000-84, SouthPark Defendants filed amended Petition No. 2000-52 for the SouthPark site and surrounding areas, approximately 95.6 acres, to rezone the site from a business-1 shopping center district, office-1 district and office-2 district to a commercial center district. Included in the amended application was the property known as Dillard's. Consistent with the Small Area Plan, Petition No. 2000-52, as amended, indicated the land use of the SouthPark site would include: a shopping center mall; mixed-use development at the corner of Sharon Road and Morrison Boulevard; public open space at the corner of Morrison Boulevard and Barclay Downs Drive; a pedestrian-friendly environment; public parks; and a transit facility. In the package submitted to the City, SouthPark Defendants also included the permitted uses and proposed restrictions on the property.

The Commission reviewed Petition No. 2000-52 and according to Crampton, the rezoning would have a "major positive effect" on the land use policies of the City as a whole. With respect to the surrounding neighborhoods, the Commission received reports stating there would be "no significant effect" on traffic and storm water management "would be handled within the standards set by the City for storm water management." After reviewing Petition No. 2000-52, the Commission concluded the petition was "consistent with the recommendation of the SouthPark Small Area Plan for the redevelopment of SouthPark Mall to take the form of a 'town center.' "

On 30 August 2000, more than seventy people attended a community meeting held to discuss Petition No. 2000-52. Prior to this meeting, representatives of SouthPark Defendants had participated in approximately twenty community meetings in connection with Petition No. 2000-52. At the 30 August meeting, a representative of SouthPark Defendants provided an overview of the SouthPark Mall rezoning plan by explaining the details of the plan and its consistency with the Small Area Plan. The representative also provided details on the traffic study performed in connection with Petition No. 2000-52. A question and answer session followed in which the meeting attendants were able to ask questions and present their concerns about the rezoning plan.

The City Ordinance

On 18 September 2000, a public hearing was held before the Council on Petition Nos. 2000-51 and 2000-52. Prior to the hearing, proponents and opponents of both petitions submitted various written materials regarding the two petitions. With respect to Petition No. 2000-51, approximately thirteen people commented at the hearing expressing their opinions on whether the petition should be approved. There was extensive discussion on the planning and development concerning Petition No. 2000-51, especially relating to traffic and building size. A member of the Commission commented that Petition No. 2000-51 takes into account the Small Area Plan's design elements "in terms of pedestrian friendly design, streetscape amenities[,] . . . open space and a mixture of uses the South Plan was looking for," as well as reducing the number of trips made from the area by creating more internal trips. After receiving the public's comments on Petition No. 2000-51, the Council voted unanimously to close the public hearing and deferred its decision pending a recommendation from the zoning committee. With respect to Petition No. 2000-52, approximately fifteen people commented on the petition and expressed their views on whether that petition should be approved. SouthPark Defendants presented a notebook containing approximately 3,500 names of persons who supported Petition No. 2000-52. Concerns regarding Petition No. 2000-52 centered around public green space, neighborhood preservation, quality of life, and traffic.

On 18 October 2000, the Council approved Petition No. 2000-51 in Ordinance No. 1631-Z, rezoning approximately 11.6 acres from an office-1 district to MUDD-O, and Petition No. 2000-52 in Ordinance No. 1632-Z, rezoning 95.6 acres from an office-1, office-2 and business-1 shopping center district to a commercial center. In each ordinance, the Council specifically provided:

> The development and use of the property hereby rezoned shall be governed by the predetermined ordinance requirements applicable to such district category, the approved site plan for the district, and any additional approved rules, regulations, and conditions, all of which shall constitute the zoning regulations for the approved district and are binding on the property as an amendment to the regulations and to the Zoning Maps.

On 12 December 2000, Plaintiffs filed a complaint seeking a declaratory judgment to determine the validity of Ordinance Nos. 1631-Z and 1632-Z. In their complaint, Plaintiffs argued: Session Law

2000-84 violated the constitutional guarantee of separation of powers; the adoption of the two zoning ordinances violated Plaintiffs' substantive and procedural due process rights; the City violated its delegated authority; and there was no showing of changed circumstances justifying Petition Nos. 2000-51 and 2000-52. On 21 December 2000, Plaintiffs filed an amended complaint alleging the adoption of the two zoning ordinances constituted illegal and unlawful spot zoning.[3] On 22 December 2000, Pension Fund Defendant filed an answer and a motion to dismiss Plaintiffs' complaint based on Plaintiffs' failure to state a claim upon which relief could be granted and lack of standing. SouthPark Defendants filed an answer and a motion to dismiss on 3 January 2001. SouthPark Defendants alleged Plaintiffs lacked standing to assert the claims and Plaintiffs' complaint failed to state claims upon which relief could be granted. On 3 January 2001, the City filed its answer and motion to dismiss Plaintiffs' complaint for failure to state a claim upon which relief could be granted.

Pension Fund Defendant filed a motion on 19 January 2001, to dismiss Plaintiffs' first cause of action and procedural due process claims alleged in their second and third causes of action. Subsequently, the City filed a motion on 19 January 2001 for partial summary judgment on Plaintiffs' first cause of action and the procedural due process claims set forth in Plaintiffs' second and third causes of action. In an order filed 2 February 2001, the trial court determined that with respect to the City's motion for partial summary judgment, there were no issues of fact in dispute, and it granted the City's motion for partial summary judgment on the first cause of action and procedural due process claims in the second and third causes of action. With respect to the motions to dismiss by SouthPark Defendants and Pension Fund Defendant, the trial court granted the motions to dismiss Plaintiffs' first cause of action and the procedural due process claims in the second and third causes of action.

On 6 and 7 March 2001, SouthPark Defendants, the City, and Pension Fund Defendant filed motions for summary judgment on Plaintiffs' remaining claims. Plaintiffs filed a motion for summary judgment on 7 March 2001 seeking a declaration that the two ordinances were invalid, unlawful, and void. In an order filed 21 March 2001, the trial court granted: SouthPark Defendants' motion for summary judgment, "except for that portion of the motion which seeks

3. As Plaintiffs have presented no argument in their brief to this Court regarding either changed circumstances or illegal and unlawful spot zoning, their assignments of error relating to these issues are abandoned. *See* N.C.R. App. P. 28(a).

judgment upon the grounds that [Plaintiffs] lack standing"; Pension Fund Defendant's motion; and the City's motion. The trial court denied Plaintiffs' motion for summary judgment.

The issues are whether: (I) a conditional rezoning, which does not involve a subsequent permitting process, constitutes a legislative or a quasi-judicial act; and (II) the ordinances were consistent with constitutional and statutory restraints.

We first note that because Plaintiffs' causes of action were disposed of summarily, it is unclear what standard of review the trial court used in evaluating the Council's decisions. The standard of review utilized by the trial court, however, is immaterial as "an appellate court's obligation to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Capital Outdoor, Inc. v. Guilford County Bd. of Adjust.*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting) (citations omitted), *reversed per curiam*, 355 N.C. 269, —— S.E.2d —— (2002) (reversing for reasons stated in the dissenting opinion).[4]

I

[1] Plaintiffs argue that because the Council engaged in conditional zoning, the rezoning was "quasi-judicial in nature, rather than legislative." We disagree.

Zoning is generally described as a legislative process. *Kerik v. Davidson County*, 145 N.C. App. 222, 228, 551 S.E.2d 186, 190 (2001). Conditional use zoning, as historically practiced, is a two-step process " 'with the rezoning decision meeting all of the statutory requirements for legislative decisions and the permit decision meeting all of the constitutional requirements for quasi-judicial decisions.' " *Village Creek Property Owners' Ass'n, Inc. v. Town of Edenton*, 135 N.C. App. 482, 487, 520 S.E.2d 793, 796 (1999) (citation omitted). More recently, however, some local governments have com-

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4. Thus, it is not necessary for this Court to review appeals from a superior court's order entered after evaluating a board decision by employing the two-fold standard of review most recently used in *Howard v. City of Kinston*, 148 N.C. App. 238, 241, 558 S.E.2d 221, 224 (2002). *See Capital Outdoor, Inc.*, 146 N.C. App. at 392, 552 S.E.2d at 268 (Greene, J., dissenting) (not necessary to determine whether the trial court exercised and correctly applied the proper scope of review).

bined this two-step process into one proceeding, commonly referred to as conditional zoning. Under this procedure, the rezoning decision is made concurrent with approval of the site plan. This combined procedure or conditional zoning is entirely a legislative act. *Massey v. City of Charlotte*, 145 N.C. App. 345, 353, 355, 550 S.E.2d 838, 844, 845, *cert. denied*, 354 N.C. 219, 554 S.E.2d 342 (2001).

In this case, the City's decision to adopt Ordinance Nos. 1631-Z and 1632-Z rezoning the two parcels of land was a single procedure, constituting legitimate conditional zoning, and thus was a legislative act. Furthermore, we note the action of the City was entirely consistent with Session Law 2000-84, which grants it the power to engage in conditional zoning as a purely legislative process.[5] 2000 N.C. Sess. Laws ch. 84, § 1(e).

II

[2] Plaintiffs argue adoption of the ordinances violated their procedural due process rights, was "unreasonable, arbitrary and capricious, and . . . violated N.C.G.S. [§] 160A-383." We disagree.

Local governments have been delegated the power to zone their territories and restrict them to specified purposes by the General Assembly. *Zopfi v. City of Wilmington*, 273 N.C. 430, 434, 160 S.E.2d 325, 330 (1968). This authority "is subject both to the . . . limitations imposed by the Constitution and to the limitations of the enabling statute." *Id.* Within those limitations, the enactment of zoning legislation "is a matter within the discretion of the legislative body of the city or town." *Id.*

A

Procedural Due Process

A city, engaging in a legislative act, is required to afford procedural due process to a party before that party's vested property rights are altered. *PNE AOA Media, L.L.C. v. Jackson County*, 146 N.C. App. 470, 481, 554 S.E.2d 657, 664 (2001). A vested right entitled to protection from legislation " 'must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; it *must have become a title*, legal or equitable, *to the present or*

5. We note Plaintiffs assigned error to the trial court's dismissal of their claim that Session Law 2000-84 violated the constitutional protection of separation of powers. Plaintiffs, however, have presented no argument in their brief to this Court dealing with the constitutionality of Session Law 2000-84. Accordingly, this assignment of error is deemed abandoned. *See* N.C.R. App. P. 28(a).

future enjoyment of property, a demand, or legal exemption from a demand by another.' " *Armstrong v. Armstrong*, 322 N.C. 396, 402, 368 S.E.2d 595, 598 (1988) (citation omitted). "The fundamental premise of procedural due process protection is notice and the opportunity to be heard. Moreover, the opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' " *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citations omitted).

In this case, even assuming Plaintiffs have a vested right in the property, adequate procedural due process protection was afforded to them. There were various community meetings held after due notice was given to surrounding property owners. Also, the notes and minutes from those community meetings were forwarded to the Council to review in making its decision. At the hearing on the two petitions for rezoning, the public was allowed to argue for or against the petition during the reserved time allowed by the Council. Accordingly, the trial court did not err in dismissing Plaintiffs' procedural due process claims.[6]

B

Arbitrary and Capricious

The Constitution imposes limits on the legislative power to zone by forbidding arbitrary, capricious, and "unduly discriminatory interference with the rights of property owners." *Zopfi*, 273 N.C. at 434, 160 S.E.2d at 330. This standard is a very difficult standard to meet. *Teague v. Western Carolina Univ.*, 108 N.C. App. 689, 692, 424 S.E.2d 684, 686, *disc. review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993). "A decision is arbitrary and capricious if it was 'patently in bad faith,' 'whimsical,' or if it lacked fair and careful consideration." *Id.* (citation omitted). In deciding whether a decision is arbitrary and capricious, "courts must apply the 'whole record' test." *Id.*

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6. We note our statutes provide that before a city or town adopts or amends an ordinance, the city council is required to hold a public hearing and provide notice of the public hearing. N.C.G.S. § 160A-364 (1999); *see also* N.C.G.S. § 160A-384(a) (1999). Plaintiffs neither alleged in their complaint nor presented any argument in their brief to this Court regarding whether the statutes were complied with. Instead, Plaintiffs argue they did not receive a "full and fair hearing" similar to a quasi-judicial hearing whereby they could offer evidence, cross-examine adverse witnesses, and inspect documents. Because the Council's adoption of the two ordinances was a legislative act, however, Plaintiffs were not entitled to those rights afforded in a quasi-judicial hearing.

In this case, prior to making its decision, the Council received the Commission's recommendation and report, storm water management studies, traffic reports, community meeting notes, and memorandums. The Commission found both petitions were consistent with and promoted the goals of the Small Area Plan and that adoption of the ordinances would assist in promoting the expansion and development of the SouthPark area. Plaintiffs have not shown that the Council's decision was "patently in bad faith," "whimsical," or "lacked fair and careful consideration." To the contrary, the record shows the Council's decision was based on and consistent with the various reports and recommendations and entered after fair and careful consideration. Accordingly, the Council's decision is not arbitrary or capricious. Furthermore, Plaintiffs have made no showing, indeed no argument, the ordinances are "unduly discriminatory."

C

Enabling Statute

North Carolina's enabling statute, found at N.C. Gen. Stat. § 160A-383, delegates a city's authority to pass zoning regulations and provides:

> Zoning regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city.

N.C.G.S. § 160A-383 (1999). It is not necessary that a zoning ordinance accomplish "all of the purposes specified in the enabling act. It is sufficient that the legislative body of the city had reasonable ground upon which to conclude that one or more of those purposes would be accomplished or aided by the amending ordinance." *Zopfi*, 273 N.C. at 436-37, 160 S.E.2d at 332.

In this case, Zoning Ordinance Nos. 1631-Z and 1632-Z were adopted in accordance with the Small Area Plan, which included

goals of: creating a greater mixture of land uses; planning for future mass transit service; developing pedestrian improvements; and developing a public gathering space and a network of green spaces. Traffic studies performed with respect to the two petitions did not show any "significant effect" on traffic and the surrounding neighborhoods. Moreover, the Commission offered that the ordinances would (1) have a "major positive effect" on the City's land use and overall viability and (2) "facilitate the adequate provision of transportation." Accordingly, as the Council adopted the ordinances in due regard to section 160A-383, it did not violate its delegated zoning authority.[7]

Affirmed.[8]

Judges McGEE and THOMAS concur.

DEBRA RILEY, PLAINTIFF-APPELLANT v. LINDA DEBAER AND TIM MILLER, DEFENDANTS-APPELLEES

No. COA00-675-2

(Filed 2 April 2002)

Workers' Compensation— negligent infliction of emotional distress by rehabilitation specialist—ancillary claim—exclusive jurisdiction

The Workers' Compensation Act provides the exclusive remedy for a workers' compensation recipient's negligent infliction of emotional distress claim against the vocational rehabilitation specialists to whom she had been referred. The Workers' Compensation Act gives the Industrial Commission exclusive jurisdiction over workers' compensation claims and all related matters.

Chief Judge EAGLES dissenting.

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7. We note that while Plaintiffs argue in their brief to this Court that the City violated the delegated authority of its local zoning act, Plaintiffs did not raise the local zoning procedures in their complaint or before the trial court. Accordingly, the trial court did not address whether the City violated local zoning procedures and we will not do so for the first time on appeal.

8 In light of our decision, we need not address whether Plaintiffs lacked standing to bring their cause of action. Moreover, we need not address Plaintiffs' remaining assignments of error as Plaintiffs have abandoned these assignments of error by failing to present argument in their brief regarding these assignments of error. N.C.R. App. P. 28(a).

On remand based on order of Supreme Court entered on 18 December 2001, *Riley v. DeBaer*, 354 N.C. 575, 559 S.E.2d 183 (2001), allowing defendants' petition for discretionary review for the limited purposes of remanding to the Court of Appeals for reconsideration in light of *Johnson v. First Union Corp.*, 131 N.C. App. 142, 504 S.E.2d 808, *rev. allowed by* 349 N.C. 529, 526 S.E.2d 175 (1998), *rev. improvidently allowed by* 351 N.C. 339, 525 S.E.2d 171, *and reh'g denied by* 351 N.C. 648, 543 S.E.2d 870 (2000). Appeal by plaintiff from order entered 9 March 2000 by Judge Howard E. Manning, Jr. in Durham County Superior Court. Originally heard in the Court of Appeals 20 April 2001.

Browne, Flebotte, Wilson and Horn, P.L.L.C., by Martin J. Horn, for plaintiff-appellant.

Newsom, Graham, Hedrick & Kennon, P.A., by William P. Daniell, for defendants-appellees.

BRYANT, Judge.

The evidence presented at trial is summarized in this Court's prior opinion, *Riley v. DeBaer*, 144 N.C. App. 357, 547 S.E.2d 831 (2001) (*Riley I*). Although neither party has disputed whether the trial court lacked subject matter jurisdiction to hear this case, pursuant to remand from our Supreme Court, we now consider this issue. *See Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 341, 543 S.E.2d 169, 171 (2001) (stating that jurisdictional issues "can be raised at any time, even for the first time on appeal and even by a court *sua sponte*").

The issue presented is one of first impression: Whether a workers' compensation claimant's (plaintiff's) sole remedy for a claim of NIED against her vocational rehabilitation specialists lies pursuant to the Workers' Compensation Act or whether our courts have subject matter jurisdiction to adjudicate this claim. Based on the holdings in *Johnson v. First Union Corp.*, 131 N.C. App. 142, 504 S.E.2d 808 (1998) and *Deem v. Treadaway & Sons Painting and Wallcovering, Inc.*, 142 N.C. App. 472, 543 S.E.2d 209, *rev. denied by* 354 N.C. 216, 553 S.E.2d 911 (2001), we hold that the instant case must be dismissed for lack of subject matter jurisdiction.

In *Johnson*, the case arose from an allegation of on-the-job injuries suffered by plaintiffs. In 1992 and 1993, the plaintiffs filed separate claims with the Industrial Commission seeking workers'

compensation benefits for repetitive motion disorders they allegedly suffered in the course of their employment for First Union Corporation and/or First Union Mortgage Corporation. Both plaintiffs were initially diagnosed with job-related repetitive motion disorders, and both subsequently had their claims rejected. The rejection of their workers' compensation claims were apparently based in part on a videotape defendants prepared to illustrate the nature of plaintiffs' jobs.

The plaintiffs contested that the videotape did not accurately portray the requirements of their jobs. They also asserted that defendants made the videotape with the intention of deceiving the plaintiffs' physician. The plaintiffs further contended that, based on the inaccurate videotape, their physician withdrew diagnoses that plaintiffs' disorders were job-related.

Plaintiff Smith alleged that the defendants made material alterations in a workers' compensation Form 21 that she had previously signed. Smith asserted that defendants deliberately concealed the alteration from her and her attorney. Smith also said that the Industrial Commission subsequently notified her that defendants had submitted the Form 21 with material alterations. Allegedly, the Industrial Commission also told Smith that the Form 21 agreement might be voided or set aside and that she might be entitled to full restoration of compensation.

The plaintiffs filed suit against the employer and insurer alleging fraud, bad faith refusal to pay or settle a valid claim, unfair and deceptive trade practices, IIED and civil conspiracy. The trial court dismissed the complaint pursuant to N.C. R. Civ. P. 12(b)(6), stating that the complaint failed to state a claim for which relief could be granted. The plaintiffs appealed and the defendants cross-appealed stating that the trial court was correct in dismissing the appeal, but asserting that the dismissal should have been granted based on lack of subject matter jurisdiction pursuant to N.C. R. Civ. P. 12(b)(1). Defendants contended that the Workers' Compensation Act gave the Industrial Commission exclusive jurisdiction over workers' compensation claims and all related matters, including the issues raised in the case at bar. The *Johnson* Court agreed.

The *Johnson* Court stated:

> Through the Workers' Compensation Act, North Carolina has set up a comprehensive system to provide for employees who suffer

work-related illness or injury. "The purpose of the Act, however, is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers."

The purpose of the act is to provide compensation for an employee in this State who has suffered an injury by accident which arose out of and in the course of his employment, the compensation to be paid by the employer, in accordance with the provisions of the act, without regard to whether the accident and resulting injury was caused by the negligence of the employer, as theretofore defined by the law of this State. The right of the employee to compensation, and the liability of the employer therefor, are founded upon mutual concessions, as provided in the act, *by which each surrenders rights and waives remedies which he theretofore had under the law of this State.* The act establishes a sound public policy, and is just to both employer and employee. As administered by the North Carolina Industrial Commission, in accordance with its provisions, the act has proven satisfactory to the public and to both employers and employees in this State with respect to matters covered by its provisions.

. . .

Plaintiffs in this case assert that their injuries are work-related. The Workers' Compensation Act gives jurisdiction for such cases to the North Carolina Industrial Commission. Plaintiffs must pursue their remedies through the Commission.

Johnson, 131 N.C. App. at 144-45, 504 S.E.2d at 809-10 (citations omitted). The *Johnson* Court affirmed the decision of the trial court to dismiss plaintiff's complaint.

In *Deem*, plaintiff was an employee of defendant Treadaway & Sons Painting when he fell off a ladder and suffered injury. Plaintiff filed a workers' compensation claim against Treadaway Painting and its workers' compensation carrier, Montgomery Mutual Insurance Company. Montgomery Mutual hired an independent adjusting company headed by R.E. Pratt (R.E. Pratt & Co.), to handle plaintiff's workers' compensation claim. Defendant Goad was Pratt's adjuster assigned to plaintiff's claim.

Plaintiff returned to work in November 1994 as a paint foreman but later, his condition worsened and he was taken out of work on 3

January 1996. About the same time, Montgomery Mutual and Pratt hired defendant Concentra Managed Care to provide plaintiff with vocational rehabilitation counseling. Defendants Smith, Wertz and Seltzer were employees of Concentra. On 20 February 1996, plaintiff's attending physician released plaintiff to work, however the release was conditioned upon a number of restrictions. Thereafter, Treadaway Painting notified Concentra that plaintiff's job was no longer vacant. Treadaway Painting offered the job of laborer to plaintiff, which plaintiff accepted.

On 11 July 1997, plaintiff entered into an agreement of final settlement and release with Treadaway Painting, Montgomery Mutual and Pratt. Pursuant to this agreement, the plaintiff agreed to release and discharge all claims available under the Worker's Compensation Act relating to this injury in exchange for payment of $100,000. On 23 July 1997, the Industrial Commission approved the settlement agreement. However, notwithstanding the former release and settlement agreement, on 31 December 1998, plaintiff filed suit against the employer Treadaway Painting, insurer Montgomery Mutual, the insurer's adjuster R.E. Pratt & Co. & Goad, vocational rehabilitation counseling company Concentra and Concentra's employees (defendants). Plaintiff alleged that they committed fraud, bad faith, unfair and deceptive trade practices, IIED and civil conspiracy arising out of the handling of his workers' compensation claim.

The defendants filed separate motions to dismiss pursuant to Rule 12(b)(1). The defendants stated that the courts were without subject matter jurisdiction over the claims and that pursuant to the Workers' Compensation Act the Industrial Commission had exclusive jurisdiction over these claims. Pursuant to Rule 12(b)(6), defendants also stated that the plaintiff had failed to state a claim for which relief may be granted and sought dismissal of the complaint. The trial court agreed with defendants and granted each of their motions to dismiss based upon both Rules 12(b)(1) and (6). On appeal, plaintiff brought forward three assignments of error all dealing with the trial court's grant of each defendant's motion to dismiss. The *Deem* Court affirmed the trial court's rulings stating:

> [P]laintiff at bar argues that it matters not that his claims originally arose out of his compensable injury. Instead, he argues that the "intentional conduct" of defendants fails to come under the exclusivity provisions of the Act because that conduct did not arise out of and in the course of plaintiff's employment relationship. Again, finding *Johnson* [*v. First Union Corp.*, 131 N.C. App.

142, 504 S.E.2d 808 (1998)] on point, we disagree.

> From both his complaint and his brief to this Court, we can clearly glean that . . . plaintiff's complaint is nothing more than an allegation that defendants did not appropriately handle his workers' compensation claim, and thus he was injured because he did not receive his entitled benefit. This is the exact argument of the *Johnson* plaintiffs and, in that case, this Court held that "[t]he North Carolina Workers' Compensation Act (N.C. Gen. Stat. § 97-1 through 97-200) gives the North Carolina Industrial Commission exclusive jurisdiction over workers' compensation claims *and all related matters, including issues such as those raised in the case at bar.*" *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809 (emphasis added). . . . [W]e hold in the case at bar that plaintiff's claims are ancillary to his original compensable injury and thus, are absolutely covered under the Act and this collateral attack is improper. *Id.* at 144-45, 504 S.E.2d at 809. *See also Spivey v. General Contractors*, 32 N.C. App. 488, 232 S.E.2d 454 (1977).

Deem, 142 N.C. App. at 477, 543 S.E.2d at 211-12.

In the case at bar, plaintiff alleges in her complaint that she was the recipient of workers' compensation benefits when she was referred to defendants for vocational rehabilitation. She alleges that defendants were negligent in that they: 1) ignored facts known to them that would have benefitted plaintiff in her effort to pursue vocational rehabilitation; and 2) ignored valid and relevant reports by a neurologist and psychologist and relied only upon reports by an orthopedist to base their opinions as to plaintiff's ability to work. She alleged that this failure to follow up on medical information was negligence on the part of the vocational rehabilitation counselors and company. This failure constituted a breach of duty, and this breach proximately caused injury to the plaintiff such that her workers' compensation benefits were discontinued. In addition, plaintiff alleges that defendants' negligent acts inflicted emotional distress upon her, including but not limited to medical expenses for psychological and medical treatment, pain and suffering and lost wages.

Although, our courts have not previously addressed whether a workers' compensation claimant's (plaintiff's) sole remedy for a claim of NIED against her vocational rehabilitation specialists lies pursuant to the Workers' Compensation Act or whether our courts have subject matter jurisdiction to adjudicate this claim, we find both

the *Johnson* and *Deem* case to be persuasive authority as to this issue. The plaintiff in the case at bar makes essentially the same argument as made by the claimants in *Johnson* and *Deem*—that defendants' mishandling of plaintiff's workers' compensation claim caused some type of tortious injury to the plaintiff for which the plaintiff seeks court sanctioned remedies. As stated by the *Johnson* and *Deem* Courts, " 'the North Carolina Workers' Compensation Act (N.C. Gen. Stat. § 97-1 through 97-200) gives the North Carolina Industrial Commission exclusive jurisdiction over workers' compensation claims and *all related matters, including issues such as those raised in the case at bar.*' " *Deem*, 142 N.C. App. at 477, 543 S.E.2d at 212 (citing *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809). Therefore, we find that in the instant case, plaintiff's claim of NIED was ancillary to the original claim and that the Workers' Compensation Act provides the sole remedy for plaintiff's NIED claim.

We note that there have been other cases that have reviewed IIED or NIED claims stemming from an employment relationship and have found that the claims did not fall within the exclusive jurisdiction of the Industrial Commission. *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *rev. denied by* 317 N.C. 334, 346 S.E.2d 140 (1986) (holding that the exclusivity provisions of the Workers' Compensation Act did not bar a claim of IIED against the employer based on the allegation of sexual harassment); *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232, *rev. allowed by* 325 N.C. 270, 384 S.E.2d 513, *cert. allowed by* 325 N.C. 704, 387 S.E.2d 55 (1989), *and rev. dismissed as improvidently granted by* 326 N.C. 356, 388 S.E.2d 769 (1990) (holding that the exclusivity provisions of the Workers' Compensation Act did not bar a claim of IIED against the employer based on the allegation of sexual harassment); *Ridenhouser v. Concord Screen Printers, Inc.*, 40 F. Supp. 2d 744 (M.D.N.C. 1999) (holding that the exclusivity provisions of the Workers' Compensation Act did not bar claims of IIED and NIED against the employer based on the allegation of sexual harassment); *Atkins v. USF Dugan, Inc.*, 106 F. Supp. 2d 799 (M.D.N.C. 1999) (holding that the exclusivity provisions of the Workers' Compensation Act did not bar claims of IIED and NIED based on the allegation of age discrimination); *Buser v. Southern Food Service, Inc.*, 73 F. Supp. 2d 556 (M.D.N.C. 1999) (holding that the exclusivity provisions of the Workers' Compensation Act did not bar claims of IIED and NIED against the employer and the employer's vice president based on alleged violations of the Family Medical Leave Act);

Thomas v. Northern Telecom, Inc., 157 F.Supp.2d 627 (M.D.N.C. 2000) (holding that the exclusivity provisions of the Workers' Compensation Act did not bar claims of IIED and NIED against the employer based on the allegations of racial and disability discrimination).

However, upon remand and based on *Johnson* and *Deem*, we hold that the Workers' Compensation Act provides the exclusive remedy for plaintiff's NIED claim against her vocational rehabilitation specialists. Therefore, for the reasons stated above, the order of the trial court is vacated and this case is remanded to the trial court for that court to enter an order of dismissal for lack of subject matter jurisdiction.

Vacated and remanded for entry of order of dismissal.

Judge McCULLOUGH concurs.

Chief Judge EAGLES dissents with a separate opinion.

EAGLES, Chief Judge, dissenting.

I respectfully dissent. This case returns to this Court on remand from our Supreme Court for the limited purpose of reconsideration in light of *Johnson v. First Union Corp.*, 131 N.C. App. 142, 504 S.E.2d 808 (1998) (subsequent history omitted).

Here, plaintiff, seeking damages for negligent infliction of emotional distress, filed suit against two vocational rehabilitation specialists. Plaintiff alleged that "defendants were both personally negligent and professionally negligent in their pursuit of plaintiff's vocational rehabilitation." *Riley v. Debaer*, 144 N.C. App. 357, 359, 547 S.E.2d 831, 833 (2001). Unlike the cases relied upon by the majority, *Johnson* and *Deem*, plaintiff here did not file any action against her employer or co-employee.

This case presents an issue of first impression: Whether plaintiff's sole remedy lies within the Workers' Compensation Act and whether the trial court had subject-matter jurisdiction to adjudicate plaintiff's negligence claim against a non-employer and non-coworker defendant. The Court of Appeals of Indiana addressed the same issue in *Campbell v. Eckman/Freeman & Assoc.*, 670 N.E.2d 925 (Ind. App. 1996), as did the Supreme Court of Oregon in *Nicholson v. Blachly*, 753 P.2d 955 (Or. 1988). In both of those cases, the learned courts held

that a plaintiff-employee could maintain an action in tort against a third-party vocational rehabilitation organization that had contracted with plaintiff's employer to provide assistance under each State's respective workers' compensation act. The Indiana and Oregon workers' compensation acts are substantially similar to our Act. *See* Ind. Code §§ 22-3-1 to -12 (2002); Or. Rev. Stat. §§ 656.001-.990 (2001). The rationale supporting the decisions by the Indiana Court of Appeals in *Campbell* and the Oregon Supreme Court in *Nicholson* is applicable here and should be adopted by our courts.

The North Carolina Workers' Compensation Act presumes that all employers and employees fall under the jurisdiction of the Act:

> [E]very *employer and employee* . . . 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.

N.C.G.S. § 97-3 (1999) (emphasis added). *Cf.* Ind. Code § 22-3-2-2 (2002); Or. Rev. Stat. § 656.017 (2001).

In *Rorie v. Holly Farms Poultry Co.*, our Supreme Court summarized the purpose of the Workers' Compensation Act:

> The purpose of the Workers' Compensation Act is twofold. It was enacted to provide swift and sure compensation to injured workers without the necessity of protracted litigation. This Court has long held that the Act should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretations. *The Act, however, also insures a limited and determinate liability for employers, and the court cannot legislate expanded liability under the guise of construing a statute liberally.* The rule of statutory construction is to give the legislative intent full effect when interpreting the language of the statute. While the Act should be liberally construed to benefit the employee, *the plain and unmistakable language of the statute must be followed.*

306 N.C. 706, 709-10, 295 S.E.2d 458, 460-61 (1982) (citations omitted) (internal quotations omitted) (emphasis added).

The Act's plain language specifically provides that an employee's injury is compensable only when the injury "aris[es] out of and in the course of the employment." N.C.G.S. § 97-2(6) (1999).

Furthermore, an employee's common law rights against the employer are abrogated and the exclusive remedy for on-the-job injuries lies within the Act:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then *the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury or death.*

N.C.G.S. § 97-10.1 (1999) (emphasis added). *Cf.* Ind. Code § 22-3-2-6 (2002); Or. Rev. Stat. § 656.018 (2001). This section limits an employee, whose injury occurred by accident and *arose out of and in the course of the employment*, to the rights and remedies provided by the Act. "An injury arises out of the employment 'when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment.' " *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 496, 340 S.E.2d 116, 124 (1986) (quoting *Robbins v. Nicholson*, 281 N.C. 234, 239, 188 S.E.2d 350, 354 (1972)).

Additionally the plain language of the statute establishes that the abrogation of an employee's common law rights and remedies against his employer applies only to the employer. A court is barred from hearing any common law action brought by the employee against the employer for the same injury. N.C.G.S. § 97-10.1 (1999). The Act expressly permits actions against third-party tortfeasors, so long as the third-party is not the employer or a fellow employee. N.C.G.S. § 97-10.2 (1999); *Lovette v. Lloyd*, 236 N.C. 663, 667, 73 S.E.2d 886, 890 (1953). *Cf.* Ind. Code § 22-3-2-13 (2002); Or. Rev. Stat. § 656.154 (2001).

An employee is permitted to bring a malpractice claim against physicians who treat an employee's compensable injury. *Bryant v. Dougherty*, 267 N.C. 545, 148 S.E.2d 548 (1966). This right was affirmed in *North Carolina Chiropractic Ass'n, Inc. v. Aetna Cas. & Sur. Co.*, 89 N.C. App. 1, 6, 365 S.E.2d 312, 315 (1988), wherein Judge Parker (now Justice) wrote: "The Act does not take away common law rights that are unrelated to the employer-employee relationship."

In affirming an employee's right to sue a vocational rehabilitation company in tort, the Indiana Court of Appeals, in *Campbell*, cogently

noted that "various entities may be involved in assisting employers to fulfill their obligations under the worker's compensation laws, such as ambulance services, hospitals, physicians, and others providing medical and rehabilitative care covered under worker's compensation." *Campbell*, 670 N.E.2d at 930. The same is true under North Carolina's Workers' Compensation Act.

Here, the allegedly negligent conduct of defendants is not the kind of harm for which our Workers' Compensation Act was intended to compensate. Plaintiff's negligence action against these two vocational rehabilitation therapists is separate and distinct from the plaintiff's original workers' compensation claim. The injury underlying plaintiff's claim against the defendants did not arise out of and in the course of employment, nor did it result naturally and unavoidably from the original injury that served as the basis for plaintiff's original workers' compensation claim. N.C.G.S. § 97-2(6) (1999); *see Bryant*, 267 N.C. at 548, 148 S.E.2d at 551-52; *Hogan*, 79 N.C. App. at 496, 340 S.E.2d at 124. Defendants' allegedly negligent conduct cannot rationally be considered the natural result of plaintiff's compensable injury. One cannot say that when a vocational rehabilitation therapist treats an injured worker it is naturally expected that further injury will result. Indeed, the reasonable expectation is that the original injury will be ameliorated.

Plaintiff's action for negligent infliction of emotional distress against two third-party vocational rehabilitation therapists is analogous, for jurisdictional purposes, to a medical malpractice claim against a treating physician. After being injured during the course of employment, employees often require treatment by third-party professionals. In *Bryant v. Dougherty*, 267 N.C. at 548, 148 S.E.2d at 551-52, our Supreme Court wrote:

> The Workmen's Compensation Act does not confer upon the Commission jurisdiction to hear and determine an action, brought by an injured employee against a physician or surgeon, to recover damages for injury due to the negligence of the latter in the performance of his professional services to the employee. G.S. § 97-26 relates to the right of the employee to recover damages or benefits under the Act from the employer, and so from the insurance carrier of the employer. It does not impose liability upon the physician or surgeon or relieve him thereof.

Here, defendants rendered professional services to plaintiff. As with surgeons or physicians, North Carolina's Workers' Compensa-

tion Act does not impose liability upon rehabilitation therapists or relieve them thereof. *See id.*

Our Act is founded on the principle that in forming the employer-employee relationship, both employer and employee mutually assent to the Act's governance of claims by employee against the employer for injuries to employee arising out of the scope of employment. As to the relationship between a third-party care provider and an employee pursuing a compensable claim, no mutual assent to submit to the Workers' Compensation Act exists. Plaintiff's claim, though it arose during treatment for a compensable injury, as do many medical malpractice claims, is not the type of claim that was intended to be covered by our Workers' Compensation Act.

Accordingly, I would hold that jurisdiction of plaintiff's claim lies squarely with the trial court. For the foregoing reasons and the reasons stated in *Riley*, 144 N.C. App. 357, 547 S.E.2d 831, I would reverse the trial court's decision and remand for trial.

GREEN PARK INN, INC., PLAINTIFF v. GARY T. MOORE AND WIFE, GAIL O. MOORE, GMAFCO, LLC, AND FIRST UNION NATIONAL BANK OF SOUTH CAROLINA, DEFENDANTS

No. COA01-268

(Filed 2 April 2002)

1. Mortgages— lease/purchase agreement—anti-deficiency statute

The Anti-Deficiency Statute did not apply to a long term lease with an option to purchase where defendants argued that the documents and the conduct of the parties indicated a purchase money mortgage subject to the Anti-Deficiency Statute. There was neither an instrument of debt nor a securing instrument stating on its face that the transaction was a purchase money mortgage. N.C.G.S. § 45-21.38.

2. Damages— liquidated—provision enforceable

A liquidated damages provision in a lease was enforceable where the damages in the event of a breach would have been difficult to ascertain at the time the parties entered into their agree-

ment and the statements about the negotiations offered by defendants to show that the amount was unreasonable were insufficient to raise a genuine issue of material fact.

3. Contract— lease—disguised sale—meeting of minds

The trial court did not err by not granting summary judgment for defendants in an action arising from breach of a lease/purchase agreement where defendants contended that there was no meeting of the minds in that defendants understood the transaction to be a sale disguised as a lease. The tax consequences of the agreement may not constitute an essential term because they do not relate to the rights and obligations of the parties to each other.

4. Judgments— interest—payment from trust account

The trial court did not err by awarding interest in an action arising from a breached lease/purchase agreement, but liability for the interest may only be assessed against defendants Moore and GMAFCO, not First Union, which the agreement required to retain assigned trust account assets until any dispute was resolved.

Appeal by defendants from order entered 25 October 2000 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 9 January 2002.

Adams, Hendon, Carson, Crow & Saenger, P.A., by George W. Saenger, for plaintiff-appellee.

Matney & Associates, P.A., by David E. Matney, III, for defendant-appellants.

HUDSON, Judge.

Gary T. and Gail O. Moore, GMAFCO, LLC, and First Union National Bank of South Carolina (collectively, "Defendants") appeal from an order granting summary judgment in favor of Green Park Inn, Incorporated. We affirm.

Allen and Patsy McCain are the owners of Green Park Inn, Incorporated ("Plaintiff"). Through Plaintiff, the McCains operated the Green Park Inn ("the Inn"), a hotel in Blowing Rock, North Carolina. Beginning in the Summer of 1996, Plaintiff negotiated with Defendants Gary and Gail Moore for the sale of the Inn.

In August 1996, Plaintiff as seller, and the Moores as buyers, signed a document entitled "Offer to Purchase and Contract for Sale and Purchase" ("Sales Contract"). The purchase price was $2,600,000. Paragraph XII of the Sales Contract provided for a purchase money mortgage. Additionally, Paragraph XII required, *inter alia*, that the Moores pledge as additional security for the loan $1,000,000 worth of assets held in trust with the First Union National Bank of South Carolina ("First Union") and that the Moores personally guarantee the loan.

Paragraph XXXXV of the Sales Contract provided an alternative form for the transaction. Paragraph XXXXV states as follows:

> Notwithstanding any provision in any other Article of this Offer to Purchase and Contract For Sale and Purchase to the contrary, Seller may at its option elect not to pay at Closing the existing indebtedness (hereinafter the "Existing Debt") . . . in which event the structure and form of the transaction shall be as set forth in this Article XXXXV. It is the intent of the parties that if the structure of the transaction is as set forth in this Article, the financial substance of the transaction as between the parties and as between each party and all taxing authorities shall be the same as if the structure and form as set forth in this Article were not utilized. The terms and conditions of any documents described in this Article shall be those such as to fulfill the terms and the structure described below. If so elected by Seller the structure shall be as follows.

Paragraph XXXXV then went on to outline the alternative form of the transaction. At a "First Closing," the parties were to enter into a contract for purchase of the property with a closing date—the "Second Closing"—to occur within 30 days after the Existing Debt had been paid in full. Additionally, at the First Closing, the parties would enter into a lease for a term of three years or until the Second Closing, with the possibility, at the seller's option, of extending the lease for an additional three years. Paragraph XXXXV of the Sales Contract also provided that "[t]he parties covenant and agree, for all income tax reporting purposes, to report this transaction as a sale as of the date of First Closing, with the rental payments as payments of principal and interest as set forth herein and as a foreclosure in the event of a termination of Buyer's rights pursuant to default under the Lease."

Shortly after Plaintiff executed these documents in August 1996, Mr. McCain's accountant advised him that the transaction would be

considered a sale of the Inn by the Internal Revenue Service, with adverse tax consequences. In September 1996, McCain hired a North Carolina law firm to restructure the transaction. In October 1996, the parties executed a set of documents, including a Lease Agreement, an Option to Purchase, and a Security Deposit Assignment Agreement for Trust Account Collateral ("Security Deposit Agreement").

The Lease Agreement was executed by Plaintiff as lessor and GMAFCO, the Moores' limited liability company, as lessee. It provided for a lease term of eleven and one-half years with monthly rental payments due according to the following schedule:

(1) May 1st, 1997 through December 1st, 2001—monthly payments each in the amount of Twenty Thousand Eight Hundred Sixteen Dollars and 04/100 ($20,816.04);

(2) January 1st, 2002 through April 1st, 2002—monthly payments each in the amount of Twenty Two Thousand Three Hundred Seventy-Four Dollars and 04/100 ($22,374.04);

(3) May 1st, 2002 through June 1st, 2008—monthly payments each in the amount of Twenty Four Thousand Five Hundred Ninety One and 01/100 ($25,491.01).

The Lease Agreement was accompanied by an Option to Purchase the Inn for $1,800,000, which could be exercised on or after 1 January 2008. The Option to Purchase contained a provision stating: "Parties covenant and agree, for all income tax reporting purposes, to report this transaction as a sale as of the date of the Lease, with the rental payments as payments of principal and interest as set forth herein, and as a foreclosure in the event of a termination of Buyer's rights pursuant to default."

Section Seventeen of the Lease Agreement included a provision for liquidated damages. This section provided that in case of a default by GMAFCO, Plaintiff would be entitled to $500,000 in liquidated damages. The accompanying Security Deposit Agreement provided that, upon stated terms and conditions, the Moores "as Assignor, hereby assigns, pledges and grants as Security Deposit to [Plaintiff], as Assignee, all of [Assignor's] and [Assignor's] estate's beneficial interest in the principal and income from Five Hundred Thousand Dollars ($500,000.00) of the Trust Account assets" held by First Union.

GMAFCO defaulted on the February 2000 rent. Pursuant to the terms of the Lease Agreement and the Security Deposit Agreement, Plaintiff, by letter dated 28 February 2000, gave GMAFCO notice and an opportunity to cure the default. GMAFCO made no further payments and returned possession of the property to Plaintiff. In March 2000, Plaintiff advised First Union of the default and made demand for the security deposit. First Union did not tender the security deposit. Instead, First Union advised Plaintiff that the Moores had contested payment of the deposit, and that First Union had frozen the assets pending resolution of the dispute.

Plaintiff filed suit against the Moores, GMAFCO, and First Union on 6 April 2000 to obtain the $500,000 security deposit. In their answer, the Moores and GMAFCO raised as defenses, *inter alia*, that North Carolina's Anti-Deficiency Statute, N.C. Gen. Stat. § 45-21.38 (1999), prohibited the payment of the $500,000, because the Lease was a disguised sale and the $500,000 would be a deficiency judgment; and the Lease provision requiring payment of $500,000, although labeled a liquidated damages provision, was in fact an unenforceable penalty provision. In its answer, First Union acknowledged that it was the stakeholder of the $500,000 it held in trust. First Union requested that the court enter an order directing First Union to whom it should deliver the stake, at no cost to First Union.

Plaintiff filed a motion for summary judgment on 5 October 2000, which the trial court granted. The court's order provides in relevant part that "Defendants, jointly and severally, are ordered to pay to Plaintiff the Five Hundred Thousand ($500,000.00) Dollars maintained in the account of Defendant Gary T. Moore and wife, Gail O. Moore at Defendant First Union National Bank of South Carolina" and "Plaintiff is entitled to interest at the legal rate from March 14, 2000." Defendants appeal.

I.

[1] In their first assignment of error, Defendants maintain that the trial court erred in granting Plaintiff's motion for summary judgment. Defendants do not dispute that GMAFCO breached the agreement. They argue that the agreement was in effect a purchase money mortgage, subject to North Carolina's Anti-Deficiency Statute. Defendants contend that, as a result, Plaintiff's only remedy is recovery of the property, and the Security Deposit Agreement is unenforceable. We disagree.

The Anti-Deficiency Statute provides as follows:

> In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

N.C.G.S. § 45-21.38.

Defendants argue that the transaction—a long-term lease followed by an option to purchase—was a *de facto* sale and was "substantively equivalent to purchase money financing." Defendants devote much of their brief to their contention that the parties intended their transaction to be a sale, as evidenced by the documents and their conduct. We believe, however, that regardless of how we characterize their transaction or the parties' intents, the Anti-Deficiency Statute simply does not apply here.

Defendants rely on cases decided by our Supreme Court to argue that the Anti-Deficiency Statute is to be broadly interpreted, and thus, the Lease Agreement should be treated as a purchase money mortgage under that statute, with the Lease viewed as evidence of indebtedness and security. In *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979), our Supreme Court eschewed a literal reading of the statute, stating that the Court was "compelled to construe the statute more broadly." *Id.* at 373, 250 S.E.2d at 275. In order to effectuate the intent of the Legislature, the Court held that the statute, in addition to abolishing deficiency judgments, prohibits creditors in a purchase-money mortgage transaction from suing on the note in lieu of accepting reconveyance of the property. *See id.*; *see also Barnaby*

v. Boardman, 313 N.C. 565, 566, 330 S.E.2d 600, 601 (1985) (holding that "the holder of a promissory note given by a buyer to a seller for the purchase of land and secured by a deed of trust embracing such land may [not] release his security and then sue on the note").

In *Adams v. Cooper*, 340 N.C. 242, 460 S.E.2d 120 (1995), the Court held that the Anti-Deficiency Statute "bars an action against the guarantors of a purchase money note to recover the debt for the balance of the purchase price represented by the note." *Id.* at 243, 460 S.E.2d at 121. Again noting that the statute should be broadly construed to effectuate the Legislature's intent, the Court stated that "[o]ur cases interpreting and applying the anti-deficiency statute have consistently held that the 1933 General Assembly intended it to prevent any suit on such a purchase money obligation other than one to foreclose upon the real property securing the obligation." *Id.* at 244, 460 S.E.2d at 121.

It should be noted that in each of the transactions at issue in these cases, the buyer had executed a note secured by a deed of trust, and the documents of the transaction made clear that the parties had engaged in purchase money financing. *See id.* at 243, 460 S.E.2d at 120; *Barnaby*, 313 N.C. at 566, 330 S.E.2d at 601; *Realty Co.*, 296 N.C. at 366-67, 250 S.E.2d at 272. None of the documents in the case before us, however, purports to be an instrument of debt or a securing instrument, and none of the documents contain a statement that the property served as security for the balance of its purchase price.

The statute expressly states that its application is limited to transactions where the "evidence of indebtedness *shows upon the face* that it is for balance of purchase money for real estate." N.C.G.S. § 45-21.38 (emphasis added). We interpret this language as precluding the reading of the statute which Defendants have requested. Indeed, our Supreme Court has stated that "the manifest intention of the Legislature was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate *and the securing instruments state that they are for the purpose of securing the balance of the purchase price.*" *Realty Co.*, 296 N.C. at 370, 250 S.E.2d at 273 (emphasis added). We hold that the Anti-Deficiency Statute does not apply to this transaction, in which there is neither an instrument of debt nor a securing instrument stating on its face that the transaction is a purchase money mortgage. *See Friedlmeier v. Altman*, 93 N.C. App. 491, 496, 378

S.E.2d 217, 220 (1989) (rejecting argument that parties' agreement must state that transaction is purchase money transaction and observing that "[b]oth the note and deed of trust recited on their faces that they were for the balance of purchase money for real estate, as required by the statute").

[2] Defendants next argue that even if the agreement was in fact a lease, the purported liquidated damages provision was an unenforceable penalty provision. Again, we disagree.

> "*Liquidated damages* are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable . . . if the breach occurs. A *penalty* is a sum which a party similarly agrees to pay or forfeit . . . but which is fixed, not as a pre-estimate of probable actual damages, but as a *punishment*, the threat of which is designed to prevent the breach, or as *security* . . . to insure that the person injured shall collect his actual damages."

Knutton v. Cofield, 273 N.C. 355, 361, 160 S.E.2d 29, 34 (1968) (quoting McCormick, *Damages* § 146 (1935)) (alterations in original). A penalty clause will not be enforced. *See id.* at 360-61, 160 S.E.2d at 34.

According to our Supreme Court:

> Whether a stipulated sum will be treated as a penalty or as liquidated damages may ordinarily be determined by applying one or more aspects of the following rule: "[A] stipulated sum is for liquidated damages only (1) where the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach."

Id. at 361, 160 S.E.2d at 34 (quoting 22 Am. Jur. 2d *Damages* § 214). "The question whether damages are difficult of ascertainment is to be determined by a consideration of the status of the parties at the time they enter into the contract, and not at the time of the breach." 22 Am. Jur. 2d *Damages* § 700, at 757 (1988). "Where the damages result-

ing from a breach of contract cannot be measured by any definite pecuniary standard, as by market value or the like, but are wholly uncertain, the law favors a liquidation of the damages by the parties themselves; and where they stipulate for a reasonable amount, the agreement will be enforced." *Knutton*, 273 N.C. at 362, 160 S.E.2d at 35 (internal quotation marks omitted).

We agree with Plaintiff that damages in the event of a breach would have been difficult to ascertain at the time the parties entered into their agreement. Mr. McCain explained in his affidavit that

> [t]he Green Park Inn is an old structure in which is operated a full-service hotel. We had worked very hard over the 14 years we owned the Green Park Inn to develop the business and its reputation for quality and service. The value of the building was minimal without the added value of the ongoing concern of a first class hotel and restaurant. Concern as expressed in the liquidated damages clause was that in the event of a default the value of the going concern portion could be seriously jeopardized and lost if the Inn was shut down. Also, a default would likely cause my wife and I to return to salvage the Inn operation.

The parties agreed to the following in the liquidated damages clause of the Lease Agreement:

> Allen and Pat McCain, the only two shareholders of lessor, have actively worked in the day to day operation of the hotel for the past fourteen years, and have steadily built up the clientele, reputation and physical plant of the hotel, and, correspondingly, the revenues/profits of the hotel. In addition, Allen and Pat McCain are 64 and 55 years old respectively, and that both retired from the business after this lease was agreed to. The McCains have retired to Florida, and would have to relocate back to Blowing Rock for extended periods of time if they are forced out of retirement to take over operation of the hotel. The parties agree to the following items which will be included in lessor's damages:
>
> (a) restoration of the physical plant;
>
> (b) lost lease payments owed to lessor which will not be paid because of lessee's breach with due consideration having been given to lessor's obligation to mitigate damages;
>
> (c) harm to the reputation of the hotel, which will have to be remedied by lessor;

> (d) interruption of business damages caused by the necessity of lessor having to hire new employees to recommence operations.

While some of the items listed in the liquidated damages provision are not indefinite or uncertain, others, such as the harm to the hotel's reputation or the cost to the McCains of being forced out of retirement, clearly would have been difficult to ascertain at the time the Lease Agreement was signed. Thus, the first prong of the *Knutton* test is satisfied.

Whether a liquidated damages amount is a reasonable estimate of the damages that would likely result from a default is a question of fact. *See Coastal Leasing Corp. v. T-Bar Corp.*, 128 N.C. App. 379, 384-85, 496 S.E.2d 795, 799 (1998) (affirming grant of summary judgment because the liquidated damages clause protected plaintiff's expectation interest and there was "no evidence that plaintiff exercised a superior bargaining position in the negotiation of the liquidated damages clause, [and therefore] no genuine issue of material fact exist[ed] as to its reasonableness"). In support of its motion for summary judgment, Plaintiff submitted McCain's affidavit, in which he stated that, after he and his wife were forced out of retirement and back to Blowing Rock to operate the hotel, "[t]he estimate of $500,000.00 as the fair and reasonable estimate to measure the damages suffered by us in the event of default has proven to be just that fair and reasonable." Additionally, the Lease Agreement states that "[t]he parties have agreed that the sum of Five Hundred Thousand Dollars ($500,000.00) represents a fair and reasonable estimate and measure of the damages to be suffered by lessor in the event of default by lessee." Defendants have proffered no evidence to show the liquidated damages amount was unreasonable. Defendants' only evidence in the record on this issue is the affidavit of Gary Moore, in which he states that

> [t]here was never any discussion of which I am aware as to what amount of liquidated damages would be reasonable, or whether or not the damages in the event of default could be determined or calculated. Mr. McCain just demanded the various requirements be in the documents, and I agreed to insert them in the documents, as I did not think the provisions were enforceable.

In his affidavit, Greg Justus, the real estate broker who worked for the Moores, repeated that

> [t]here was never any discussion of which I am aware as to what amount of liquidated damages would be reasonable, or whether or not the damages in the event of default could be determined or calculated. Mr. McCain just demanded the various requirements be in the documents, and Mr. Moore agreed to insert them in the documents.

These statements are insufficient to raise a genuine issue of material fact regarding whether the liquidated damages amount was reasonable. Therefore, the trial court did not err in granting summary judgment in favor of Plaintiff.

II.

[3] In their second assignment of error, Defendants assert that the trial court erred in failing to grant summary judgment in their favor. North Carolina Rule of Civil Procedure 56 provides that "[s]ummary judgment, when appropriate, may be rendered against the moving party." N.C. Gen. Stat. § 1A-1, Rule 56(c) (Supp. 2000).

We have already rejected Defendants' argument that the Anti-Deficiency Statute bars Plaintiff's recovery of the security deposit and their argument that the liquidated damages clause is unenforceable. The trial court did not err in failing to grant summary judgment for Defendants on these grounds.

Defendants argue in the alternative that if Plaintiff intended the transaction to be a lease, then there was no meeting of the minds as to an essential term of their agreement because Defendants understood that the transaction was a sale disguised as a lease. According to Defendants, the characterization of the transaction is an essential term because "[w]hether this transaction was a lease or a sale disguised as a lease has consequences of tax reporting and enforceability of deficiency actions such as action on the Security Deposit Agreement." Defendants conclude that, because there was no meeting of the minds, a valid contract does not exist.

We disagree that the tax consequences of the agreement may constitute an essential term, because the tax consequences do not relate to the parties' rights and obligations *vis a vis* each other. *See Zanone v. RJR Nabisco*, 120 N.C. App. 768, 772, 463 S.E.2d 584, 587 (1995) ("The word 'agreement' implies the parties are of one mind—all have a common understanding of the rights and obligations of the others—there has been a meeting of the minds." (internal quotation marks omitted)), *disc. review denied*, 342 N.C. 666, 467 S.E.2d 738 (1996).

Defendants cite no authority for the proposition that if the parties disagree on the tax consequences of their agreement, then their agreement is void. We have already determined that the Anti-Deficiency Statute does not apply to this agreement, and so we conclude that the argument that the characterization of the transaction is relevant to the enforceability of deficiency actions has no merit. Accordingly, the trial court did not err in failing to grant summary judgment in favor of Defendants.

III.

[4] In the third and final assignment of error, Defendant First Union asserts that the grant of summary judgment in favor of Plaintiff is erroneous to the extent that it obligates First Union to pay any interest or costs in excess of the assigned Trust Assets that it holds. We agree that First Union is not liable for interest on the award.

"In an action for breach of contract, . . . the amount awarded on the contract bears interest from the date of breach." N.C. Gen. Stat. § 24-5(a) (1999). Thus, the trial court did not err in awarding interest as of the date of the breach, which the court determined had occurred on 14 March 2000. However, the court's order states that "Plaintiff is entitled to interest at the legal rate from March 14, 2000," without specifying which defendants are liable for payment of the interest.

The Security Deposit Agreement provides that "[First Union] shall incur no liability so long as it complies with the terms hereof. In the event of a dispute between [Plaintiff] and [GMAFCO] or [the Moores] over the release or reversion of the assigned Trust Account Assets[, First Union] shall retain the assigned Trust Account assets until the dispute is resolved." We see nothing in the record to suggest that First Union has not complied with the terms of the Security Deposit Agreement. Therefore, First Union, consistent with the Security Deposit Agreement, is required only to release the assigned Trust Account assets, but is not liable for any of the interest. We conclude that the trial court did not err in awarding interest, but that liability for the payment of interest may be assessed only against the Moores and GMAFCO, not against First Union.

Affirmed.

Judges WYNN and THOMAS concur.

STATE OF NORTH CAROLINA v. ELISEO BUSTOS CARRILO

No. COA01-341

(Filed 2 April 2002)

1. Homicide— first-degree murder—felony child abuse—motion to dismiss-sufficiency of evidence—caretaker

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder and by instructing the jury on the felony murder rule with child abuse as the underlying felony even though defendant contends the State failed to prove that defendant was a parent, provider of child care to the child, or supervisor of the child as required by N.C.G.S. § 14-318.4(a), because: (1) there was substantial evidence that defendant provided supervision for the minor child within the meaning of N.C.G.S. § 14-318.4(a) since defendant was living with the child's mother and the child at the time of the child's death; (2) the evil the legislature intended to suppress by the felony child abuse statute is the intentional infliction of serious injury upon a child who is dependent upon another for his care or supervision, and the minor victim was dependent upon defendant for the minor's care or supervision; and (3) contrary to defendant's assertion, the testimony from an expert witness for the State did not negate defendant's guilt.

2. Evidence— prior crimes or bad acts—violence

The trial court did not abuse its discretion in a first-degree murder case by admitting evidence under N.C.G.S. § 8C-1, Rule 404(b) of prior instances of violence by defendant towards the minor child victim's mother, because the evidence was offered: (1) to show why the mother did not take any action against defendant when he first began assaulting her son; (2) to identify defendant, rather than the victim's mother, as the perpetrator of the crime; and (3) to dispel defendant's contention that the injuries were accidentally inflicted.

3. Evidence— redirect examination—defendant in this country illegally—opening door

The trial court did not err in a first-degree murder case by permitting the State to suggest during its redirect examination of a detective that defendant was in this country illegally, because by questioning the detective on cross-examination about the

motivation which defendant might have had to give false identification to the investigating officers, defendant opened the door to the admission of explanatory or rebuttal evidence regarding other possible motivations.

4. Evidence— illustrative—compact disk—demonstration of baby shaking syndrome

The trial court did not abuse its discretion in a first-degree murder case by failing to exclude a compact disk presentation demonstrating the baby shaking syndrome, because: (1) the video presentation of the shaking of a doll was relevant since an expert testified that the victim in this case died as a result of brain injury due to shaken baby syndrome; (2) the compact disk presentation was used to illustrate the expert's testimony to the jury concerning the manner in which an infant is shaken in order to cause the severity of injuries sustained in the typical shaken baby syndrome case; and (3) the introduction of such evidence was not unduly prejudicial under N.C.G.S. § 8C-1, Rule 403 since the trial court limited the jury's consideration of the video to its use as illustrative evidence only.

Appeal by defendant from judgment entered 15 November 2000 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 24 January 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General A. Danielle Marquis, for the State.

Jeffrey S. Lisson for defendant-appellant.

MARTIN, Judge.

Defendant, Eliseo Bustos Carrilo, was charged with the first degree murder of Brian Noe Gomez-Arellanes, an eight-month-old infant. A jury found him guilty and he was sentenced to life imprisonment without parole. Defendant appeals.

The State's evidence tended to show that defendant began living with Laticia Marin and her son, Brian, in February 2000. Defendant was not Brian's father. From February until 24 April 2000, the date of Brian's death, defendant, Ms. Marin, Brian, and Ms. Marin's brother, Antonio Arellanes lived in a two-bedroom apartment. Ms. Marin, defendant, and Brian slept in one room while Mr. Arellanes slept in the other.

Ms. Marin testified that on Friday, 21 April 2000, Brian started crying as she was preparing to give him a bath. Defendant hit the baby on his forehead with the fingers of his open hand three times and told him to "shut up." After arguing about defendant's treatment of the baby, according to Ms. Marin, defendant hit her on her arms and leg with an open hand and then went outside. Ms. Marin testified that this was the only time she had witnessed defendant hitting her baby.

Ms. Marin further testified that on Saturday, 22 April 2000, defendant got home at 1:00 or 1:30 a.m. with lipstick stains on his shirt. Ms. Marin was upset and defendant told her to go to bed. Defendant then took off his belt and told Ms. Marin to leave or he was going to hit her. Defendant subsequently took Ms. Marin to bed and began choking her.

On Sunday, 23 April 2000, while Ms. Marin and defendant were lying down, Brian started crying. Ms. Marin took the baby to the bed and then went to the kitchen to prepare a bottle. From the kitchen, Ms. Marin heard the baby crying even louder and so she went into the bedroom to ". . . see what had happened to him." Ms. Marin saw defendant shaking Brian and testified that "[i]t seemed like the baby's head was hitting the bed." At the same time, defendant was telling the baby to be quiet. The shaking incident occurred at about 3:00 or 4:00 p.m. Defendant then handed Ms. Marin the baby and pushed her and the baby onto the bed. Defendant subsequently left.

After defendant returned to the apartment, he received a phone call at approximately 7:00 p.m. Ms. Marin picked up another phone and listened in on the conversation. Ms. Marin became upset when she heard a woman's voice that she did not recognize. After defendant realized that Ms. Marin was listening to his conversation on the other line, he told her to hang up and Ms. Marin then threw the phone against the wall.

After the shaking incident, according to Ms. Marin, the baby cried, got quiet, then fell asleep for a while. Brian woke up later and Ms. Marin fed him. Ms. Marin laid Brian down to sleep at about 8:00 p.m. Ms. Marin testified that she awoke about 5:00 a.m. and checked on Brian, who was in bed with her and defendant. Ms. Marin noticed that Brian was coughing as if he had a cold. On Sunday morning, Ms. Marin had given Brian an over-the-counter herbal syrup called "Broncotine" for his cold. At 5:00 a.m., Ms. Marin made defendant

breakfast. While defendant was eating, Ms. Marin laid down next to Brian and sensed that he was breathing but still asleep.

Ms. Marin fell asleep from about 5:30 a.m. to 8:00 a.m. When Ms. Marin woke up at 8:00 a.m., her baby was not breathing. An ambulance was called and Brian was taken to the hospital. Attempts to revive the child failed.

About two weeks prior to Brian's death, Ms. Marin testified that she had left Brian with defendant while she went to the store. When she returned approximately ten minutes later, defendant was holding Brian, who seemed to have been crying. Defendant had blood on his hand; Brian's nose was bleeding and he had a black and blue mark on his eye.

Ms. Marin's brother, Mr. Arellanes, testified that he had never seen defendant injure Brian or Ms. Marin. Ms. Marin did not tell Mr. Arellanes that defendant had abused her until after Brian's death. Mr. Arellanes also testified that he had never hit, shaken, or hurt Brian at any time.

Defendant initially denied to investigating detective George Flowe that he had ever shaken Brian. He later admitted that he would sometimes shake Brian while playing with him. When Detective Flowe informed defendant that the force required to cause Brian's injuries could not have been caused by play, defendant stated that he had possibly shaken Brian too hard and caused Brian's injuries, but he continued to insist that he had only shaken Brian while playing with him. Thereafter, defendant admitted to the officer that he had shaken Brian in order to get him to stop crying following the altercation with Ms. Marin over the phone call.

When Ms. Marin was initially interviewed, she denied any knowledge of a shaking incident. However, on 26 April 2000, the day after defendant was arrested, Ms. Marin contacted Detective Flowe and stated, "I let him kill my baby." She also told the police that defendant had been physically abusive to her and the baby in the past.

Dr. Donald Jason, assistant professor at Wake Forest University's School of Medicine in the Department of Pathology, performed an autopsy on Brian on 25 April 2000. He found bleeding around the brain, swelling of the brain, and flattening of the brain's surface. Dr. Jason testified that there were both fresh and healing injuries. The older injuries consisted of previous bleeding that had occurred over the right side of the brain. Dr. Jason stated that these injuries had

occurred about two to three weeks prior to Brian's death while the new injuries were twelve to twenty-four hours old. The doctor also found healing fractures of the ribs at the sixth, seventh, and eighth ribs where they attached to the spine and back. Dr. Jason testified that the older injuries were consistent with a violent shaking incident. There were no bruises on the scalp to indicate a blow to the head. Dr. Jason opined that the child died due to shaken baby syndrome, a whiplash injury where the child's head is whipped back and forth from shaking, causing injury to and subsequent swelling of the brain, eventually resulting in a loss of oxygen to the brain and eventual death. During his testimony, Dr. Jason showed a computer presentation of shaken baby syndrome, illustrating what happens during such an incident.

Dr. Sara Sinal, a professor of pediatrics at Wake Forest University School of Medicine, testified that the victim had the classic autopsy findings of a shaken impact syndrome. Dr. Sinal stated that in twenty-five percent of such cases, the child dies. In addition to the victim's bleeding of the brain and healing rib fractures, Dr. Sinal also noted retinal hemorrhages in his right eye. She explained that during a violent shaking incident, layers of the retina separate such that noticeable bleeding appears on the back of the eye. According to Dr. Sinal, children who have fatal shaking injury, have immediate symptoms. These children usually become extremely ill, comatose, and often stop breathing within an hour of the shaking or instantaneously. Following a shaking incident, Dr. Sinal testified that the child may be lethargic or may go into a seizure, but a layperson may believe that the child is sleeping. The doctor further testified that even if a child was shaken at 4:00 p.m. and was in a coma by 8:00 p.m., it would be possible that the child would have been able to take a bottle at 8:00 p.m. since the suck reflex is a primitive one. However, Dr. Sinal added that the child would not have been able to wake up and act normally at 8:00 p.m.

I.

[1] Defendant first contends the trial court erred in denying defendant's motion to dismiss at the close of the evidence and in instructing the jury on felony murder. Defendant notes that his conviction of first degree murder was based upon the felony murder rule, G.S. § 14-17, with child abuse as the alleged underlying felony, G.S. § 14-318.4. Defendant argues that the State failed to prove that defendant was a parent, provider of care to the child, or supervisor of the child, an essential element of felony child abuse under G.S. § 14-318.4(a).

Therefore, defendant argues that his conviction should be reversed based on the insufficiency of the evidence.

In reviewing a motion to dismiss, this Court must determine "whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense." *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985). Substantial evidence has been defined as "that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). Further, the evidence should be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *Bates*, 313 N.C. at 581, 330 S.E.2d at 201. Any contradictions or discrepancies in the evidence are for resolution by the jury and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980).

Defendant contends the State failed to prove that he was Brian's parent, provider of care, or supervisor since the evidence shows that he did not act *in loco parentis*, such as daycare operators, foster parents, babysitters, and those who take on the responsibility to see after a child. We disagree.

The felony child abuse statute relevant to this case provides:

> *A parent or any other person providing care to or supervision of a child* less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E felony, except as otherwise provided in subsection (a3) of this section.

N.C. Gen. Stat. § 14-318.4(a) (1999) (emphasis added). The appellate courts of this State have never precisely addressed the question of who may constitute a parent, provider of care, or supervisor of a child under this statute. While a criminal statute must be strictly construed against the State, the intent of the legislature controls the interpretation of statutes, and such statutes must be construed "with regard to the evil which it is intended to suppress." *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990). Legislative intent may be determined by reviewing the "legislative history of an act and the circumstances surrounding its adoption, earlier statutes on the same

subject, the common law as it was understood at the time of the enactment of the statute, and previous interpretations of the same or similar statutes." *In re Banks*, 295 N.C. 236, 239-40, 244 S.E.2d 386, 389 (1978) (citations omitted).

Applying these principles to the felony child abuse statute at issue, G.S. § 14-318.4(a), we conclude there was substantial evidence that defendant provided supervision for Brian within the meaning of the statute. Felony child abuse has been defined by the North Carolina Supreme Court as "the intentional infliction of serious injuries by a *caretaker* to a child." *State v. Phillips*, 328 N.C. 1, 20, 399 S.E.2d 293, 302 (emphasis added), *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). We find guidance in our State's juvenile code; the definition of "caretaker" found in the juvenile code subchapter pertaining to abuse and neglect includes "an adult member of the juvenile's household." N. C. Gen. Stat. § 7B-101(3) (1999). Defendant would fall under this definition since he was living with Ms. Marin and Brian at the time of Brian's death.

Additionally, the evil that the legislature intended to suppress by the felony child abuse statute is clearly the intentional infliction of serious injury upon a child who is dependent upon another for his or her care or supervision. The evidence in this case was sufficient to establish that Brian was dependent upon defendant for his care or supervision. The State's evidence showed that defendant had resided with Brian's mother for two months prior to the murder, that Brian and Brian's mother shared the same bedroom with defendant, and that Brian's mother had left Brian in defendant's care for short periods of time. On the day defendant allegedly inflicted the fatal injury upon the child, Brian was left in defendant's care while his mother went to the kitchen to prepare a bottle. Defendant admitted picking Brian up and shaking him, in an effort to get the child to stop crying, immediately after an altercation had occurred between defendant and Brian's mother. There was evidence that, on another occasion, Ms. Marin had left Brian in defendant's care while she went to the store. Considered in the light most favorable to the State, there was substantial evidence that defendant "provid[ed] care to or supervision of" Brian within the meaning of the felony child abuse statute.

Defendant also contends the State failed to offer substantial evidence of his guilt because the testimony of the State's expert witness, Dr. Sinal, shows that defendant could not be guilty. Ms. Marin testi-

fied that Brian took a bottle between 7:00 p.m. and 8:00 p.m.; Dr. Sinal testified that if the child was shaken at 4:00 p.m., he would have had immediate symptoms and would have been in a coma shortly thereafter. However, Dr. Sinal also testified that even if Brian had been shaken at 4:00 p.m. and had gone into a coma as a result, it would still be possible that he would have been able to take a bottle at 8:00 p.m. because the suck reflex is a primitive one. Dr. Sinal's testimony, therefore, does not negate defendant's guilt. The trial court properly denied defendant's motion to dismiss and his assignment of error to the contrary is overruled.

II.

A.

[2] Defendant next contends the trial court erred in admitting evidence of prior instances of violence on defendant's part directed toward Ms. Marin. He argues the evidence showed only defendant's bad character and propensity to commit violent acts and, therefore, was not admissible by reason of G.S. § 8C-1, Rule 404(b). We disagree.

Rule 404(b) provides for the exclusion of evidence of other crimes, wrongs, or acts if the sole purpose of the evidence is to show a person's bad character in order to prove that his conduct on a particular occasion was consistent with that bad character. However, evidence of other crimes, wrongs, or acts is admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b). The Supreme Court has made it clear that Rule 404(b) is a 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). Therefore, as long as evidence of other crimes, wrongs, or acts is relevant to any other fact or issue other than the defendant's propensity to commit the crime for which he is being tried, the evidence is admissible. *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). However, even relevant evidence may be excluded if its prejudicial impact outweighs its pro-

bative value. N.C. Gen. Stat. § 8C-1, Rule 403 (1999). "Whether to exclude evidence of other crimes or bad acts is a matter within the sound discretion of the trial court." *State v. Woolridge*, 147 N.C. App. 685, 692, 557 S.E.2d 158, 162 (2001). A trial court will be held to have abused its discretion only "upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

In the present case, the assaults on Ms. Marin were offered into evidence to show why the mother did not take any action against defendant when he first began assaulting her son; to identify defendant, rather than Ms. Marin, as the perpetrator; and to dispel defendant's contention that the injuries were accidentally inflicted. Because the evidence of prior acts of domestic violence toward Ms. Marin was offered for a purpose other than to show the propensity of defendant to commit the crime for which he was being tried, the trial court did not abuse its discretion in admitting this evidence.

B.

[3] Defendant also argues that the trial court erred by permitting the State to suggest, in its examination of Detective Flowe, that defendant was in this country illegally. The assignment of error arises from the following examination of Detective Flowe, which occurred after Detective Flowe had testified that defendant had given a false name when he was initially arrested:

Q: And you say it didn't surprise you because he was illegal, right?

MR. BEDSWORTH: Objection and move to strike.

THE COURT: Overruled.

Q: Is that right?

A: I don't know if he was illegal; but didn't surprise me that he used a different name.

Q: Well, is that the general habit of someone who is not legally in this country?

MR. BEDSWORTH: Objection and move to strike.

THE COURT: Denied.

A: That is correct.

Defendant contends the only purpose of this examination was to establish that defendant was a person of bad character. We disagree.

During his cross-examination of Detective Flowe, defendant's counsel asked whether the officer knew that a number of persons in the Mexican community used false names for the purpose of obtaining employment; Detective Flowe acknowledged that was correct. In questioning Detective Flowe about the motivation which defendant might have had to give false identification to the investigating officers, defendant opened the door to the admission of explanatory or rebuttal evidence regarding other possible motivations. Our Supreme Court has stated:

> [T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.

State v. Albert, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). The rule applies even where a defendant solicits evidence during cross-examination of a State's witness, prompting the State to introduce otherwise inadmissible evidence in rebuttal. *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991). Therefore, the trial court did not err in allowing the State's questions on redirect examination regarding defendant's possible motivation for giving a false identification.

III.

[4] Finally, defendant contends the trial court should have excluded a compact disk presentation entitled "The Mechanism of Baby Shaking Syndrome," which included (1) a stop-action video demonstration of the shaking of a doll, representing an infant, and (2) animated diagrams of the infant brain. We disagree.

Admission of relevant evidence is a matter left to the sound discretion of the trial court and will not be reversed except upon a showing of abuse of discretion. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). The test for admissibility of a demonstration is whether, if relevant, the probative value of the evidence ". . . is substantially out-

weighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (1999); *see also Id.*

The video presentation of the shaking of a doll was relevant since Dr. Jason, an expert in the field of forensic pathology, opined that the victim in this case died as a result of brain injury due to shaken baby syndrome, a whiplash injury where the child's head is whipped back and forth by shaking. The compact disk presentation was used to illustrate Dr. Jason's testimony to the jury concerning the manner in which an infant is shaken in order to cause the severity of injuries sustained in the typical shaken baby syndrome case.

Moreover, the introduction of such evidence was not unduly prejudicial. The trial court limited the jury's consideration of the video to its use as illustrative evidence only. It was made clear to the jury that the video was not of the victim being shaken but only a depiction of the mechanism by which shaken baby syndrome occurs, using a doll to simulate an infant. This assignment of error is overruled.

Defendant received a fair trial, free of prejudicial error.

No error.

Judges TIMMONS-GOODSON and BRYANT concur.

STATE OF NORTH CAROLINA v. EDWARDO MARTINEZ

No. COA01-308

(Filed 2 April 2002)

1. Evidence— out-of-court-statements—hearsay—prior inconsistent statement exception

The trial court did not err in a prosecution for conspiracy to traffic in marijuana by allowing the State to introduce out-of-court statements for impeachment purposes where there was no evidence that the State's primary purpose was to evade the hearsay rule; there was other evidence of conspiracy; the statement was not admitted for substantive purposes; and it would otherwise have been admissible because of the prior inconsistent statement exception to the hearsay rule.

2. Evidence— recorded telephone conversation—testimony admissible

There was no plain error in a prosecution for conspiracy to traffick in marijuana in the introduction of the contents of a recorded telephone conversation between defendant and an accomplice. A law enforcement officer testified that he was present when the conversation was taking place and had listened to it several times; the accomplice had given his consent to the recording; the provisions of N.C.G.S. § 8C-1, Rule 901 were complied with; the best evidence rule did not apply because the contents of the conversation were not disputed; defendant did not move to have the tape played for the jury; defendant did not show that the jury probably would have reached a different result if the tape had been played; and the evidence was not unduly prejudicial.

3. Evidence— marijuana trafficking—record of customers and amounts due

The trial court did not err in a prosecution for conspiracy to traffic in marijuana by admitting papers found on defendant which contained the names of those who had purchased marijuana and the amounts due. The paper corroborated the testimony of two witnesses and was relevant and admissible as substantive evidence of intent and design.

4. Drugs— marijuana—conspiracy to traffic—implied understanding

The trial court did not err by denying motions for nonsuit and appropriate relief from a defendant charged with conspiracy to traffic in marijuana where a man (Treto) who accepted a shipment of marijuana from Federal Express had a history of drug transactions with defendant; defendant did not want to receive the package; Treto knew that part of his marijuana debt to defendant would be forgiven for accepting the package; and Treto knew the package contained marijuana. An express agreement need not be shown if a mutual, implied understanding is shown.

5. Drugs— conspiracy to transport—amount—variance between indictment and instruction—no error

There was no plain error in a prosecution for conspiracy to traffic in marijuana where defendant was indicted for transporting thirty-five pounds and the instruction was for transporting more than ten but less than fifty pounds. Defendant did not

object at trial, did not claim any difficulty in preparing for trial, and there is no possibility that he was confused about the offense charged.

Appeal by defendant from judgment entered 30 August 2000 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 30 January 2002.

Roy Cooper, Attorney General, by David R. Minges, Assistant Attorney General, for the State.

Hosford & Hosford, PLLC, by Geoffrey W. Hosford for defendant-appellant.

THOMAS, Judge.

Defendant, Edwardo Martinez, appeals a jury verdict finding him guilty of conspiracy to commit the felony of trafficking in marijuana where the quantity is in excess of ten pounds but less than fifty pounds. Among defendant's five assignments of error is that the trial court erred by allowing the State to introduce out-of-court statements to impeach the testimony of a co-defendant.

For the reasons discussed herein, we find no error.

The State's evidence tended to show the following: On 18 August 1999, Burgaw Police Detective Keith Hinkle (Hinkle) spoke with Agent Robert Zapetta (Zapetta) of the Combined Governmental Drug Enforcement and Crime Task Force. Zapetta, who was in Texas, advised Hinkle that a package containing a controlled substance was being delivered by overnight mail to Burgaw from Texas. He also provided Hinkle with the package's tracking number. Hinkle went to the Federal Express office in Wilmington the next day and matched the tracking number to a large cardboard box, addressed to "Eric Coob" at 508 Smith Street, Burgaw, North Carolina.

Hinkle and Agent Blane Hicks (Hicks) of the State Bureau of Investigation (SBI) utilized the Wilmington Police Canine Unit to check six boxes. After one of the dogs "alerted on" the box to Coob, Hinkle returned to Burgaw and obtained a search warrant. Upon opening the box, he discovered shipping material, a strong aroma of coffee grounds, and two cellophane-wrapped packages of marijuana. The marijuana collectively weighed approximately thirty-five pounds.

SBI Agent Audria Bridges (Bridges), wearing a Federal Express uniform, then delivered the box to the address listed. Fabian Treto (Treto) signed for it. The name "Eric Coob" was fictitious. Afterwards, the Pender County Sheriff's Department executed a search warrant at the residence.

Treto was arrested for, *inter alia*, conspiring to traffic marijuana. After being advised of his *Miranda* rights, Treto told police that he owed defendant money for previous marijuana purchases. According to Treto, defendant had asked that he accept the package for him as a way of making payment. Treto agreed. Following their interrogation of Treto, the police listened to and recorded a telephone conversation between him and defendant. During the call, Treto informed defendant the package had arrived and defendant acknowledged it contained marijuana.

Later the same day, Hicks arrested defendant at his place of work. Defendant waived his *Miranda* rights and admitted asking Treto to accept the package of marijuana for him. However, defendant also told police he arranged the drop off at Treto's house at the behest of a man named "Puya" who was to pay him $1,200. The police were never able to locate "Puya."

During a search of defendant, police found a list of names with dollar amounts beside them. Defendant explained that the amounts were how much he was owed for marijuana that he had sold to the individuals.

The defense presented no evidence during the guilt/innocence phase and moved to dismiss based on insufficiency of the evidence. The motion, however, was denied.

Defendant was found guilty of conspiracy to commit the felony of trafficking in marijuana where the quantity is in excess of ten pounds but less than fifty pounds. N.C. Gen. Stat. § 90-95(h)(1)(a) (1999). He was sentenced to a minimum of twenty-five months and a maximum of thirty months in prison.

[1] By defendant's first assignment of error, he argues the trial court erred in allowing the State to introduce out-of-court statements to impeach Treto, a co-defendant. We disagree.

During the State's evidence, Treto said he did not know what was in the package. Subsequently, SBI Agent Steve Zawistowski

(Zawistowski) testified that Treto did know what the package contained.

> A: Treto stated that Lalo, who is Eduardo Martinez, requested him to take delivery of a package of marijuana.
>
> Q: He didn't tell you to take the package of coffee?
>
> A: No. He knew what was in the package.
>
> Q. Or a package of oregano?
>
> A. No, sir.
>
> Q: Did Mr. Treto ever indicate to you that he didn't know what was in that package?
>
> A: No sir.
>
> Q: Did you have to open that package for him and surprise him and let him know that he had $84,000 worth of marijuana in his living room?
>
> MR. HARRELL: Objection as to whether he was surprised.
>
> MR. DAVID: I think that's relevant, Your Honor.
>
> THE COURT: Overruled.
>
> Q: You may answer, sir. Was Fabian Treto ever surprised to learn he had marijuana in his presence in that box?
>
> A: I don't think we ever showed him the marijuana at all, and all our discussions was [sic] about marijuana. He already knew what was in that package.

Defendant contends the State's questioning of whether Treto knew there was marijuana in the box was a "mere subterfuge" to get otherwise inadmissible evidence before the jury to prove conspiracy, citing *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989), *recon. denied*, 339 N.C. 741, 457 S.E.2d 304 (1995), *cert. denied*, 531 U.S. 945, 148 L. Ed. 2d 276 (2000).

Hunt states that a prosecutor may not use a witness's statement under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible. *See Whitehurst v. Wright*, 592 F.2d 834, 839-40 (5th Cir. 1979); *United States v. Dobbs*, 448 F.2d 1262 (5th Cir. 1971). In *Hunt*, the statements were admitted for both substantive and impeachment

purposes. "[S]uch a scheme merely serves as a subterfuge to avoid the hearsay rule." *United States v. Hogan*, 763 F.2d 697, *withdrawn in part on other grounds*, 771 F.2d 82 (5th Cir. 1985).

> The danger in this procedure is obvious. The jury will hear the impeachment evidence, which is not otherwise admissible and is not substantive proof of guilt, but is likely to be received as such proof. The defendant thus risks being convicted on the basis of hearsay evidence that should bear only on a witness's credibility.

Id. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801. "Hearsay is not admissible except as provided by statute or by these rules." N.C. R. Evid. 802.

A prior inconsistent statement is admissible to contradict a witness's testimony, although it may not be considered as substantive evidence. *State v. Green*, 296 N.C. 183, 250 S.E.2d 197 (1978). A statement constitutes substantive evidence when it is "adduced for the purpose of proving a fact in issue[.]" *Black's Law Dictionary* 1429 (6th ed. 1990). A statement is impeachment evidence when it is "given for the purpose of discrediting a witness[.]" *Id.* Here, immediately before Zawistowski's testimony, the trial court gave a limiting instruction to the jury regarding the earlier statement.

> THE COURT: I'm going to give the jury an instruction—give me a moment here—on this kind of testimony. Let's see here. All right, ladies and gentlemen of the jury, listen to this instruction. When evidence has been received tending to show that, at an earlier time, a witness made a statement which may be consistent with or may conflict with his testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.
>
> If you believe such earlier statement was made and it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witness' truthfulness, in deciding whether you will believe to disbelieve his testimony at this trial.

There is *no* evidence that the State's primary purpose in eliciting the testimony from Zawistowski was to evade the hearsay rule. Further, there was other evidence of the conspiracy elsewhere, including defendant's statement to the police and Treto's testimony. In accordance with the trial court's instruction, the statement was not admitted for substantive purposes and would have otherwise been admissible because of the prior inconsistent statement exception to the hearsay rule. We therefore reject defendant's argument.

[2] By defendant's second assignment of error, he argues the trial court committed plain error in allowing the State to introduce the contents of the recorded telephone conversation between defendant and Treto. We disagree.

Defendant contends he deserves a new trial under this assignment because: (1) the tape was not authenticated; (2) the State did not follow the factors set out in *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971), to determine whether the tape was admissible; (3) Zawistowski's summarization of the tape violated the best evidence rule; and (4) the tape was irrelevant.

Plain error is "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

First, the proponent of an audiotape must authenticate it by showing that it is what the proponent claims. N.C. R. Evid. 901(a). In *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), our Supreme Court held that testimony as to the accuracy of a tape recording based on personal knowledge is sufficient to authenticate because the recording was legal and contained competent evidence. Here, Zawistowski testified that he was present when the conversation was taking place and that he had listened to it several times since the original recording. He further testified that in order to legally record a conversation in North Carolina, the police need the consent of one of the parties. Treto, according to Zawistowski, gave consent.

As to defendant's second argument under this assignment of error, *State v. Lynch*, *supra*, was superceded and the seven-factor test was replaced by Rule 901 of the North Carolina Rules of Evidence. *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991). Rule 901 provides, in pertinent part:

> (a) General provision.—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> . . . .
>
> (6) Telephone Conversations.—Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

N.C. R. Evid. 901(a)(6). Those provisions were complied with here.

As to defendant's third argument under this assignment of error, the best evidence rule applies when the contents of a writing or recording are at issue. See N.C. R. Evid. 1002. Here, the contents of the recorded conversation are not being disputed by defendant and, in fact, Zawistowski actually listened to the original conversation. He was competent to testify from that alone. Additionally, defendant never moved at any time to have the tape played for the jury. When determining plain error, a defendant must show that but for the alleged error, the jury would have returned a different verdict. *State v. Sierra*, 335 N.C. 753, 440 S.E.2d 791 (1994). In light of the overwhelming evidence against defendant, as well as defendant's own admission, we hold that defendant has not shown that if the tape had been played, the jury probably would have reached a different verdict.

As to his final argument under this assignment of error, relevancy is governed by Rules 402 and 403 of the North Carolina Rules of Evidence. Rule 402 states "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." N.C. R. Evid. 402. Rule 403 provides, in pertinent part, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. R. Evid. 403. Nonetheless, we hold that the evidence was not unduly prejudicial. We therefore find no plain error in the admission of the tape and reject defendant's argument.

[3] By defendant's third assignment of error, he argues the trial court erred in allowing the State to introduce into evidence the papers found on him which contained the names of those who had purchased marijuana and the amounts due. We disagree.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. Evid. 401. In the instant case, one of the names on a document was that of Treto, the State's primary witness. That paper corroborated the testimony of Hicks, who arrested defendant, as well as the testimony of Treto, and showed a relationship between Treto and defendant. It was therefore relevant and admissible as substantive evidence to show defendant's intent and design. *See* N.C. R. Evid. 401. *See generally, State v. Kilgore*, 65 N.C. App. 331, 308 S.E.2d 876 (1983). We accordingly reject defendant's argument.

[4] By defendant's fourth assignment of error, he argues the trial court erred in denying his motions for nonsuit and appropriate relief. We disagree.

In *State v. Pallas*, 144 N.C. App. 277, 548 S.E.2d 773 (2001), this Court held that:

> [a] motion for nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. [citation omitted]. Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied."

Id. at 286, 548 S.E.2d at 780 (quoting *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975)).

In the instant case, it was shown that defendant and Treto were conspiring to commit the offense charged. There was evidence that: (1) Treto had a history of drug transactions with defendant; (2) defendant did not want to receive the package; (3) Treto accepted the package, addressed to "Eric Coob" at his home; (4) Treto knew that part of his $1,400 marijuana debt to defendant would be forgiven for

accepting the package; and (5) Treto knew the package contained marijuana.

A criminal conspiracy can be shown by direct or circumstantial evidence. *State v. Rozier*, 69 N.C. App. 38, 316 S.E.2d 893, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). An express agreement need not be shown if a mutual, implied understanding is evident. *Id.* We hold that the trial court did not abuse its discretion when it denied defendant's motion for nonsuit and appropriate relief because the State presented substantial evidence that defendant committed conspiracy to transport more than ten but less than fifty pounds of marijuana. Therefore, this assignment of error is rejected.

[5] By defendant's fifth and final assignment of error, he argues the trial court committed plain error by instructing the jury on the offense of conspiracy to commit trafficking by transporting more than ten but less than fifty pounds of marijuana when the grand jury had issued an indictment for conspiracy to commit trafficking by transporting thirty-five pounds of marijuana. We disagree.

Defendant failed to object to the instruction at trial so we analyze this issue under plain error. As aforementioned, plain error is "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

In *State v. Epps*, 95 N.C. App. 173, 381 S.E.2d 879 (1989), the defendant was indicted for trafficking 35.1 grams of cocaine. This Court held that the indictment was sufficient although the statutory offense provides a range of more than 28 but less than 200 grams of cocaine.

> It is not the function of the indictment to bind the hands of the State with technical rules of pleading; rather its purposes are to identify clearly the crime[,] . . . [put] the accused on reasonable notice . . . and to protect the accused from being jeopardized by the State more than once for the same offense.

Id. at 176, 381 S.E.2d at 881 (quoting *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981)). Likewise, in the instant case, defendant was put on reasonable notice. He does not claim any difficulty in preparing for trial and there is no possibility that he was con-

fused about the offense charged. Accordingly, we reject defendant's argument and find no error.

NO ERROR.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. JAMES ADAM ROBERTSON, DEFENDANT

No. COA1-111

(Filed 2 April 2002)

1. **Kidnapping— confinement—exceeding that required for attempted rape**

The trial court did not err by denying defendant's motion to dismiss a kidnapping charge where the evidence supports an inference that defendant fraudulently induced the victim to return to his apartment, fraudulently induced her to enter his bedroom, restrained her, brandished a knife, and threatened either to have sex with her or to kill her. Although defendant contended that the only restraint was an inherent and inevitable part of an attempted rape, the evidence of restraint or confinement exceeded that needed to establish attempted rape.

2. **Evidence— unrelated drug activity—contextual**

The trial court did not err by allowing evidence of defendant's illegal drug activity in a kidnapping and attempted rape prosecution where defendant told the victim that he was the main Ecstasy dealer in the apartment complex and that he could help the victim find the person she was searching for. The court admitted the testimony to establish context, which incidentally involved illegal drugs.

3. **Sentencing— kidnapping and attempted rape—aggravating factor—masturbation**

The trial court erred when sentencing defendant for kidnapping and attempted rape by aggravating the sentence for "performing the loathsome act of masturbation." Observing this act may have been unpleasant for the victim, but there was no showing that it increased her risk of harm.

Appeal by defendant from judgment entered 3 October 2000 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 28 November 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert O. Crawford, III, for the State.

J. Clark Fischer, for the defendant-appellant.

HUDSON, Judge.

Defendant was indicted 17 July 2000 for first degree kidnapping and attempted first degree rape. On 3 October 2000, a jury convicted defendant of attempted first degree rape and second degree kidnapping. The trial judge sentenced him in the aggravated range to consecutive sentences of 276 to 341 months for the attempted first degree rape and 36 to 53 months for the second degree kidnapping. Defendant appeals his convictions and his sentences. We find no error in the convictions, but remand for re-sentencing.

We begin with a brief review of the evidence presented at trial. The victim, Margaret M. ("Margaret"), met Nicole M. D. ("Nicole") at a party on 26 February 2000. Margaret told Nicole that she was interested in buying five hundred dollars worth of the drug Ecstasy, and Nicole offered to help her make the purchase. The two women drove Margaret's car, first to retrieve money from Margaret's boyfriend, and then to an apartment complex to buy the drugs. When they arrived at the complex, Nicole got out of the car alone with Margaret's money, returned briefly, and then disappeared. Margaret waited fifteen minutes before realizing that Nicole had stolen her money.

Margaret got out of her car to look for Nicole when a man named Adam Broom approached her. Although Margaret did not know Broom, she told him what had happened and he agreed to take her to someone who could help her find Nicole. Broom introduced Margaret to defendant, who described himself as the "main Ex dealer in this complex," and told her he could help. After an unsuccessful search of the neighborhood, Broom, Margaret, and defendant returned to defendant's apartment, where Broom lit a "blunt" (a cigar rolled with marijuana). He offered some to Margaret; she declined, saying that she did not "have time to get high," but needed to go and find Nicole.

Defendant then asked Margaret to come into his bedroom so he could "show [her] something." When she entered the room,

defendant closed the door and pulled out a "steak knife." Defendant instructed Margaret to "[s]it on the bed and take your shirt off or clothes off." When Margaret refused, defendant took his shirt off and attempted to get on top of Margaret. Margaret repeatedly pushed him away, calling out "no," "stop," and "help," to no avail. Defendant began to masturbate and threatened to kill Margaret if he could not have sex with her. She continued to push him off of her, "probably a dozen times."

Eventually, defendant assured Margaret that if she would let him see her naked, he would let her go. But when Margaret pulled down her jeans and opened her shirt, defendant came at her and "grabbed her panties and . . . tried to rip them off." Then he pushed her against the wall, with his hand around her neck and the steak knife "at [her] stomach and throat." At that point, defendant heard noise in the apartment and ordered Margaret into the closet. She refused and watched from the cracked-open door when he left the bedroom. When she saw other men speaking with defendant in the apartment, Margaret left the bedroom. Defendant saw her and called to her, but Margaret kept going. She unbolted the door, ran out of the apartment, down the stairs and out of the building. Defendant, still in his boxer shorts, began to chase her, but his friends restrained him. Margaret banged on apartment doors until someone let her in and called the police for her. The police arrived and arrested defendant.

[1] In his first argument, defendant contends that the trial court erred by denying defendant's motion to dismiss the kidnapping charge, saying the State did not present sufficient evidence of all elements of the offense. Kidnapping is defined as:

> [a]ny person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony.

N.C. Gen. Stat. § 14-39(a)(2) (1999). Pursuant to the same statute, kidnapping is a second degree offense "[i]f the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted." N.C.G.S. § 14-39(b).

Defendant argues that the second degree kidnapping charge should have been dismissed because the evidence of kidnapping was not separate and distinct from that necessary to prove attempted rape. Defendant argues that "the evidence of second degree kidnapping merged into the offense of attempted first degree rape, thus raising an issue of double jeopardy." We disagree.

To sustain a conviction of kidnapping, the state must prove the unlawful confinement or restraint of a person for the purpose of committing the felony alleged in the indictment. *See* N.C.G.S. 14-39(a); *State v. Morris*, 147 N.C. App. 247, 555 S.E.2d 353 (2001) (reversing a conviction for kidnapping where the evidence did not support what was alleged in the indictment). "[T]he requisite restraint need not be accomplished solely by physical force. It may also be accomplished by trickery or by 'fraudulent representations amounting substantially to a coercion of the will' of the victim." *State v. Harris*, 140 N.C. App. 208, 213, 535 S.E.2d 614, 618 (quoting *State v. Murphy*, 280 N.C. 1, 6, 184 S.E.2d 845, 848 (1971)), *disc. rev. denied*, 353 N.C. 271, 546 S.E.2d 121 (2000). Here, the trial court instructed the jury that "the State must prove that the person did not consent to this confinement or restraint. I further instruct you that consent obtained or induced by fraud or fear is not consent." The evidence supports an inference that defendant fraudulently induced Margaret to return to his apartment by assuring her that he would help her, and then fraudulently induced her to enter his bedroom. Once there, he restrained her, brandished a knife, and threatened either to have sex with her or to kill her.

Here, the indictment alleged that defendant confined or restrained the victim for the purpose of "facilitating the commission of a felony, Attempted First Degree Rape." Attempted first degree rape is a Class B1 felony. *See* N.C. Gen. Stat § 14-27.2(b) (1999). Pursuant to the statutory requirements for kidnapping, "[t]he unlawful restraint must be an act independent of the intended felony." *Harris*, 140 N.C. App. at 213, 535 S.E.2d at 617. However, the "[r]estraint does not have to last for an appreciable period of time." *State v. Brayboy*, 105 N.C. App. 370, 375, 413 S.E.2d 590, 593, *disc. rev. denied*, 332 N.C. 149, 419 S.E.2d 578 (1992). The trial court properly instructed the jury that:

> the State must prove that the defendant confined or restrained the person for the purpose of facilitating his commission of the felony of attempted first degree rape.

> And, fourthly, the State must prove that this confinement or restraint was a separate and complete act independent of and apart from the attempted first degree rape.

Defendant contends that the only restraint involved here was an "inherent and inevitable part" of the commission of the attempted rape. He relies on several cases, which he contends illustrate this point, including *State v. Ross*, 133 N.C. App. 310, 515 S.E.2d 252 (1999), *State v. Allred*, 131 N.C. App. 11, 505 S.E.2d 153 (1998), and *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), among others. We disagree and find that the cases concerning *attempted rape* are also instructive on this matter.

> [T]o convict a defendant of attempted rape, the State must prove, beyond a reasonable doubt, two essential elements: (i) that defendant had the specific intent to rape the victim and (ii) that defendant committed an act that goes beyond mere preparation, but falls short of the actual commission of the rape. . . . The element of intent as to the offense of attempted rape is established if the evidence shows that defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding any resistance on her part.

State v. Schultz, 88 N.C. App. 197, 200, 362 S.E.2d 853, 855 (1987) (citations omitted), *aff'd per curiam*, 322 N.C. 467, 368 S.E.2d 386 (1988); *see also Brayboy*, 105 N.C. App. at 374, 413 S.E.2d at 593 (defining *attempt* in the context of an attempted rape). Here, defendant plainly stated his specific intent. The evidence indicating that defendant threatened Margaret with a knife and began to disrobe is sufficient to raise inferences of overt acts which are "beyond mere preparation," but which fall short of completing the rape. *Schultz*, 88 N.C. App. at 200, 362 S.E.2d at 855. Thus, the evidence established both elements of attempted rape.

The defendant, however, argues that any evidence of restraint to support the kidnapping was inherent in the attempted rape, so that the kidnapping conviction cannot stand. He refers to *Ross*, 133 N.C. App. 310, 515 S.E.2d 252, in which we reversed defendant's convictions for kidnapping in connection with an armed robbery. The defendant and others ordered the victims to first lie on the floor in their apartment and then to take the defendants into their bedrooms for their personal belongings. *See id.* We held that "[defendant] Jackson's actions, while reprehensible, were an inherent part of the armed robbery." *Id.* at 315, 515 S.E.2d at 255 (citations and quotations

omitted). Similarly, defendant cites *Irwin*, 304 N.C. 93, 282 S.E.2d 439, in which the Court reversed a kidnapping conviction. There, defendant was charged with kidnapping in the commission of an attempted armed robbery of a drug store. *See id.* The State alleged that defendant kidnapped the victim when, during the attempted robbery, his accomplice "forced Ms. Sasser at knifepoint to walk from her position near the fountain cash register to the back of the store in the general area of the prescription counter and safe." *Id.* at 103, 282 S.E.2d at 446. In reversing the conviction for the kidnapping of Ms. Sasser, the Supreme Court held that,

> [her] removal to the back of the store was an inherent and integral part of the attempted armed robbery. To accomplish defendant's objective of obtaining drugs it was necessary that either Mr. Stewart [the store owner] or Ms. Sasser go to the back of the store to the prescription counter and open the safe. . . . Ms. Sasser's removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense.

Id. at 103, 282 S.E.2d at 446; *see also Allred*, 131 N.C. App. 11, 21, 505 S.E.2d 153, 159 (reversing three of defendant's convictions for kidnapping and affirming the fourth conviction, where, as to one victim "removal was not an integral part of any robbery committed against him, but a separate course of conduct designed to prevent him from hindering defendant and his accomplice from perpetrating the robberies against the other occupants.").

More recently, in *State v. Muhammad*, 146 N.C. App. 292, 552 S.E.2d 236 (2001), we found no error in defendant's conviction for common law robbery and second degree kidnapping. There, defendant approached the victim from behind, put an arm around his throat, and hit the victim in the side. *See id.* at 293, 552 S.E.2d at 236. Defendant then walked the victim to the front of the restaurant where the restaurant manager gave defendant cash from the safe and register, and then defendant fled. *See id.* at 293, 552 S.E.2d at 237. There, we held that defendant's "actions constituted restraint beyond what was necessary for the commission of common law robbery." *Id.* at 296, 552 S.E.2d at 238. Further, the Court noted that "defendant did substantially more than just force [the victim] to walk from one part of the restaurant to another," and affirmed defendant's conviction for both common law robbery and second degree kidnapping. *Id.; see also State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)

(noting that like armed robbery, forcible rape is a felony that "cannot be committed without some restraint of the victim.").

Here, however, defendant pulled a knife, stated his intent, threatened to rape Margaret, and began to undress. Evidence of these actions supports the defendant's conviction of attempted rape, as defined in *Schultz*. *See Schultz*, 88 N.C. App. at 202, 362 S.E.2d at 856. In addition, however, defendant induced Margaret into the bedroom, kept her from leaving, and physically restrained her when he repeatedly climbed on her. He confined her again when he left the bedroom. Accordingly, the evidence of confinement or restraint was separate and distinct from that necessary to prove the attempted rape. Based on our analysis of these cases and others, we conclude that the evidence of restraint or confinement exceeded that needed to establish attempted rape, and that the evidence in this case supports defendant's conviction for kidnapping as well. This assignment of error is overruled.

[2] In his second assignment of error, defendant contends that the trial court erred in allowing evidence of defendant's illegal drug activity, because it was "irrelevant to any issue before the jury and any possible relevance was vastly outweighed by its prejudicial impact." Pursuant to Rule 401 of the North Carolina Rules of Evidence, 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." Such evidence is generally admissible, unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." N.C. R. Evid. 402 & 403 (1999). Here, evidence was admitted concerning defendant's statements of illegal drug activity. Margaret testified that she was looking for Nicole, who had disappeared with her money, when she was introduced to defendant. Defendant told her that he was the main Ecstasy dealer in the apartment complex and that he knew all of the places that Nicole could be found.

We note that defendant did not properly preserve this issue for appeal, because he did not object to the testimony on this basis when it was presented at trial. *See* N.C. R. App. Proc. 10(b)(1) (1999). He objected only to Margaret's failure to specify which person made the statements. Even though not properly preserved for appeal, however, in our discretion, we address the admission of this testimony, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure (1999).

In *State v. Agee*, 326 N.C. 542, 546-48, 391 S.E.2d 171, 173-76 (1990), the trial court properly admitted evidence of defendant's possession of marijuana which led to his arrest for possession of LSD. The charges against defendant for possessing marijuana were dropped, but the evidence concerning the marijuana was still admissible because it gave rise to a chain of events or circumstances resulting in defendant's conviction for possession of LSD. *See id.* The Court in *Agee* held that this evidence was admissible and described it as "[e]vidence tending to establish the context or chain of circumstances of a crime, which incidentally establishes the commission of a prior bad act." *Id.* at 547, 391 S.E.2d at 174. In *Agee*, the Court also held that the admission of this evidence did not violate Rules 401, 403, or 404(b) of the North Carolina Rules of Evidence. *See id.* at 550, 391 S.E.2d at 176.

Here, Margaret's testimony concerning how she met defendant and came to believe that he could help her does tend to indicate that he was involved with illegal drug activity. We do not believe that the court admitted the testimony to show defendant's propensity to commit a crime or his character, but as in *Agee*, to establish the context which incidentally involved illegal drugs. *See State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (noting that "evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused"). Here, the trial court did not err in admitting this evidence, and defendant's second assignment of error is overruled.

[3] In his third assignment of error, defendant contends that the "trial court committed reversible error by aggravating defendant's sentence for conduct which was necessarily part of the sex offense of which defendant was convicted, and which did not increase defendant's criminal culpability." N.C. Gen. Stat. § 15A-1340.16(d) (1999) requires that "[e]vidence necessary to prove an element of the offence . . . not be used to prove any factor in aggravation." During sentencing, the trial court did not find any of the specific statutory grounds enumerated in N.C.G.S. § 15A-1340.16(d) that would allow defendant to be sentenced in the aggravated range. However, the trial court did find a non-statutory factor in aggravation, described as,

> evidence that the defendant unnecessarily and maliciously subjected the victim to degradation and undue humiliation by shamefully performing a loathesome act of masturbation in her

> presence and by compelling the victim to disrobe and reveal her naked body after leading her to believe she would be released unharmed if she did so.

We agree with defendant that this nonstatutory factor does not increase defendant's culpability.

> Any non-statutory factor used to increase a defendant's sentence to the aggravated range must comply with the requirements of N.C.G.S. § 15A-1340.16(d)(20), that "[a]ny other aggravating factor [be] reasonably related to the purposes of sentencing." *See State v. Manning*, 327 N.C. 608, 613-14, 398 S.E.2d 319, 322 (1990) (holding that it was appropriate to use the non-statutory aggravating factor of the crimes at issue being committed for pecuniary gain, because the factor was reasonably related to the purposes of sentencing). The purposes of sentencing are to:
>
> > impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.
>
> N.C. Gen. Stat. § 15A-1340.12 ("Purposes of sentencing."). Here defendant's behavior did not fit into any of the nineteen statutorily specified aggravating factors, nor did his behavior qualify as "reasonably related to the purposes of sentencing." The trial court found that "performing the loathesome [sic] act of masturbation" subjected the victim to "degradation and undue humiliation." While observing this act may have been unpleasant for Margaret, there was no showing that it increased any risk of harm to her. Certainly she was more threatened by defendant's jumping on top of her and grabbing her by the throat while threatening her with a knife. Therefore, we do not believe that this factor was properly used to require that he be sentenced above the presumptive range, and a new sentencing hearing is necessary. *See* N.C.G.S. § 15A-1340.12.

No error; remanded for new sentencing hearing.

Judges TIMMONS-GOODSON and TYSON concur.

STATE OF NORTH CAROLINA v. RICHARD S. HOLMES, DEFENDANT-APPELLANT

No. COA00-1543

(Filed 2 April 2002)

Sexual Offenses— indecent liberties—felonious failure to notify sheriff of change of address—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of two counts of felonious failure to notify the sheriff of a change of address by a sex offender as required by N.C.G.S. § 14-208.11 even though defendant contends he called someone in the sheriff's department to give notification of his change of address, because: (1) there is no evidence that defendant was adjudicated incompetent; (2) defendant had sufficient notice of the requirement that he change his address in writing since he signed a notice of duty to register the day he was released from prison; and (3) the State produced sufficient evidence to show that defendant was convicted of two counts of indecent liberties with a minor, which required him under N.C.G.S. § 14-208.7 to register with the sheriff.

Appeal by defendant from judgment entered 8 September 2000 by Judge Richard L. Doughton in Iredell County Superior Court. Heard in the Court of Appeals 29 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Brian L. Blankenship, for the State.

Peter A. Smith, for defendant-appellant.

BRYANT, Judge.

Defendant appeals his convictions on two counts of felonious failure to notify the sheriff of a change of address by a sex offender. On 4 June 1991, defendant was convicted of and incarcerated on two counts of taking indecent liberties with a minor. He was released on 9 October 1996. The following day, defendant met with his intensive probation officer, where he reviewed and signed a 'Notice of Duty to Register' as a sex offender. On 17 October 1996, defendant registered as a sex offender with the Iredell County Sheriff's Office, listing 1224 Fifth Street in Statesville as his address.

On 19 May 1998, defendant was convicted of assault on a female and received probation under the supervision of a different probation

officer and surveillance officer. However, on 18 August 1998, defendant notified the surveillance officer but not the Sheriff's Department of his move from 1224 Fifth Street to 103 East Raleigh Avenue. Two months later, he was incarcerated on matters unrelated to this case. On 6 November 1998, defendant, while incarcerated, signed a verification of address form for the Iredell County Sheriff's Department showing his address as 1224 Fifth Street.

Defendant was released from jail on 1 December 1998 and returned to the Fifth Street address. However, on 4 December 1998, defendant notified the surveillance officer but not the Sheriff's Department of his move from East Raleigh Street to 273 North Lackey Street. On 14 January 1999, defendant left a message with his probation officer of his move from North Lackey Street to 324 South Miller Street. Five days later, defendant called the Sheriff's Department and told someone in the administrative office that he was changing his address. Defendant was told at that time that he would have to come into the Sheriff's Office to properly complete the paperwork to change his address. On 1 February 1999, defendant completed a change of address form stating that he moved from Fifth Street to Miller Avenue, effective 15 January 1999.

On 6 July 1999, defendant was indicted on three counts of felonious failure to notify the registering sheriff of a change of address by a sex offender. The indictments were based on moves made by defendant on 18 August 1998 (99-CRS-1496), 4 December 1998 (99-CRS-1495) and 14-15 January 1999 (99-CRS-1494). Defendant was tried by jury on 5 September 2000, and convicted on two counts (99-CRS-1495 and -1496) on 7 September 2000. Defendant was acquitted on 8 September 2000 for failing to register on 14-15 January 1999 (99-CRS-1494). Defendant appeals from the two convictions.

Defendant's sole assignment of error is that the evidence was insufficient on every element of the charges to withstand his motion to dismiss at the close of all the evidence. Within this assignment of error, defendant makes the following arguments: 1) that the trial court should have strictly construed the sex offender registration statute by requiring substantial evidence of every element of the crime in ruling on a motion to dismiss because the statute is violated when a person fails to perform an affirmative act; 2) that the notification requirement should be strictly construed in favor of defendant because the statute is vague; and 3) that the State offered insufficient evidence to establish the specific elements of the crime.

Defendant first argues that the trial court was required to strictly construe N.C.G.S. § 14-208.11 because of the possibility of violating defendant's due process rights. It is well established that a constitutional question must be raised and decided at trial before this Court will usually consider the question on appeal. *State v. Youngs*, 141 N.C. App. 220, 540 S.E.2d 794, 800 (2000), *rev. denied by* 353 N.C. 397, 547 S.E.2d 430 (2001); *State v. Waddell*, 130 N.C. App. 488, 503, 504 S.E.2d 84, 93 (1998), *decision aff'd as modified by* 351 N.C. 413, 527 S.E.2d 644 (2000). Because defendant failed to raise this constitutional question at trial, this Court may not consider it. *See* N.C. R. App. P. 28(b)(5). However, we may waive our Rules of Appellate Procedure to prevent manifest injustice pursuant to Rule 2. N.C. R. App. P. 2. Herein, we waive application of Rule 2 only to make clear that *State v. Young*, 140 N.C. App. 1, 535 S.E.2d 380 (2000), *review denied*, 353 N.C. 397, 547 S.E.2d 430, *discretionary review improvidently allowed*, 354 N.C. 213, 552 S.E.2d 142 (2001), is limited to cases where defendant is mentally incompetent.

Defendant argues that *State v. Young*, which addresses a violation of the same statute, applies. We disagree. In *Young*, the defendant, Ricky Neal Young, was adjudicated incompetent and a guardian was appointed in July 1989. Two years later, Young was charged with taking indecent liberties with a minor child, but the trial court found that he lacked the capacity to be tried. After his release from the mental hospital, Young pled guilty in 1998 to the indecent liberties charge and was sentenced to a prison term. Upon his parole in early May 1998, Young lived in a family care home that provided his meals, medication and transportation to meetings with his parole officer. Young went to the sheriff's department on 12 May 1998 and registered his family care home address. He was released from the family care home on 28 June 1998, and committed to Broughton Hospital the next day. Young was discharged from Broughton on 4 October 1998 into his guardian's care. That day he notified the sheriff's department by phone of his new address. Young was later charged and convicted of failing to notify the sheriff's department of his change of address as a sex offender in violation of N.C.G.S. § 14-208.11.

On appeal, Young argued that § 14-208.11 was unconstitutional under the United States and North Carolina Constitutions because, as applied to him, the statute "severely punishes an incompetent person for failing to take some affirmative action, without regard to fault or legal excuse . . . ." *Young*, 140 N.C. App. at 5, 535 S.E.2d at 383. This Court agreed that because Young had been adjudicated incompetent,

"actual notice" as applied to a reasonable and prudent person was insufficient notice to Young. *Id.* at 9, 535 S.E.2d at 385. "Due process requires not just the mechanical act of notifying a defendant or the automatic assumption that the notice is good, but in fact, we believe due process requires that notice be synonymous with the ability to comply." *Id.* at 10, 535 S.E.2d at 385. The *Young* Court ultimately held that § 14-208.11 was unconstitutional as applied to an adjudicated incompetent defendant because it fails the due process notice requirement mandated by the Fifth and Fourteenth Amendments to the United States Constitution. *Young*, 140 N.C. App. at 15, 535 S.E.2d at 388. The *Young* Court declined to address the constitutionality of § 14-208.11 under the North Carolina Constitution.

We find *Young* distinguishable. The *Young* Court clearly limited its holding to defendants who were adjudicated incompetent. That is not the case here. Defendant does not contend — and there is no evidence — that he was adjudicated incompetent. We therefore focus our attention on the notice requirements for a person who has not been adjudicated incompetent.

This brings us to defendant's second argument. Defendant alleges that the notification requirement should be strictly construed in his favor because § 14-208.11 does not indicate the type of notice required of sex offenders. We disagree. North Carolina requires persons convicted of certain sex offenses to register with law enforcement agencies because they often pose a high risk of committing a sex offense after being released from incarceration. *See* N.C.G.S. § 14-208.5 (1999). North Carolina residents who are released from a penal institution must register with the sheriff of the county in which the person resides "[w]ithin 10 days of release from a penal institution." N.C.G.S. § 14-208.7(a)(1) (1999) (amended by Act of Aug. 17, 2001, ch. 373, sec. 1, 2001, N.C. Sess. Laws 798). Persons subject to registration must be notified at least ten days but no more than thirty days prior to release of their duty to register. N.C.G.S. § 14-208.8(a) (1999). The person to be released must sign a written statement that they were informed of the duty to register, or, if the person refuses to sign, a prison official must certify that the person was informed. N.C.G.S. § 14-208.8(a)(1) (1999). "If a person required to register changes address, the person shall provide *written* notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered." N.C.G.S. § 14-208.9 (1999) (emphasis added) (amended by Act of Aug. 17, 2001, ch. 373, sec. 1, 2001, N.C. Sess. Laws 179). If

the person fails to register or notify the last registering sheriff of a change of address, he is guilty of a Class F felony. N.C.G.S. § 14-208.11 (1999).

Article 27A (N.C.G.S. § 14-208.5 to -208.32) clearly sets out the notice, registration, and proposed punishment for failure to register as required. N.C.G.S. § 14-208.9 requires sex offenders to provide *written* notice of a change of address. N.C.G.S. § 14-208.11 clearly indicates the consequences for failure to properly register. Our rules of statutory construction provide that "[s]tatutes imposing penalties are . . . strictly construed in favor of the one against whom the penalty is imposed and are never to be extended by construction." *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 205, 282 S.E.2d 509, 511 (1981). However,

> when statutes 'deal with the same subject matter, they must be construed in *pari materia* and harmonized to give effect to each.' When, however, the section dealing with a specific matter is clear and understandable on its face, it requires no construction. In such case, 'the Court is without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain.'

State ex rel. Utilities Comm'n v. Lumbee River Elec. Membership Corp., 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citations omitted).

N.C.G.S. § 14-208.9 and the statute in question, § 14-208.11, are both within Article 27A, which defines the sex offender and public protection registration programs. Because they deal with the same subject matter, they must be construed in *pari materia* to give effect to each. N.C.G.S. § 14-208.9 states that the person required to register a change of address must provide *written* notice. N.C.G.S. § 14-208.9 (1999) (amended by Act of Aug. 17, 2001, ch. 373, sec. 1, 2001, N.C. Sess. Laws 798). N.C.G.S. § 14-208.11 makes it a felony to fail to notify the sheriff of a change of address. N.C.G.S. § 14-208.11(a)(2) (1999). Read together, certain sex offenders must notify the sheriff in writing in order to comply with our statutes. N.C.G.S. § 14-208.11 is not vague; it merely requires two statutes on the same subject matter to be read together according to the rules of statutory construction.

The record indicates that defendant signed a 'Notice of Duty to Register' [Notice] on 10 October 1996, the day he was released from prison after serving over five years for two counts of taking indecent

liberties with a minor. The Notice states that "[i]f a person required to register changes address, the person shall provide written notice of the new address not later than the tenth day after the change to the Sheriff of the County with whom the person had last registered." The Notice further provides that if a person intentionally violates the requirements, he is guilty of a Class 3 misdemeanor for the first conviction and a Class 1 felony for a subsequent conviction. This is sufficient notice for a reasonable and prudent person. Defendant, who was never adjudicated incompetent, reviewed and signed the Notice. Therefore N.C.G.S. § 14-208.11 is not unconstitutional as applied to defendant and *Young* is not applicable. Defendant's first two arguments are without merit.

Defendant next argues that the State offered insufficient evidence to establish the specific elements of the crime. Specifically, defendant argues that "the State failed to offer substantial evidence as to specific elements of this offense, including specific dates when the defendant moved and specific dates when [the Defendant] would have been required to submit [a] change of address." We disagree.

To meet its burden under § 14-208.11(a)(2), the State must prove that: 1) the defendant is a sex offender who is required to register; and 2) that defendant failed to notify the last registering sheriff of a change of address. When reviewing a defendant's motion to dismiss for insufficiency of the evidence, this Court must determine whether there is substantial evidence of every essential element of the offense. *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). This Court considers evidence in the light most favorable to the State. *Id.* Substantial evidence is evidence "a reasonable juror would consider sufficient to support the conclusion that each essential element of the crime exists." *Id.* This Court must determine "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981)).

We must first address whether the State met its burden in producing substantial evidence that defendant was required to register. A person who is convicted of taking indecent liberties with a minor has a reportable conviction and must register with the sheriff of the county where the person resides. *See* N.C.G.S. § 14-208.7 (1999) (amended by Act of Aug. 17, 2001, ch. 373, sec. 1, 2001, N.C. Sess. Laws 179); *State v. Young*, 140 N.C. App. 1, 535 S.E.2d 380 (2000). At trial, the State produced evidence that defendant was convicted of

two counts of taking indecent liberties with a minor. This evidence consisted of the testimony of the custodian of records of the Office of Clerk of Superior Court for Iredell County, who identified two court files containing judgments entered against defendant on 4 June 1991 for taking indecent liberties with a minor. We find this to be substantial evidence that defendant is a sex offender who is required by § 14-208.7 to register with the sheriff.

We next address whether the State met its burden of producing substantial evidence that defendant failed to notify the sheriff of a change of address. Defendant was convicted of two counts of failure to register as a sex offender. In 99 CRS 1496, the conviction resulted from defendant's failure to register his change of address from 1224 Fifth Street to 103 East Raleigh Avenue on 18 August 1998. Defendant testified that he called someone at the sheriff's department when he moved from Fifth Street to East Raleigh Avenue on 18 August 1998. However, he did not sign a verification of address form until 6 November 1998 when someone from the Iredell County Sheriff's Department visited him in jail. Defendant's direct testimony also confirmed the substantial evidence of record that: 1) he moved on 18 August 1998; and 2) that he failed to comply with the statutory notification requirements for sex offenders. Therefore, this evidence of defendant's failure to comply with the notification requirement was substantial.

In 99 CRS 1495, the conviction resulted from defendant's failure to register his change of address from 103 East Raleigh Avenue to 273 North Lackey Street on 4 December 1998. Defendant testified that he was released from Iredell County Jail on 1 December 1998 and that he returned to Fifth Street. He called Mr. Johnson, a surveillance officer, to tell him that he was moving to North Lackey Street. Defendant testified that January "was the only time I ever heard them tell me that I had to physically come to the [sheriff's department] and sign." The State offered the testimony of an Iredell County Sheriff's Department employee who worked in the sex offender registration unit and records. She testified that between November 1998 and 1 February 1999, she did not complete any forms or documents regarding changes of address by defendant. As stated earlier in this opinion, defendant signed a 'Notice of Duty to Register' in October 1996 which required him to provide written notice of a change of address within ten days of the change. We conclude that this is substantial evidence that defendant failed to comply with the notification requirements for sex offenders.

Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence as the State presented substantial evidence of every element of the offense. We also hold that defendant had adequate notice to satisfy constitutional due process requirements. Accordingly, we find no error.

NO ERROR.

Judges McGEE and HUNTER concur.

CAROLINA HOLDINGS, INC., PETITIONER v. HOUSING APPEALS BOARD OF THE CITY OF CHARLOTTE, RESPONDENT

No. COA01-460

(Filed 2 April 2002)

1. Open Meetings— housing appeals board—closed session—attorney-client privilege exception

The trial court did not err in a case seeking the demolition of petitioner's apartment buildings by determining that respondent housing appeals board did not violate the open meeting laws under N.C.G.S. §§ 143-318.9 through 318.18, because: (1) the record shows that the closed sessions during the 12 October 1999 and 11 April 2000 hearings were for the purpose of the board consulting with its attorney on matters within the scope of the attorney-client privilege; and (2) petitioner has failed to show any prejudice by reason of the board meeting in closed session.

2. Cities and Towns— demolition proceeding—whole record test

The trial court did not err in a case seeking the demolition of petitioner's apartment buildings by concluding respondent housing appeals board's findings and conclusions concerning housing code violations in petitioner's apartment units were supported by competent evidence in the whole record and are not arbitrary and capricious, because: (1) the evidence before the board showed that the inspector inspected each of the units in June and July 1998 and found violations in every unit; (2) these violations still

existed in October 1999; and (3) the board was presented with estimates of the cost of repairs and the value of the units enabling it to declare that some of the units were deteriorated and needed to be brought up to code while others were dilapidated and needed to be demolished.

3. Cities and Towns— demolition proceeding—space and use and light and ventilation provisions of housing code—previous failure to cite violations

The trial court did not err in a case seeking the demolition of petitioner's apartment buildings by applying the space and use and light and ventilation provisions of the housing code for petitioner's apartment units that were originally used as a motel before being converted into apartments even though petitioner contends the application of the code provisions would be an impermissible retroactive application and past code inspectors had failed to cite these violations previously, because: (1) there was no evidence before the board that the code had been retroactively or retrospectively applied; and (2) the doctrine of estoppel will not be applied against a municipality in its governmental, public, or sovereign capacity even though respondent housing appeals board failed to cite these violations in the past.

4. Cities and Towns— demolition proceeding—reasonable opportunity to conform with housing code

The trial court did not err in a case seeking the demolition of petitioner's apartment buildings by concluding that respondent housing appeals board gave petitioner a reasonable opportunity to bring its apartment units into conformity with the housing code as required by N.C.G.S. § 160A-443, because petitioner has made no showing that, after notice, it did not have a reasonable opportunity to bring the apartment units into compliance with the housing code.

Appeal by petitioner from judgment entered 13 November 2000 by Judge L. Oliver Noble, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 January 2002.

John E. Hodge, Jr. for petitioner-appellant.

Office of the City Attorney, by Senior Assistant City Attorney F. Douglas Canty, for respondent-appellee.

WALKER, Judge.

Petitioner owns Eastway Apartments in Charlotte. In June and July of 1998, the City of Charlotte inspected all of the apartments in the complex and found violations of the Charlotte Housing Code (the Code) in every apartment. The two most prominent code violations were of sections 11-52 ("space and use") and 11-53 ("light and ventilation"). Scott Edwards, the inspector, noted at least one of these violations in every apartment and provided estimates of the value of each apartment unit and the cost of repair to bring the units into compliance.

The inspector provided notice to petitioner of an opportunity for a hearing regarding the violations. After a hearing, the inspector confirmed the findings of violations and ordered demolition of all of the apartment units. Each order indicated that the affected unit contained specified violations of the Code and that such violations could not be repaired, altered, or improved at a cost of less than 65% of the value of the dwelling.

Petitioner appealed the inspector's demolition order to respondent Housing Appeals Board (the Board). In its appeal to the Board, petitioner contended the following in part:

> The property owner contends that the cited code sections are unenforceable because the code was adopted after the construction of these units and their being placed into use.
>
> Furthermore, the Findings of Fact give no compelling government reason why the code can be applied ex post facto. Additionally, each unit cited has been inspected repeatedly without being cited for space and use and/or light and ventilation violations. The units were in compliance when built, in compliance when the code was adopted and remain in compliance. Therefore, the space and use and light and ventilation violations should be struck. Every other violation is minor and will be corrected.

On 9 March 1999, the Board held its first hearing on petitioner's appeal. Officer P.J. Wilson testified about the criminal activity he was investigating which was occurring in the area. The investigation lead him to discover there were code violations at these apartments and he informed the city housing inspectors. Mr. Edwards testified that he had last visited the units on the morning of the hearing. The property appeared the same as before; although, some violations had been cor-

rected. He testified that both "housekeeping" violations and "structural" violations still existed at the time of the hearing.

The "structural" violations included sagging floor joists and sagging header supports, along with the space and use and the light and ventilation violations. Mr. Edwards further testified, "These uniits [sic] have been there for forty years and they have all passed all the inspections for these forty years." The "housekeeping" violations included trash, abandoned vehicles, furniture, and other items around the exterior of the units.

When the hearing concluded, the Board had not reached a decision on the matter. Instead, it requested the petitioner to continue to repair all of the violations except the space and use and light and ventilation violations. The Board also determined that it would reconvene and have the parties report back on their progress.

A second hearing was held on 13 April 1999. Mr. Edwards testified that he had visited the property again. He found that the property had "improved somewhat since the last time we was [sic] here." He testified that the abandoned vehicles were gone, "the trash is being disposed back into the trash receptacles again," and other exterior "housekeeping" violations were being remedied. After discussing possible new ownership of the units and the effect of that on the decision of the Board, the Board moved that "the present owner bring into compliance, excluding light ventilation and space, all the necessary repairs by July 15th and that all light ventilation and space requirement to code be completed by December 15th."

At a third hearing on 10 August 1999, Carl Wiggins, a representative of the petitioner, testified that he had been working daily on repairing the violations. However, Mr. Edwards reported there were still code violations, excluding the space and use and light and ventilation violations. The Board did not take any formal action at the hearing.

Another hearing was held on 12 October 1999. Mr. Wiggins reported that the potential buyer could not purchase the units because his source of money "had gone away." Also, there were still code violations, excluding space and use and light and ventilation violations. The Board went into closed session to consult with its attorney. At the conclusion of the session, the Board voted to order petitioner to demolish the units within ninety days. The Board did not make any written findings nor conclusions in support of its decision.

The Board met again on 11 April 2000 after providing notice to the petitioner. During a closed session, the Board's attorney informed it that the 12 October 1999 decision to demolish all of the property was in error. Back in open session, the Board passed an amended decision with the following findings in part:

. . .

2. Each of the apartments is used for human habitation and each apartment contains violations of the Code. The Code violations that each apartment contains are as listed on Exhibit A to the code enforcement findings of fact for the apartment.

3. The apartments are part of a complex of buildings that was built and used originally as a motel; consequently, some of the apartments do not contain enough square footage or window space to meet the space and use or light and ventilation requirements of Sections 11-52 and 11-53 of the Code, as indicated on the inspection checklists and lists of violations. The Board did not receive any evidence that the apartments complied with the Code at the time of construction or at any other time.

4. At some point prior to the inspections that led to the present Code enforcement proceedings against the apartments, a code inspector inspected the apartments but failed to cite the violations of Sections 11-52 and 11-53 of the Code.

5. Each of the apartments listed below in this Paragraph 5 is deteriorated, in that it can be repaired, altered, or improved to comply with the Code at a cost that does not exceed 65 percent of the value of the apartment:

[Thirty-nine of the apartment units were in this category].

6. Each of the apartments listed below in this Paragraph 6 is dilapidated, in that it cannot be repaired, altered, or improved to comply with the Code at a cost that does not exceed 65 percent of the value of the apartment:

[Fifteen of the apartment units were in this category].

The Board concluded the following in part:

1. Each of the apartments is unfit for human habitation, in that the apartment contains conditions that violate one or more of the minimum standards of fitness established by the Code.

2. All of the apartments listed in Findings of Fact No. 5 should be repaired, altered, or improved so as to comply with the minimum standards of fitness established by the Code.

3. All of the apartments listed in Findings of Fact No. 6 should be demolished. Because such apartments were converted unlawfully from motel units to dwellings, justice does not require a waiver of the space and use or light and ventilation requirements with respect to the apartments.

4. The failure of an inspector to cite the space and use and light and ventilation violations in a previous inspection does not operate as a perpetual waiver of those requirements. The failure of the apartments to meet those requirements is an ongoing violation of law that can be remedied through this proceeding.

The Board then ordered the demolition of the fifteen dilapidated apartment units and the repair of the thirty-nine deteriorated apartment units within sixty days. Petitioner appealed the Board's decision to the superior court. After a hearing on 28 September 2000, the trial court made findings and conclusions and affirmed the Board's decision of 11 April 2000.

While the review provisions of the North Carolina Administrative Procedure Act are not applicable to this appeal, "the principles that provision embodies are highly pertinent." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 625, 265 S.E.2d 379, 382, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). The scope of review of a trial court reviewing a decision by a 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 [the Board] are supported by competent, material and substantial evidence in the whole record, and

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

Id. at 626, 165 S.E.2d at 383.

[1] Petitioner first contends that the Board made its decisions during closed sessions in violation of the open meeting laws, N.C. Gen. Stat. §§ 143-318.9 through 318.18 (1999), and that the trial court erred in determining otherwise. The trial court found, "The record indicates that the respondent issued both its original decision and its amended decision in open meetings." Petitioner contends that the use of the language "the record indicates" shows that the trial court used an improper standard of review. The proper standard of review of this issue is *de novo*. Thus, our review of the trial court's order is *de novo* as to the issue of violation of the open meeting laws.

N.C. Gen. Stat. § 143-318.10(a) states, "Except as provided in G.S. 143-318.11, . . ., each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting." N.C. Gen. Stat. § 143-318.11(a) states the following in part:

> It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:
>
> . . .
>
> (3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant.

While there is a public policy against closed sessions, discussions between a board and its attorney regarding matters traditionally falling within the attorney-client privilege must be allowed to be conducted in closed sessions to preserve the attorney-client privilege, including consulting on constitutional and legal challenges which might result from actions being taken or considered by a board. *Multimedia Publ'g of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 575, 525 S.E.2d 786, 792, *disc. rev. denied*, 351 N.C. 474, 543 S.E.2d 492 (2000).

The record shows that the closed sessions during the 12 October 1999 and 11 April 2000 hearings were for the purpose of the Board

consulting with its attorney on matters within the scope of the attorney-client privilege. Further, petitioner has failed to show any prejudice by reason of the Board meeting in closed session. Thus, this assignment of error is overruled.

[2] Petitioner further contends that the findings and conclusions of the Board are not supported by competent evidence in the whole record and are arbitrary and capricious. The trial court concluded the following in part:

> 3. In light of the petitioner's claim that the respondent['s] decision is not supported by substantial, competent evidence and is arbitrary and capricious, the court must employ the "whole record" test, which requires the court to examine all competent evidence that was presented to the respondent to determine if the respondent's decision is supported by competent evidence.
>
> 4. The respondent's findings of fact are supported by substantial, competent evidence contained in the record. The respondent's conclusions of law are supported by the findings of fact.

The evidence before the Board showed that the inspector inspected each of the units in June and July of 1998 and found code violations in every unit, including space and use and/or light and ventilation violations. These violations still existed in October of 1999. The Board was presented with estimates of the cost of repairs and the value of the units. Based on the evidence, the Board determined that in thirty-nine of the units, the cost of repairs would be less than sixty-five percent of the total value. Thus, these units were declared deteriorated and were ordered to be brought up to code. In fifteen of the units, the Board found that the cost of repairs would exceed sixty-five percent of the value of the units. Thus, these units were declared dilapidated and were ordered demolished. We find there was competent evidence to support the findings which, in turn, support the conclusions of the Board.

[3] Petitioner next contends that the Board erred in applying the space and use and light and ventilation provisions of the Code. The Board found that the units were originally used as a motel before being converted into apartments. The Board also found that past code inspectors had failed to cite the space and use and light and ventilation violations. Petitioner claims that the Code provisions should not be applied because to do so would be a retroactive or retrospective application and thus constitutionally impermissible.

"The application of a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment." *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980). However, a statute is not unconstitutional simply because it is applied to facts which were in existence before its enactment. *Wood v. Stevens & Co.*, 297 N.C. 636, 650, 256 S.E.2d 692, 701 (1979). "Instead, a statute is impermissibly retrospective only when it interferes with rights which had vested or liabilities which had accrued prior to its passage." *Id.*

Here, the original Code became effective in 1961 with amendments through 1989. While the record shows that the units were built as motels in the late 1940s and subsequently converted into apartment units, there was no evidence presented as to when this conversion took place. Further, petitioner did not acquire the units until 1992. During the Board hearings, Mr. Wiggins testified that "between the time we made the offer on it and the time that it closed, we learned that it was not in compliance with the City Ordinance." Thus, we agree that the trial court properly determined there was no evidence before the Board that the Code had been retroactively or retrospectively applied.

Petitioner also claims that because the space and use and light and ventilation violations had existed for years without citation, the Board is estopped from now enforcing these provisions of the Code. However, "[i]t is generally recognized in North Carolina that the doctrine of estoppel will not be applied against a municipality in its governmental, public or sovereign capacity." *Sykes v. Belk*, 278 N.C. 106, 121, 179 S.E.2d 439, 448 (1971). Our Supreme Court held in *Helms v. Charlotte*, 255 N.C. 647, 122 S.E.2d 817 (1961), that "[a] municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting the violation." *Helms*, 255 N.C. at 652, 122 S.E.2d at 821. *See also*, *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 436 (1992). Just as in *Helms*, we find that the Board is not estopped from enforcing the Code against petitioner by the failure to cite these violations in the past.

[4] Petitioner finally claims the Board did not give it a reasonable opportunity to bring the units into conformity with the Code. N.C. Gen. Stat. § 160A-443, which grants a city the authority to create housing codes, requires that "[n]o such ordinance shall be adopted to require demolition of a dwelling until the owner has first been given

a reasonable opportunity to bring it into conformity with the housing code." N.C. Gen. Stat. § 160A-443(5). Here, the trial court concluded the following:

> 9. The housing code contains a provision (Section 11-28(e)(3)) that grants to a dwelling owner the right to repair a dwelling that is subject to a demolition order, provided that the owner gives to the code official, within 10 days from the date of the demolition order, written notice of intent to repair. The record contains no indication that the petitioner attempted to exercise its rights under this provision.

Petitioner has made no showing that, after notice, it did not have a reasonable opportunity to bring the units into compliance with the Code.

In conclusion, we find the trial court properly determined that the Board did not violate the open meeting laws. Further, the trial court's findings and conclusions were supported by competent evidence. Thus, the judgment of the trial court which upheld the order of the Board is

Affirmed.

Judges McGEE and BIGGS concur.

STATE OF NORTH CAROLINA v. GREGORY NORMAN

No. COA01-582

(Filed 2 April 2002)

1. Appeal and Error— indictment—not challenged at trial

A defendant on appeal may challenge an indictment on the grounds that the indictment is insufficient to support the offense of which defendant was convicted, even when defendant failed to challenge the indictment on this basis at the trial level.

2. Burglary and Unlawful Breaking or Entering— breaking and entering—ownership of property

The trial court correctly denied a motion to dismiss a felonious breaking and entering charge that was based upon the argu-

ment that the indictment was insufficient in specifying the ownership of the property. The building broken into was sufficiently identified; it was not necessary to allege ownership of the building or ownership of the property defendant intended to steal.

3. Larceny— indictment—identity of corporate victim—insufficient

A larceny indictment which alleged that property was taken from "Quail Run Homes Ross Dotson, Agent" was fatally defective because it lacked any indication of the legal ownership status of the victim.

4. Burglary and Unlawful Breaking or Entering— variance—identity of corporate agent—immaterial

A variance between an indictment for felonious breaking and entering and the evidence concerning the agent for the corporate victim was immaterial and not fatal. The variance did not prevent defendant from preparing his defense or leave defendant vulnerable to another prosecution for the same incident.

5. Evidence— larceny—whether property valuable or easily pawned—door opened

The trial court did not err in a prosecution for felonious larceny and felonious breaking and entering by admitting evidence from the general manager of the corporate victim about whether the lamps allegedly stolen by defendant had been stolen in the past. Defendant had opened the door by asking an officer whether the lamps were valuable or easy to pawn.

6. Sentencing— consolidated convictions—one reversed—sentence remanded

A sentence was remanded for resentencing where 5 convictions had been consolidated and one was reversed. It was possible that the reversed conviction influenced the trial judge on the length of sentence imposed.

Appeal by defendant from judgment entered 9 November 2000 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 20 February 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General William R. Miller, for the State.

J. Clark Fischer for defendant-appellant.

HUNTER, Judge.

Gregory Norman ("defendant") appeals from a judgment entered upon a verdict of guilty on the charges of felonious breaking and entering, felonious larceny, resisting arrest, assault upon an officer, and habitual felon. On appeal, defendant argues that the charges of felonious breaking and entering and felonious larceny should have been dismissed due to an insufficient indictment and due to a fatal variance between the indictment and the evidence at trial. Defendant also assigns error to the trial court's admission of certain evidence at trial. We vacate the judgment on the charge of felonious larceny, hold there was no error in the judgment on the remaining charges, and remand for resentencing.

The evidence at trial tended to show that on the evening of 19 July 2000, defendant, who was intoxicated at the time, forcibly entered a trailer belonging to a company called "Quail Run Homes" by breaking a window on the trailer. At the time, the trailer was on display for sale at the company's display lot, and it was unoccupied. At some subsequent point in time that same evening or very early the next morning, Officer M.J. Snow of the Winston-Salem Police Department was walking by the trailer with a police dog and saw the door to the trailer open and then quickly close. After about ten seconds, the door opened again and defendant stood in the doorway holding two electric lamps, one under each arm. Officer Snow ordered defendant to come out of the trailer, but defendant remained in the trailer and closed the door. Defendant then opened a different door at the back of the trailer and told Officer Snow he would come out if Officer Snow would restrain his police dog. When defendant exited the trailer, Officer Snow ordered him to lie on the ground, but defendant continued to walk away from the officer. As defendant approached his own car, which was parked close to the trailer, Officer Snow sprayed defendant with pepper spray. Defendant grabbed Officer Snow and pushed him, at which point the police dog attacked defendant, knocked him to the ground, and Officer Snow placed him under arrest. Subsequent to defendant's arrest, Officer Snow inspected the trailer and discovered a broken window and pry marks on a door. He also found the two electric lamps which were still inside the trailer.

Defendant was indicted and tried on five charges: (1) felonious breaking and entering, pursuant to N.C. Gen. Stat. § 14-54(a) (1999); (2) felonious larceny, pursuant to N.C. Gen. Stat. § 14-72(b)(2) (1999); (3) resisting an officer, pursuant to N.C. Gen. Stat. § 14-223

(1999) (misdemeanor); (4) assaulting an officer, pursuant to N.C. Gen. Stat. § 14-33(c)(4) (1999) (misdemeanor); and (5) being an habitual felon, pursuant to N.C. Gen. Stat. § 14-7.1 (1999). At the close of the State's evidence, and again at the close of all the evidence, defendant moved to dismiss the charges of felonious breaking and entering and felonious larceny, which motions were denied. Defendant was found guilty on all charges and sentenced to 80 to 105 months in prison. Defendant appeals.

On appeal, defendant presents two arguments for our review. The first argument pertains to the trial court's denial of defendant's motion to dismiss. The second argument pertains to the admission of certain evidence.

I.

[1] Defendant first argues that his motion to dismiss should have been granted as to the charges of felonious breaking and entering and felonious larceny. Defendant presents two independent grounds to support this argument: (1) the indictment, on its face, is insufficient in specifying the ownership of the property that was the subject of the crime; and (2) there was a fatal variance between the indictment and the evidence presented at trial.

We first note that defendant's motion to dismiss was not, in fact, based upon the contention that the indictment is insufficient on its face. Rather, the motion to dismiss was based solely upon the grounds that there existed a fatal variance between the indictment and the evidence presented at trial. However, a defendant on appeal may challenge an indictment on the grounds that the indictment is insufficient to support the offense of which defendant was convicted, even when the defendant failed to challenge the indictment on this basis at trial. *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419, *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998). Thus, we review both grounds upon which defendant contends his motion to dismiss should have been granted.

A. Sufficiency of the Indictment

[2] Defendant contends that the motion to dismiss should have been granted as to the charges of felonious breaking and entering and felonious larceny because the indictment, on its face, is insufficient in specifying the ownership of the property that was the subject of the crime. With regard to the felonious breaking and entering charge, defendant's argument is without merit.

Defendant was convicted of felonious breaking and entering, pursuant to N.C. Gen. Stat. § 14-54(a) ("[a]ny person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon"). As to the building itself, it was not necessary that the indictment allege ownership of the building; it was only necessary that the State "identify the building with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense." *State v. Carroll*, 10 N.C. App. 143, 145, 178 S.E.2d 10, 12 (1970). Ideally, an indictment for violation of N.C. Gen. Stat. § 14-54 should "identify the subject premises by street address, highway address, or other clear designation." *State v. Melton*, 7 N.C. App. 721, 724, 173 S.E.2d 610, 613 (1970). Here, the indictment alleged that defendant did break and enter a building occupied by Quail Run Homes located at 4207 North Patterson Avenue in Winston-Salem, North Carolina. Thus, the particularity with which the indictment identified the building was sufficient.

As to the ownership of the property defendant intended to steal, it is well established that, where a defendant is charged with breaking and entering with felonious intent to steal,

> neither the identification of the owner of the personal property sought to be stolen nor the accomplishment of the felonious intent is a prerequisite of guilt. A person is guilty of feloniously breaking and entering a dwelling house if he unlawful[ly] breaks and enters such dwelling house with the intent to steal personal property located therein without reference to the ownership thereof.

State v. Thompson, 280 N.C. 202, 214-15, 185 S.E.2d 666, 674 (1972). For example, in *State v. Crawford*, 3 N.C. App. 337, 164 S.E.2d 625 (1968), the defendant argued that his motion for judgment as of nonsuit should have been allowed because the bill of indictment charged the crime of feloniously breaking and entering a certain building with intent to steal, pursuant to N.C. Gen. Stat. § 14-54, without identifying the ownership of the property the defendant allegedly intended to steal. We rejected the defendant's argument based upon the following reasoning:

> In the instant case, it was incumbent upon the State to establish that, at the time the defendant broke and entered, he intended to steal something. However, it was not incumbent upon the State

> to establish the ownership of the property which he intended to steal, the particular ownership being immaterial.

Id. at 341, 164 S.E.2d at 628. Thus, in the present case, it was not necessary that the indictment set forth the ownership of the property that defendant intended to steal.

[3] However, as to the larceny charge, we are compelled to agree with defendant that the indictment is insufficient. Any crime that occurs when a defendant offends the ownership rights of another, such as conversion, larceny, or embezzlement,

> requires proof that someone other than a defendant owned the relevant property. Because the State is required to prove ownership, a proper indictment must identify as victim a legal entity capable of owning property. An indictment that insufficiently alleges the identity of the victim is fatally defective and cannot support conviction of either a misdemeanor or a felony.

State v. Woody, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999). Furthermore, where the victim is not an individual, the indictment must allege that the victim was "a legal entity capable of owning property." *Id.* at 790, 513 S.E.2d at 803. If the indictment fails to so allege, it is "fatally defective." *Id.*

Here, the indictment alleges that defendant did "steal, take and carry away 2 electric lamps, the personal property of Quail Run Homes Ross Dotson, Agent, such property having a value of $40.00." Because the indictment lacks any indication of the legal ownership status of the victim (such as identifying the victim as a natural person or a corporation), it is fatally defective and cannot support defendant's conviction. *See State v. Thornton*, 251 N.C. 658, 111 S.E.2d 901 (1960) (indictment alleging defendant embezzled from "The Chuck Wagon" fatally defective for failing to allege fact that victim was corporation since name itself did not import a corporation); *State v. Thompson*, 6 N.C. App. 64, 169 S.E.2d 241 (1969) (same result where indictment alleged defendant committed larceny of property owned by "Belk's Department Store"). Accordingly, the judgment on the charge of felonious larceny pursuant to N.C. Gen. Stat. § 14-72(b)(2) must be vacated.

B. Fatal Variance

[4] Defendant also contends that his motion to dismiss should have been granted as to the charges of felonious breaking and entering and

felonious larceny because of a fatal variance between the indictment and the evidence. Because we have already determined that the judgment against defendant on the charge of felonious larceny must be vacated, we address only whether there was a fatal variance as to the felonious breaking and entering charge.

Whether an indictment is sufficient on its face is a separate issue from whether there is a variance between the indictment and the evidence presented at trial, although both issues are based upon the same concerns. A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial. *See* 41 Am. Jur. 2d *Indictments and Informations* § 257 (1995). Nonetheless, both issues are based upon the same concerns: to insure that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident. *See State v. Coffey*, 289 N.C. 431, 438, 222 S.E.2d 217, 221 (1976); *State v. McDowell*, 1 N.C. App. 361, 365, 161 S.E.2d 769, 771 (1968).

In order for a variance to warrant reversal, the variance must be material. *McDowell*, 1 N.C. App. at 365, 161 S.E.2d at 771 ("[i]t is the settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense"). A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged. *See* 41 Am. Jur. 2d *Indictments and Informations* § 259. For example, in *State v. Miller*, 271 N.C. 646, 157 S.E.2d 335 (1967), our Supreme Court held that the variance between the indictment, which alleged that stolen rings were the property of "Friedman's Jewelry, a corporation," and the evidence, which showed that the rings were the property of "Friedman's Jewelry, Incorporated," was not fatal as to the charge of felonious larceny. Also by way of example, in *State v. Davis*, 253 N.C. 224, 116 S.E.2d 381 (1960), our Supreme Court held that the variance between the indictment, which alleged that property was stolen from "T. A. Turner Co., a corporation," and the evidence, which showed that the property was stolen from "T. A. Turner & Co., Inc.," was not fatal.

Here, the indictment alleges that defendant "unlawfully, willfully and feloniously did break and enter a building occupied by Quail Run Homes, Ross Dotson Agent used s [sic] a retail mobile park located at 4207 N. Patterson Ave. Winston-Salem, NC with the intent to commit a larceny therein." Defendant contends there was a fatal variance

because, although the evidence otherwise comported with these allegations, the evidence failed to show that any individual named "Ross Dotson" had any connection to Quail Run Homes or the trailer in question. We hold that this variance is immaterial and, therefore, not fatal.

As noted above, an indictment charging a violation of N.C. Gen. Stat. § 14-54(a) need only "identify the building with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense." *Carroll,* 10 N.C. App. at 145, 178 S.E.2d at 12. Also as noted above, an indictment for violation of N.C. Gen. Stat. § 14-54 should "identify the subject premises by street address, highway address, or other clear designation." *Melton*, 7 N.C. App. at 724, 173 S.E.2d at 613.

The indictment in this case is sufficient in that it alleges that the building is occupied by Quail Run Homes, and that it is located at 4207 North Patterson Avenue in Winston-Salem, North Carolina. As to these material allegations, the evidence conformed to the indictment. Although the indictment also alleges that Ross Dotson is an agent for Quail Run Homes, we believe this allegation is "surplusage" and immaterial. *See State v. McNeil*, 28 N.C. App. 125, 127, 220 S.E.2d 401, 402 (1975), *appeal dismissed and disc. review denied*, 289 N.C. 454, 223 S.E.2d 163 (1976). The fact that the evidence failed to show that Ross Dotson was the agent for Quail Run Homes did not prevent defendant from preparing his defense, or leave defendant vulnerable to another prosecution for the same incident. *See McDowell*, 1 N.C. App. at 365, 161 S.E.2d at 771; *see also State v. Vawter*, 33 N.C. App. 131, 134, 234 S.E.2d 438, 441 (no fatal variance where indictment alleged defendant " 'did feloniously break and enter a building occupied by E. L. Kiser [sic] and Company, Inc., a corporation d/b/a Shop Rite Food Store used as retail grocery located at Old U. S. Highway #52, Rural Hall, North Carolina, . . .' " and evidence showed that Kiger family, rather than corporation, owned and operated the Shop Rite Food Store located on Old U.S. 52 at Rural Hall), *disc. review denied*, 293 N.C. 257, 237 S.E.2d 539 (1977). Thus, we hold that the variance between the indictment and the evidence was immaterial and not fatal as to the charge of felonious breaking and entering.

II.

[5] Defendant also assigns error to the trial court's admission of certain evidence. At trial, the State asked Sue Fiala, the general manager

of Quail Run Homes, whether the kind of lamps allegedly stolen by defendant had ever been stolen from Quail Run Homes in the past. Defendant objected and the trial court overruled the objection. Ms. Fiala responded that such lamps had been stolen on more than a dozen occasions in the ten years that she had worked at Quail Run Homes. On appeal, defendant contends that this testimony was irrelevant and prejudicial, and that the admission of this testimony constitutes reversible error. We disagree.

Prior to Ms. Fiala taking the stand, defendant asked Officer Snow on cross-examination whether the type of lamps stolen by defendant would be difficult to "pawn," and whether the lamps would have any significant value if one attempted to sell such lamps. Clearly the purpose of asking such questions was to suggest to the jury that defendant did not intend to steal the lamps in question because he would not have intended to steal property that is not valuable and would be difficult to pawn. We hold that by questioning Officer Snow as to whether the lamps were valuable or easy to pawn, defendant "opened the door" for the State to ask Ms. Fiala similar or related questions.

> "The law 'wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself.' " "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially."

State v. McNeil, 350 N.C. 657, 682, 518 S.E.2d 486, 501 (1999) (citations omitted), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). Thus, we hold that the trial court's admission of Ms. Fiala's testimony during the State's direct examination was not error because defendant had "opened the door" to the subject of the value of the lamps during the cross-examination of Officer Snow, and the State was entitled to offer evidence to explain or rebut Officer Snow's testimony.

[6] For the reasons stated herein, we vacate the judgment against defendant on the charge of felonious larceny, but otherwise hold there was no error in the trial court's judgment. Since all five of the convictions were consolidated for judgment and sentencing, and since it is possible that defendant's conviction on the felonious larceny charge influenced the trial court's judgment on the length of

the sentence imposed, we remand for resentencing. *See State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 70 (1999); *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987).

Vacated in part, no error in part, and remanded.

Judges WALKER and BRYANT concur.

MARIE DEROSIER, EMPLOYEE, PLAINTIFF v. WNA, INCORPORATED/IMPERIAL FIRE HOSE COMPANY, EMPLOYER; AND THE TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA01-72

(Filed 2 April 2002)

Workers' Compensation— calculation of disability—overtime available in new job

A workers' compensation disability award was remanded where plaintiff had worked after the accident in a position with defendant which did not provide as much overtime and the Commission found that plaintiff had sustained a decrease in her earning capacity. Plaintiff's pre-injury earnings should not be compared with her post-injury earnings in another job because the circumstances of the pre-injury job had changed in that the plant had suffered a downturn which resulted in a plant-wide reduction in overtime. The proper comparison should be between the amount of overtime available to the person currently in plaintiff's former postion and the overtime available to plaintiff in her new position.

Judge GREENE dissenting.

Appeal by defendants from opinion and award entered 7 September 2000 by Commissioner Christopher Scott of the North Carolina Industrial Commission. Heard in the Court of Appeals 4 December 2001.

Devore, Acton & Stafford, P.A., by William D. Acton, Jr., for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Paul C. Lawrence and Terry L. Wallace, for defendant appellants.

McCULLOUGH, Judge.

Defendants WNA, Inc./Imperial Fire Hose, the employer, and Travelers Insurance Company, the carrier, appeal from an opinion and award by the North Carolina Industrial Commission awarding plaintiff Marie Derosier permanent partial disability benefits pursuant to N.C. Gen. Stat. § 97-30 (1999).

On 3 October 1996 plaintiff slipped and fell down a flight of steps while at work. The steps beneath her gave way, and plaintiff suffered a leg laceration and back strain due to the accident. Defendant WNA, Inc./Imperial Fire Hose filed a Form 60 with the Industrial Commission on 25 October 1996, admitting plaintiff's right to compensation and paid plaintiff temporary total disability benefits.

Plaintiff, prior to her accident, was assigned to what is called a "floater" position in the weave department at work at the time of the accident. A floater performs many different tasks as needed around the department. Plaintiff earned $10.50 per hour and $15.75 per overtime hour as a floater. She averaged 17.93 hours of overtime per week.

Plaintiff reached maximum medical improvement on 6 March 1998. Plaintiff had been given a lifting restriction of 25 pounds and limited bending, stooping and squatting. Her doctor gave her a 2% permanent partial disability rating. These permanent restrictions prevented plaintiff from performing the duties of a floater.

Plaintiff did not return to work until 8 March 1997. She worked part-time from then through 28 September 1997, during which time she received temporary partial disability benefits from defendants. When she returned, plaintiff was assigned to the Quality Control Department as a lab technician because she could no longer perform the job of floater due to her restrictions. However, plaintiff earned the exact same wages as a lab technician as she did when she was a floater. Plaintiff's wages were also the exact same as the present floater, Sheila DeMarco.

Sheila DeMarco replaced plaintiff as floater. As said above, Ms. DeMarco's hourly wage and plaintiff's hourly wage were identical when plaintiff returned to work. Evidence in the record showed that Ms. DeMarco worked 436.5 hours of overtime during the period between January 1998 through September 1999. During the same period, plaintiff worked 257.5 hours of overtime as a lab technician. This averages out to 13.23 hours per week. Not only is this average significantly less than what plaintiff averaged as a floater before she was injured, 17.93 hours per week, but is also less than the present floater. The record shows that the floater position worked 179 more overtime hours than did the position of lab technician during the same time period.

The Industrial Commission found as a fact that plaintiff's job in the Quality Control Department "afforded her fewer opportunities to work overtime." Consequently, plaintiff's earning capacity decreased. Finding of Fact #8 reads:

> 8. The evidence of record establishes that plaintiff's decrease in earnings following her injury by accident was due to her having to work in defendant-employer's Quality Control Department as the result of her restrictions, which afforded her fewer opportunities to work overtime and thus decreased her earning capacity.

The Commission made the conclusion of law that "[p]laintiff sustained a decrease in earning capacity due to her admittedly compensable injury by accident." The award read, in pertinent part, as follows:

> 1. Subject to attorney's fees hereinafter provided, defendants shall pay to plaintiff weekly compensation pursuant to G.S. § 97-30 in an amount equal to sixty-six and two-thirds percent of the *difference between her average weekly wages at the time of her injury and the average weekly wages which she has been and is able to earn thereafter* until 300 weeks from the date of the injury.

(Emphasis added.) Defendant appeals from this opinion and award.

Defendant makes several assignments of error as to the opinion and award, but the sole question presented is whether the Industrial Commission erred in awarding plaintiff benefits pursuant to N.C. Gen. Stat. § 97-30.

Standard of Review

The standard for appellate review of an opinion and award of the Industrial Commission is well settled. Review "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); *see also Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000); *Shah v. Howard Johnson*, 140 N.C. App. 58, 61, 535 S.E.2d 577, 580 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

In addition, "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.' " *Id.* at 61-62, 535 S.E.2d at 580 (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)). The *Calloway* Court went further stating that "our task on appeal is not to weigh the respective evidence but to assess the *competency* of the evidence in support of the Full Commission's conclusions." *Calloway*, 137 N.C. App. at 486, 528 S.E.2d at 401.

I.

Defendants contend that the Industrial Commission erred by awarding plaintiff benefits pursuant to N.C. Gen. Stat. § 97-30 in that there is no competent evidence in the record to support its findings of fact and conclusions of law that plaintiff sustained a decrease in earning capacity due to her injury.

> The term "disability" means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9). "To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury." If the Commission makes these findings, and they are supported by competent evidence, they are conclusive on appeal even though there is evidence to support a contrary finding. A claimant who is able to work and earn some

> wages, but less than the wages earned at the time of injury, is partially disabled. Disability is a legal conclusion and will be binding on the reviewing court if supported by proper findings.

Harris v. North American Products, 125 N.C. App. 349, 354, 481 S.E.2d 321, 324 (1997). The burden is on the employee to prove his incapacity to earn, as a result of the compensable injury, the same wages he was earning at the time of the injury. *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 575, 139 S.E.2d 857, 861 (1965).

Defendant correctly points out that "although the Plaintiff's post-injury earnings were less than her pre-injury earnings, the focus should be on the issue of whether Plaintiff's earning capacity or power has been diminished." Our Supreme Court has held that "[c]ompensation must be based upon loss of wage earning power rather than the amount actually received. It was intended by the statute to provide compensation only for loss of earning capacity." *Hill v. DuBose*, 234 N.C. 446, 447-48, 67 S.E.2d 371, 372 (1951).

In support of its contention that the Industrial Commission erred, defendants contend that its economic downturn evidence negates the pre-injury wage and post-injury wage comparison as being the proper way to determine earning capacity in this case. "It is uniformly held that while an injured employee's post-injury wages may create a presumption of post-injury earning capacity, the presumption may be rebutted by either party upon a showing that such wages are an unreliable basis for determining the employee's actual earning capacity. North Carolina follows this rule." *Harris*, 125 N.C. App. at 355, 481 S.E.2d at 325 (citation omitted).

The *Harris* case dealt with an employee who became sick on the job due to conditions on the site. Once he left that job and found other work, his hourly wage went down but his income went up because of the hours he was working. Rather than holding that the employee suffered no loss of earning capacity, this Court concluded that the evidence showed that the plaintiff-employee's actual post-injury earnings were not a reliable indicator of his post-injury earning capacity. The Court said:

> [T]he presumption [of post-injury earning capacity] may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity. Unreliability of post-injury earnings may be due to a number of things[:] increase in general wage levels

since the time of the accident; claimant's own greater maturity or training; *longer hours worked by claimant after the accident*; payment of wages disproportionate to capacity out of sympathy to claimant; and the temporary and unpredictable character of post-injury earnings."

Harris, 125 N.C. App. at 356, 481 S.E.2d at 325 (quoting *Sjoberg's Case*, 394 Mass. 458, 462, 476 N.E.2d 196, 198-99 (1985) (citations omitted)).

In the present case, defendant contends that "plaintiff's inflated pre-injury wages due to overtime hours worked during a period of economic stability and the subsequent downturn by the plant which resulted in a plant-wide reduction of overtime hours available explains the disparity in plaintiff's pre-injury wages and her post-injury wages." In other words, plaintiff's decrease in wages was not caused by her injury by accident, but due to the period of decline in the fire hose industry that coincided with her injury. According to defendants, the employee now filling the floater position has less overtime opportunities than were available in the previous years.

We agree with defendants that plaintiff's pre-injury earnings as floater should not be compared with plaintiff's post-injury earnings as a lab technician to determine her loss in earning capacity in this case. The Industrial Commission was wrong to compare pre-injury and post-injury earnings as to earning capacity in this case, because as defendants contend, circumstances surrounding the pre-injury position have changed. Even if she was still the floater, presumably she would not work the hours as she did before.

However, this conclusion does not necessarily mandate that plaintiff suffered no loss in earning capacity. It would seem that plaintiff would be harmed, if at all, in the following way: If she had not suffered the injury, she could still be working as a floater. That job apparently has a certain amount of overtime hours available to work. Since she was injured, she is now working as a lab technician that also has a certain amount of overtime hours available to the employee. If there is a difference between the hours of overtime available between present floater and present lab technician, then she has lost the capacity to earn those overtime hours. Thus, the proper comparison should be between the amount of overtime *available*, not *worked*, to the present floater and the plaintiff in her present job as lab technician.

The record does not allow such a comparison. The closest the record comes to making this comparison is with defendant's exhibits one and two. These exhibits are salary histories of Ms. Derosier and Sheila DeMarco during a specified period of time. They show the hours worked, regular and overtime, by each respective employee. The columns are clearly marked, and nowhere do they make reference to overtime hours available.

Testimony about these exhibits seems to confuse what they plainly represent. For instance, Sherrie Hutchinson, the personnel manager at Imperial Fire Hose, testified that the exhibits represented "1998 and 1999's year-to-date earnings, which include hours and overtime hours worked." When asked about the exhibit dealing with the present floater, Ms. DeMarco, Ms. Hutchinson testified that it represented "the hours available for a floater to work from that period of time 1998 through the end of August 1999." Finally, later on in Ms. Hutchinson's testimony, the following exchange in regard to the same two exhibits took place:

> Q. These would be, in essence, a comparison of the overtime hours, if we follow the two columns for both of these people, we can compare the overtime hours Ms. Derosier worked with the overtime hours Ms. Demarco worked; is that right?
>
> A. [Hutchinson]: Correct.

At the very least, it is confusing as to what exactly the records represent.

We do note that there is evidence in the record that Ms. Derosier has been allowed fewer overtime opportunities as a lab technician than as a floater:

> Q. . . . And in the lab technician, have you been allowed to work as much overtime work as you had been offered before when you were a floater?
>
> A. No, sir.

There is also evidence that, due to her injury, Ms. Derosier did not work every overtime hour available to her, even though her doctor never said she could not work the overtime. As said above, we hold that based on the facts of this case the proper comparison to arrive at Ms. Derosier's earning capacity is between the hours of overtime available to the present floater and the overtime available to plaintiff

in her present job as lab technician. The record does not provide such a comparison. Therefore we reverse the decision and remand for further findings consistent with this opinion.

Reversed and remanded.

Judge CAMPBELL concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

In remanding this case to the Full Commission, the majority accepts defendants' position that plaintiff's post-injury overtime hours decreased due to an economic downturn experienced by the company. The majority therefore orders the Full Commission to compare the number of overtime hours available to the present floater, Ms. DeMarco, and those available to plaintiff in her post-injury job as a lab technician in order to determine whether plaintiff suffered a loss in earning capacity. Because I believe this analysis to be an issue that is only reached upon a finding by the Full Commission that defendants have met their burden under *Harris v. North Am. Prods.*, 125 N.C. App. 349, 481 S.E.2d 321 (1997), a finding the Full Commission did not make, I dissent.[1]

In *Harris*, this Court held that while an injured employee's post-injury wages create "a presumption of post-injury earning capacity, the presumption may be rebutted by either party upon a showing that such wages are an unreliable basis for determining the employee's actual earning capacity." *Id.* at 355, 481 S.E.2d at 325. In this case, defendants offered evidence that an economic downturn, resulting in an overall decrease in overtime, caused plaintiff's post-injury earnings to be reduced. The deputy commissioner found "competent evidence in the record . . . that [plaintiff's] decrease in earnings following her admittedly compensable injury by accident was due to her having to work in the defendant-employer's Quality Control Department which afforded her fewer opportunities to work overtime and thus decreased her earning capacity." On appeal to the Full Commission, Defendants assigned as error that this finding was "not supported by the competent evidence of [r]ecord in that the

1. Only if the Full Commission had found defendants to have met their burden of showing plaintiff's post-injury wages to be unreliable under *Harris* would the Full Commission have to compare available overtime as outlined in the majority opinion.

[d]eputy [c]ommissioner failed to take into account the economic downturn faced by the [d]efendant[-employer] and the effect of the economic downturn on [plaintiff's] ability to work overtime." The Full Commission, however, implicitly rejected defendants' argument by adopting the deputy commissioner's finding almost verbatim. As plaintiff has met her burden of proving a decrease in her earning capacity and defendants have failed to meet their burden of showing plaintiff's evidence to be unreliable, *see id.*, I would affirm the Full Commission's opinion and award.

NORTH CAROLINA DEPARTMENT OF CORRECTION, PETITIONER-APPELLANT v. MICHAEL McKIMMEY, RESPONDENT-APPELLEE

No. COA00-1528

(Filed 2 April 2002)

Public Officers and Employees— termination—probation/parole officer—grossly inefficient job performance

The trial court did not err by upholding the State Personnel Commission's recommended decision reinstating respondent probation/parole officer with back pay and attorney fees after he was terminated for alleged grossly inefficient job performance when he failed to turn in the necessary paperwork (DAPP-1B) for a parolee's parole violation charges and the parolee thereafter shot and killed a Maryland State Trooper, because: (1) respondent's failure to submit the DAPP-1Bs for a parolee's three misdemeanor assault charges was not a grossly inefficient job performance justifying his termination; (2) there existed insufficient evidence that respondent's failure to submit the DAPP-1Bs resulted in the creation of the potential for death or serious bodily injury as required by N.C. Admin. Code tit. 25, r. 1J.0606; and (3) although the trial judge in a separate letter of memorandum discussed the use of a proximate causation analysis in its interpretation of N.C. Admin. Code tit. 25, r. 1J.0606, he did not rely on such an analysis in his final order.

Appeal by petitioner from order entered 15 September 2000 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 8 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen for petitioner-appellant.

D. Keith Teague, P.A., by D. Keith Teague and Danny Glover, Jr., for respondent-appellee.

BRYANT, Judge.

On 20 November 1995, petitioner North Carolina Department of Correction (NCDOC) dismissed respondent probation/parole officer Michael McKimmey pursuant to N.C. Admin. Code tit. 25, r. 1J.0606 for grossly inefficient job performance. After an internal appeal within NCDOC, respondent's dismissal was upheld by the Secretary of the Department of Correction. On 6 March 1996, respondent filed a petition for a contested hearing with the Office of Administrative Hearings. On 18 December 1997, Administrative Law Judge Robert Roosevelt Reilly, Jr. issued a recommended decision that respondent be reinstated with back pay and attorney fees. On 23 July 1998, the State Personnel Commission adopted Judge Reilly's recommended decision and petitioner filed a petition for judicial review.

This matter was heard before the Honorable Henry V. Barnette, Jr., Superior Court Judge presiding at the 20 March 2000 session of Wake County Superior Court. By order filed 15 September 2000, the decision of the State Personnel Commission was affirmed. Petitioner appealed.

The underlying facts of this case are not in dispute. Respondent began service as a probation/parole officer in January 1994. Respondent assumed supervision of parolee Donovan Ault (a.k.a. Ivan Lovell) beginning 17 June 1994. On 24 August 1995, Ault was arrested and charged with misdemeanor assault with a deadly weapon for stabbing a man several times in the chest, shoulder and arm with a screwdriver. Respondent was aware of this arrest, but did not submit an offense report form (DAPP-1B) to the Parole Commission.

Ault was arrested again on 6 September 1995 and charged with two counts of misdemeanor assault with a deadly weapon for incidents involving his ex-girlfriend. Respondent learned of this arrest on 7 September 1995, however, he did not file a DAPP-1B for the two 6 September 1995 charges. Sometime between 14-17 October 1995, Ault absconded from North Carolina and traveled to Maryland, where he shot and killed a Maryland State Trooper. On 20 November 1995, peti-

tioner mailed to respondent a letter of dismissal for grossly inefficient job performance pursuant to N.C. Admin. Code tit. 25, r. 1J.0606. The dismissal letter read in pertinent part:

> On September 7, 1995 according to your own narrative entry, the parolee reported to you that his ex-girlfriend had him arrested for multiple charges. According to policy you failed to submit a DAPP-1B, "Offense Report" to the North Carolina Post Release Supervision and Parole Commission for each pending assault charge (AWDW 95 CR 4518 and 4519) within thirty (30) calender days; the deadline for which would have been October 6, 1995. Additionally, after receiving information from the parolee and your brother, you not only failed to verify the reported pending charges, you also failed to determine if there were any other pending charges by utilizing all available resources . . . .
>
> Moreover, your failure to throughly investigate these charges or other possible criminal acts through all available resources, prevented you from discovering a third charge of Assault with a Deadly Weapon (95 CR 4517) . . . . Additionally, your failure to follow the High Risk Supervision Level minimum requirement to conduct a collateral contact every thirty (30) days to determine possible criminal acts prevented you from discovering the Assault with the Deadly Weapon charge (95 CR 4517) . . . .
>
> Consequently, the required DAPP-1B "Offense Report" was not provided by you to the North Carolina Post Release Supervision and Parole Commission pursuant to policy and procedures. Your failure to follow DAPP standard policy and procedures precluded the implementation of the departmental system which is designed to manage parolees who exhibit assaultive behavior. The end result is that a Maryland State Trooper may have died needlessly. Your failure to act in this case is considered to be gross inefficiency in the performance of duties in that your failure to act created the potential for death or serious bodily injury to the public.

At the time the dismissal letter was sent to respondent, petitioner did not know that respondent was in fact previously aware of the 24 August 1995 arrest (95 CR 4517), but failed to submit a DAPP-1B concerning that arrest.

Petitioner argues on appeal that: 1) the trial court erred in its interpretation of N.C. Admin. Code tit. 25, r. 1J.0606, and 2) the trial

court's conclusion is unsupported by substantial evidence in the record. We disagree.

In reviewing the trial court's order, this Court must first determine whether the trial court applied the appropriate standard of review. *See Act-up Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). If the appropriate standard was applied, we then determine if the trial court properly applied this standard to the issues presented. *See id.*

If a party presents to the trial court a question concerning statutory interpretation or errors in conclusions of law, *de novo* is the appropriate standard of review. *See Associated Mechanical Contractors, Inc. v. Payne*, 342 N.C. 825, 831, 467 S.E.2d 398, 401 (1996). If a party argues to the trial court that the underlying decision is unsupported by substantial evidence in the record, the whole record test is the appropriate standard of review. *See Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). The "[superior] court *may even utilize more than one standard of review* if the nature of the issues raised so requires." *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (emphasis in original).

We first note the trial court applied the appropriate standards of review, in that it applied the *de novo* standard to petitioner's question of statutory interpretation and the whole record test to petitioner's arguments concerning the lack of substantial evidence supporting the underlying decision. We now must determine whether the trial court properly applied these standards.

Respondent was a career state employee who could only be terminated for just cause. Just cause would exist if respondent engaged in acts justifying dismissal pursuant to N.C. Admin. Code tit. 25, r. 1J.0606. N.C. Admin. Code tit. 25, r. 1J.0606 (October 1995) in pertinent part provides:

> (a) Dismissal on the basis of grossly inefficient job performance is administered in the same manner as for unacceptable personal conduct. Employees may be dismissed on the basis of a current incident of grossly inefficient job performance without any prior disciplinary action.

N.C. Admin. Code tit. 25, r. 1J.0614 (October 1995) defines grossly inefficient job performance in pertinent part:

(f) Gross Inefficiency (Grossly Inefficient Job Performance)—A type of unsatisfactory job performance that occurs in instances in which the employee: fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency; and, that failure results in:

(1) the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) over whom the employee has responsibility . . . .

The trial court affirmed the decision of the State Personnel Commission and determined that respondent's failure to submit DAPP-1Bs for Ault's three misdemeanor assault charges was not a grossly inefficient job performance justifying his termination.

Petitioner argues that the trial court erred when it concluded respondent's failure to submit DAPP-1Bs had to be causally linked to the resulting death of the Maryland State Trooper for respondent to have engaged in grossly inefficient job performance. Specifically, petitioner contends that for respondent's failure to submit DAPP-1B's to be considered a grossly inefficient job performance, these failures must result only *in the creation of the potential for death or serious bodily injury*—and not result in actual death or serious bodily injury. Due to the fact that respondent failed to submit the DAPP-1Bs, petitioner argues that respondent's failure resulted in the creation of the potential for death or serious bodily injury. We disagree.

Based on this Court's reading of N.C. Admin. Code tit. 25, r. 1J.0606, it is uncontroverted that the regulation only requires the creation of the potential for death or serious bodily injury and does not require that actual death or serious bodily injury result. The trial court interpreted N.C. Admin. Code tit. 25, r. 1J.0606 only to require the creation of the potential for death or serious bodily injury. Therefore, we hold that the trial court did not err in its interpretation of law.

Regarding the procedure for submitting a DAPP-1B, the State Personnel Commission adopted the administrative law judge's findings which read in pertinent part:

26. A DAPP-1B is a report which a P/PO uses to advise the Parole Commission that a parolee under his supervision has com-

mitted a criminal offense in contravention of the parolee's parole agreement.

27. DAPP's policy concerning the filing of a DAPP-1B was set forth in the dismissal letter:

> Upon receipt of information that a parolee is suspected of violating his parole, the officer must initiate a complete and accurate investigation to determine whether there is validity in the charge . . . . If the parolee has been arrested and charged with an offense it is the duty of the officer to ascertain all of the facts about the violation from the police or other persons, and to interview the parolee for his version . . . . The officer's chief role, however, is to investigate and report violations of parole to the Parole Commission which has the final decision making authority in revocation matters . . . . The DAPP-1B "Offense Report" is to be submitted each time a parolee is charged with the following: all assaultive and sex related offenses, all felony offenses, and all alcohol and drug related driving offenses. A subsequent DAPP-1B must also be submitted on these cases when the disposition of the charge is determined.

28. It is DAPP's policy that the P/PO submit a DAPP-1B within 30 calender days after it is learned that a parolee under supervision has been charged with an assaultive criminal violation.

29. JDM Roy Daniels told the [respondent] that he did not have to submit a DAPP-1B on all misdemeanor charges because, if he did, he would never get all of his field work done.

30. To submit a DAPP-1B, the P/PO mails the DAPP-1B to the DAPP Supervision Office in Raleigh. Upon its receipt of such, the DAPP Supervision Office then mails the DAPP-1B to the Parole Commission Office.

31. After submitting a DAPP-1B, a P/PO does nothing further with respect to the underlying criminal charge until a court disposition of the criminal charge is made or unless he receives further instructions from the Parole Commission, whichever occurs first.

32. If after receiving a DAPP-1B the Parole Commission wishes to issue a parole warrant, it mails the DAPP Supervision Office a request for a PC-14.

33. A PC-14 is a report which a P/PO uses to advise the Parole Commission that a parolee under his supervision has violated his parole and upon which the P/PO makes a recommendation that the Parole Commission issue a parole warrant.

34. I/O Brickhouse, who had over six years experience as a P/PO, has never received a parole warrant after only filing a DAPP-1B.

35. Ray Griggs, a P/PO from Currituck County who had over eleven years experience as a P/PO, has never received a parole warrant after only filing a DAPP-1B.

36. Charles Mann, Sr., a member of the Parole Commission who had reviewed over 50,000 parole cases, testified that the Parole Commission does not issue a warrant based solely on the filing of a DAPP-1B.

37. The Parole Commission has discretion as to whether to request a PC-14 from the P/PO after receiving a DAPP-1B. Prior to the date of the [respondent's] dismissal, there was no statutory time limit in which the Parole Commission, after receiving a DAPP-1B, could request a PC-14.

38. Upon receipt of the request for a PC-14 from the Parole Commission, the DAPP Supervision Office mails the request for a PC-14 to the P/PO. The P/PO then completes the PC-14 and mails it to the DAPP Supervision Office. The DAPP Supervision Office mails the PC-14 to the Parole Commission.

39. Upon receipt of the PC-14, the Parole Commission has discretion to issue or not to issue a parole warrant. Prior to the date of the [respondent's] dismissal, there was no statutory time limit in which the Parole Commission, after receiving a PC-14, could issue a parole warrant.

40. In all of the cases in which the [respondent] had filed a DAPP-1B as a result of misdemeanor charges, the Parole Commission had never requested additional information or issued a warrant. The Commission had only instructed him to continue supervision of the case pending the outcome of the case in Court.

The trial court determined that these findings were sufficient to support the State Personnel Commission's conclusion that respondent's actions were not sufficient to justify dismissal based on

grossly inefficient conduct pursuant to N.C. Admin. Code tit. 25, r. 1J.0606.

For this Court to accept petitioner's argument that respondent's failure to file the necessary DAPP-1Bs created the potential for death or serious bodily injury, it must also logically follow that if respondent had submitted the DAPP-1Bs, the Parole Commission would have acted in some manner that would have stayed the creation of the potential for death or serious bodily injury.

In reviewing the evidence, however, it appears that the Parole Commission was not under any statutory obligation to process DAPP-1Bs in a specific time frame. The Parole Commission rarely, if ever, issued an arrest warrant based on the receipt of a DAPP-1B. Instead, the Parole Commission usually instructed the probation/parole officer to continue supervision pending disposition of the new charges. As previously stated in Findings of Fact No. 40 adopted by the State Personnel Commission, "[I]n all the cases in which [respondent] had filed a DAPP-1B as a result of misdemeanor charges the Parole Commission had never requested additional information or issued a warrant."

The evidence of record does not show that the submission of the DAPP-1Bs would have triggered a series of events that would have resulted in the revocation of Ault's parole, thus removing the potential for him to engage in malfeasance. Therefore, we find that there existed insufficient evidence that respondent's failure to submit the DAPP-1Bs resulted in the creation of the potential for death or serious bodily injury.

Petitioner also argues that the trial court erred in applying a proximate causation analysis in its interpretation of N.C. Admin. Code tit. 25, r. 1J.0606. We note that even though the trial court judge in a separate letter of memorandum discussed the use of a proximate causation analysis, he did not rely on such an analysis in his final order. Therefore, this assignment of error is overruled and the order of the trial court is affirmed.

AFFIRMED.

Judges McGEE and HUNTER concur.

SAMANTHA C. MOSES, ADMINISTRATRIX OF THE ESTATE OF CHARLES WAYNE MOSES, PLAINTIFF v. RODNEY EDWARD YOUNG, INDIVIDUALLY AND IN HIS CAPACITY AS LAW ENFORCEMENT OFFICER FOR THE TOWN OF CRAMERTON, NORTH CAROLINA; THE TOWN OF CRAMERTON, NORTH CAROLINA, BY AND THROUGH ACTING CITY MANAGER, DAVID YOUNG, DEFENDANTS

No. COA01-140

(Filed 2 April 2002)

1. Appeal and Error— appealability—partial summary judgment—public duty doctrine—substantial right

Although an appeal from partial summary judgment is typically an appeal from an interlocutory order, appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review, and defendants in this case have asserted governmental immunity from liability based on the public duty doctrine.

2. Cities and Towns; Police Officers— wrongful death suit—public duty doctrine

The trial court did not err by granting partial summary judgment to plaintiff based on its conclusion that the public duty doctrine did not shield defendant police officer and defendant town from a wrongful death suit brought by plaintiff based on an incident where the officer's vehicle collided with decedent's motorcycle while the officer was pursuing arrest of a lawbreaker, because: (1) the public duty doctrine has operated to shield a defendant from acts where defendant's actions proximately or indirectly result in injury rather than for a defendant whose acts directly cause injury or death; (2) this claim originated from allegations that the officer's collision with decedent's motorcycle directly caused decedent's death, rather than defendant's failure to furnish police protection or failure to prevent a criminal act or any other act of negligence proximately resulting in injury; (3) there are no cases in North Carolina applying the public duty doctrine to claims brought against police officers involving vehicular accidents in which the police officer is directly involved; and (4) although the officer's actions were accidental in nature and do not implicate an allocation of resources by the town, the town has purchased liability insurance for just such an incident.

Appeal by defendants from partial summary judgment entered 18 October 2000 and amended partial summary judgment entered 1 November 2000 by Judge Marcus L. Johnson in Gaston County Superior Court. Heard in the Court of Appeals 28 November 2001.

Templeton & Raynor, P.A., by Kenneth R. Raynor, and Harkey, Lambeth, Nystrom, Fiorella & Morrison, L.L.P., by Averill C. Harkey, for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Paul C. Lawrence, and Parker, Poe, Adams & Bernstein, L.L.P., by William L. Brown, for defendant appellants.

TIMMONS-GOODSON, Judge.

Cramerton Police Officer Rodney Edward Young ("Officer Young") and the Town of Cramerton ("Cramerton") (collectively, "defendants") appeal from the trial court's grant of partial summary judgment concluding that the public duty doctrine does not shield defendants from a wrongful death suit brought by Samantha Moses ("plaintiff") as administratrix of her deceased husband's estate. In her complaint, plaintiff alleged that the Town of Cramerton, through its police officer, Officer Young, had caused the death of her husband, Charles Wayne Moses ("Moses"), when Officer Young's vehicle collided with a motorcycle driven by Moses. The accident occurred when Moses attempted to pass Officer Young's vehicle in a no-passing zone. As Moses drove his motorcycle in the left-hand lane, Officer Young also entered the left-hand lane in order to pursue a second motorcyclist who had passed him in the no-passing zone at a high rate of speed. The two vehicles collided, and Moses was thrown from his motorcycle, thereby sustaining serious injury. Moses died from his injuries shortly thereafter.

Plaintiff filed suit against defendants, asserting damages based on allegations of negligence, willful and wanton conduct, gross negligence, and constitutional violations by defendants. In their Answer to plaintiff's complaint, defendants asserted that the public duty doctrine barred recovery by plaintiff. Plaintiff thereafter filed a motion for partial summary judgment, which was heard by the trial court on 9 October 2000. Upon arguments by the parties, the trial court concluded that the public duty doctrine was inapplicable to the facts presented by the instant case and granted plaintiff's motion. On 1 November 2000, the trial court entered an amended

order re-affirming the grant of partial summary judgment and concluding that its decision affected a substantial right of defendants and that there was no just reason for delay in appeal.

Defendants now appeal from the trial court's granting of partial summary judgment.

The sole issue on appeal is whether defendants may assert the public duty doctrine as an affirmative defense to plaintiff's claims. For the reasons stated herein, we conclude that the public duty doctrine is inapplicable to the facts presented in the instant case, and we therefore affirm the trial court's grant of partial summary judgment to plaintiff.

[1] We note initially that this case is interlocutory, as it fails to "dispose[] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). While as a general rule this Court does not review interlocutory orders, we have consistently held that "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999). In this case, defendants have asserted governmental immunity from liability based upon the public duty doctrine. We may therefore review defendants' appeal. *See Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 402-03, 442 S.E.2d 75, 77 (holding that an interlocutory order based on the public duty doctrine implicates a substantial right), *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994).

[2] In *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), our Supreme Court for the first time adopted the common law public duty doctrine, stating:

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

Id. at 370-71, 410 S.E.2d at 901 (citation omitted). In *Braswell*, the plaintiff was the son and administrator of the estate of a woman

killed by her estranged husband. The plaintiff filed suit against the county sheriff, alleging that the sheriff had negligently failed to protect plaintiff's mother from foreseeable harm. The Supreme Court rejected plaintiff's arguments, concluding that the public duty doctrine shielded the sheriff from liability. The Court noted that the public duty doctrine is subject to two exceptions, namely:

> (1) where there is a special relationship between the injured party and the police . . . ; and (2) 'when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.'

Id. at 371, 410 S.E.2d at 902 (quoting *Coleman v. Cooper*, 89 N.C. App. 188, 194, 366 S.E.2d 2, 6, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988)). Concluding that neither exception applied to the plaintiff's case, the Court affirmed directed verdict in favor of the defendant.

The public duty doctrine applies to "law enforcement departments when they are exercising their general duty to protect the public." *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000). Defendants argue that Officer Young was exercising his general duty to protect the public at the time of the accident by pursuing arrest of a lawbreaker who was endangering the motoring public, and that therefore the public duty doctrine operates to bar plaintiff's claims. We do not agree.

The public duty doctrine is simply inapplicable to the facts presented by the instant case. An exhaustive review of the public duty doctrine as applied in North Carolina reveals no case in which the public duty doctrine has operated to shield a defendant from acts directly causing injury or death. Rather, the application of the public duty doctrine in this State has been confined to cases where the defendant's actions proximately or indirectly result in injury. *See, e.g.*, *Wood v. Guilford County*, 355 N.C. 161 558 S.E.2d 490 (2002) (holding that the public duty doctrine barred the plaintiff's claims against the county for failing to provide adequate security at the courthouse where the plaintiff was attacked by a third party); *Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 482-83, 495 S.E.2d 711, 717 (holding that the public duty doctrine barred the plaintiffs' negligence claims against the North Carolina Department of Labor for its failure to adequately inspect a chicken plant where workers subsequently

died in a fire), *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998); *Little v. Atkinson*, 136 N.C. App. 430, 433-34, 524 S.E.2d 378, 381 (holding that the public duty doctrine barred claims against city and its police officers who failed to adequately inspect a crime scene before allowing relatives of the victim to visit the site), *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000); *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 340-41, 511 S.E.2d 41, 45 (holding that the public duty doctrine barred claims against city and its police officers who failed to warn the public of broken power lines that caused decedent's death), *cert. denied*, 350 N.C. 851, 539 S.E.2d 13 (1999); *Simmons v. City of Hickory*, 126 N.C. App. 821, 823-25, 487 S.E.2d 583, 586 (1997) (holding that the public duty doctrine applied to bar claim against city for negligently inspecting homes and issuing building permits); *Humphries v. N.C. Dept. of Correction*, 124 N.C. App. 545, 547-48, 479 S.E.2d 27, 28 (1996) (holding that the doctrine barred claim against the Department of Correction for alleged negligence in the supervision of a probationer), *disc. review improvidently allowed*, 346 N.C. 269, 485 S.E.2d 293 (1997); *Tise v. Yates Construction Co.*, 122 N.C. App. 582, 588-89, 471 S.E.2d 102, 107 (1996) (holding that the public duty doctrine shielded city from liability for its failure to inform construction company of potential tampering of construction equipment by trespassers where decedent died after construction equipment crushed him); *Davis v. Messer*, 119 N.C. App. 44, 55-56, 457 S.E.2d 902, 909 (holding that the public duty doctrine applied to a claim against a fire chief, a fire department, a town, and a county for negligence in their failure to complete their effort to extinguish a fire in plaintiff's home), *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995); *Sinning v. Clark*, 119 N.C. App. 515, 518-20, 459 S.E.2d 71, 73-74 (holding that the public duty doctrine applied to bar a claim against a municipality, the city building inspector, and the city code administrator for gross negligence in an inspection of a home), *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995); *Clark*, 114 N.C. App. at 406, 442 S.E.2d at 78 (holding that the public duty doctrine protected municipality and police officers who negligently issued a taxicab permit to a driver who subsequently murdered a customer); *Prevette v. Forsyth County*, 110 N.C. App. 754, 758, 431 S.E.2d 216, 218 (holding that the public duty doctrine barred wrongful death claim against county and against director and employee of the county animal control shelter for failing to protect plaintiff from dogs which defendants knew were dangerous), *disc. review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993).

In the instant case, plaintiff has alleged injury directly resulting from Officer Young's actions. Thus, this case does not concern defendants' "failure to furnish police protection" or "failure to prevent [a] criminal act" or any other act of negligence proximately resulting in injury. *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901. Rather, the claim originates from allegations that Officer Young's collision with decedent's motorcycle directly caused decedent's death.

Vehicular accidents involving law enforcement officers are not new to this State. *See, e.g., Young v. Woodall*, 343 N.C. 459, 471 S.E.2d 357 (1996); *Goddard v. Williams*, 251 N.C. 128, 110 S.E.2d 820 (1959), overruled, 343 N.C. 459, 471 S.E.2d 357 (1996). In *Young*, the defendant police officer was involved in an accident with the plaintiff while pursuing a suspect. Our Supreme Court did not address or apply any type of governmental immunity to the police officer's actions, although both the amicus curiae and the defendant's briefs urged such application. Defendants have not furnished, nor have we discovered, any cases applying the public duty doctrine to claims brought against police officers involving vehicular accidents in which the police officer is directly involved. If we adopted the position advanced by defendants, the public duty doctrine would operate as a blanket defense to bar all claims based on acts of negligence by police officers. Such a blanket defense, however, would not be consistent with the purpose of the public duty doctrine, which is to " 'shield[] the state and its political subdivisions from tort liability arising out of discretionary governmental actions.' " *Stone*, 347 N.C. at 482, 495 S.E.2d at 716 (quoting *DeFusco v. Todesca Forte, Inc.*, 683 A.2d 363, 365 (R.I. 1996)). This is because

> "[t]he amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits."

Braswell, 330 N.C. at 371, 410 S.E.2d at 901 (quoting *Riss v. City of New York*, 22 N.Y.2d 579, 581-82, 240 N.E.2d 860, 860-61 (1968)).

Officer Young's act of steering his vehicle into an occupied lane is not the type of "discretionary governmental action" shielded by the

public duty doctrine. Clearly, Officer Young did not deliberately collide with decedent's vehicle after actively weighing the safety interests of the public. Rather, Officer Young's actions were accidental in nature and do not implicate an allocation of resources by the Town of Cramerton. As such, plaintiff's claim does not raise the specter of "overwhelming liability" for defendants or otherwise encourage future lawsuits; indeed, the city has purchased liability insurance for just such an incident.

Our review is strictly limited to whether the public duty doctrine applies to the facts presented by the instant case. We hold that it does not. The trial court therefore properly granted partial summary judgment to plaintiff on this issue.

Affirmed.

Judges HUDSON and TYSON concur.

JAMES R. SELLERS, PLAINTIFF v. GILBERT RODRIGUEZ; VINCENT DANIEL FRAZER; BILLY BYRANT, SHERIFF OF LEE COUNTY; AND THE CITY OF SANFORD, DEFENDANTS

No. COA01-339

(Filed 2 April 2002)

Cities and Towns; Counties— injury while in police custody— public duty doctrine—no intentional misconduct—no action on sheriff's bond

The trial court correctly denied plaintiff's Rule 60(b) motion to set aside summary judgment for defendants in an action arising from injuries suffered in custody of a county deputy sheriff and a city police officer where plaintiff did not sufficiently allege a claim under the special relationship exception to the public duty doctrine, made no allegation that either of the officers intentionally engaged in misconduct or misbehavior in the performance of their duties, and does not mention N.C.G.S. § 58-76-5 (waiver of immunity through purchase of a bond) as the basis for the cause of action against the sheriff.

Appeal by plaintiff from order entered 8 January 2001 by Judge Wiley F. Bowen in Superior Court, Lee County. Heard in the Court of Appeals 30 January 2002.

Van Camp, Meacham & Newman, PLLC, by Thomas M. Van Camp, for the plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Tyrus V. Dahl, Jr. and Andrew C. Buckner, for the defendants-appellees.

WYNN, Judge.

Plaintiff James R. Sellers appeals from the trial court's 8 January 2001 order denying his Rule 60(b) motion to set aside judgment. We affirm.

The facts of this case arise from Mr. Sellers' complaint of January 1996 alleging that while in police custody he suffered injury as a result of the negligent acts of Lee County Deputy Sheriff Gilbert Rodriguez and Sanford Police Officer Vincent Frazer. Mr. Sellers alleged that at the time of the incident giving rise to his injuries, Deputy Rodriguez acted within his capacity as an agent and employee of the Lee County Sheriff's office; and Officer Frazer acted within his capacity as an agent of the City of Sanford. Mr. Sellers further alleged that Lee County, including Sheriff Billy Bryant; and the City of Sanford, including the Sanford Police Department; were vicariously liable for the actions of Deputy Rodriguez and Officer Frazer, as Lee County and the City of Sanford had acquired liability insurance for the negligence of their agents and employees, thereby waiving any applicable defense of governmental immunity for such negligence to the extent of such insurance.

Gerald M. Shaw of Sanford acted as Mr. Sellers' attorney. This matter was calendared for trial the week of 29 November 1999; on 9 November 1999, defendants noticed a motion for summary judgment and served supporting affidavits on Mr. Shaw. Subsequently, Mr. Shaw's secretary notified defendants and the trial court that Mr. Shaw had suffered a heart attack and might require imminent surgery. Defendants therefore consented to postpone the trial and hearing on the motion for summary judgment.

Mr. Shaw underwent by-pass surgery in December 1999, and on 28 January 2000 his secretary again informed defendants and the trial court of Mr. Shaw's health status and requested a continuance of all his matters on the trial calendar. In February 2000, defendants

filed a calendar request for a hearing on their summary judgment motion and for a trial on the merits for the week of 29 May 2000.

The summary judgment motion was calendared for hearing on 10 April 2000, and notice of this hearing was duly mailed to Mr. Shaw. Mr. Shaw's office purportedly contacted the trial court on another matter to indicate that he would not be present for the 10 April 2000 motion calendar; apparently, Mr. Shaw did not contact defendants to indicate his intended absence from the motion hearing. Counsel for defendants appeared at the 10 April 2000 summary judgment motion hearing, and the trial court determined that Mr. Shaw had received due notice of the hearing. The trial court then heard oral argument from defendants, and defendants filed a brief in support of their motion. Based on defendants' counsel's arguments and supporting documents, the trial court granted the defendants' summary judgment motion on 12 April 2000.

Mr. Sellers learned of the trial court's grant of summary judgment after contacting Mr. Shaw's office for an update on the status of this matter. Mr. Shaw's secretary informed Mr. Sellers that the case had been dismissed on grounds of "police immunity," but apparently indicated that she had spoken with Mr. Shaw, who felt the dismissal was improper and said he would ask for a re-hearing. Mr. Sellers waited to hear from Mr. Shaw's office, and eventually went by his office again for an update; however, he found the office vacant and was told that Mr. Shaw had retired due to health reasons.

Shortly thereafter Mr. Sellers retained attorney Thomas M. Van Camp, and on 13 November 2000 Mr. Sellers filed a motion to set aside the trial court's 12 April 2000 grant of summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) and (6) (1999). Following a hearing on 2 January 2001, the trial court denied this motion pursuant to an order filed on 8 January 2001. Mr. Sellers appeals.

On appeal,[1] Mr. Sellers argues that the trial court erred in concluding that his Rule 60(b) motion was not made within a reasonable time; and, he contends that he showed excusable neglect. We hold it dispositive that even if we assume both of those contentions to be

1. We first note that the record on appeal does not conform with our rules of appellate procedure. Mr. Sellers' assignments of error are set out at the beginning of the record, rather than being "stated at the conclusion of the record on appeal[.]" N.C.R. App. P. 10(c)(1) (2002). Nonetheless, we elect to exercise our discretion and consider the merits of Mr. Sellers' appeal. *See* N.C.R. App. P. 2 (2002).

true, Mr. Sellers is still not entitled to relief under Rule 60(b) because he failed to demonstrate *prima facie* evidence of a meritorious defense. *See Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 515 S.E.2d 17 (1999); *see also Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E.2d 787 (1975) (holding that to obtain relief under Rule 60(b)(1) on grounds of excusable neglect, the movant must also demonstrate *prima facie* evidence of a meritorious defense); *Sides v. Reid*, 35 N.C. App. 235, 241 S.E.2d 110 (1978) (holding that a Rule 60(b)(6) movant must show the existence of a meritorious *prima facie* defense).

In the instant case, Mr. Sellers' complaint alleges that "[d]efendants were negligent," that "Deputy Rodriguez and Officer Frazer were careless and reckless," and that he suffered injuries "[a]s a result of defendants[']] negligence[.]" Defendants answered, asserting defenses of public officers' immunity and public duty doctrine, among others. Defendants argued in their brief supporting their summary judgment motion that Deputy Rodriguez and Officer Frazer are immune from liability for mere negligence; by extension, defendants contend that the Lee County Sheriff's office and the City of Sanford are likewise immune from suit, as any liability on their part is vicariously derived from the conduct of Deputy Rodriguez and Officer Frazer. Defendants further argued in their brief that they were entitled to summary judgment because (1) neither Deputy Rodriguez nor Officer Frazer were negligent as a matter of law, and (2) Mr. Sellers' claims were barred by his contributory negligence as a matter of law.

We note that the caption of Mr. Sellers' complaint does not specifically designate whether defendants Rodriguez, Frazer and Bryant are being sued in their individual or official capacities. To afford these defendants the opportunity to prepare a proper defense, the complaint should have clearly stated the capacities in which these defendants were being sued. *See Mullis v. Sechrest*, 347 N.C. 548, 495 S.E.2d 721 (1998). Nonetheless, a review of the complaint and the course of proceedings in the instant case indicates an intent by Mr. Sellers to sue these defendants in their official capacities only. *See id. See also Taylor v. Ashburn*, 112 N.C. App. 604, 607-08, 436 S.E.2d 276, 279 (1993) (a complaint that fails to state any allegations other than those relating to a defendant's official duties does not state a claim against defendant in his or her individual capacity, and will be treated as a claim against defendant in his official capacity), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). "[O]fficial capacity suits are merely

another way of pleading an action against the governmental entity." *Mullis*, 347 N.C. at 554, 495 S.E.2d at 725.[2]

Generally, governmental immunity protects a municipality and its officers or employees sued in their official capacity for torts committed while performing a governmental function; it is well-established that law enforcement constitutes a governmental function. *See Young v. Woodall*, 119 N.C. App. 132, 458 S.E.2d 225, *rev'd on other grounds*, 343 N.C. 459, 471 S.E.2d 357 (1995); *see also Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 344 (1993). However, "[a] governmental entity may waive immunity by the purchase of liability insurance, thereby subjecting itself to liability for the tortious acts of its officers and employees." *Mellon v. Prosser*, 126 N.C. App. 620, 622, 486 S.E.2d 439, 441 (1997), *rev'd in part on other grounds*, 347 N.C. 568, 494 S.E.2d 763 (1998). *See* N.C. Gen. Stat. § 160A-485 (1999); N.C. Gen. Stat. § 153A-435 (1999). A plaintiff bringing claims against a governmental entity and its employees acting in their official capacities must allege and prove that the officials have waived their sovereign immunity or otherwise consented to suit; by failing to do so, the plaintiff fails to state a cognizable claim against either the official or the governmental entity. *See Mellon*, 126 N.C. App. at 623, 486 S.E.2d at 441-42.

In the instant case, Mr. Sellers alleged that Lee County, including Sheriff Billy Bryant; and the City of Sanford, including the Sanford Police Department; had acquired insurance policies or participated in risk pools insuring against liability for the negligent acts of their agents or employees. *See* G.S. § 160A-485; G.S. § 153A-435. To the extent such insurance had been purchased, Mr. Sellers alleged that the City of Sanford and Sheriff Billy Bryant had waived any claim of governmental immunity. In their answer, defendants "admitted that the referenced entities have purchased insurance, participate in risk pools, or otherwise have waived governmental immunity."

Nonetheless, a waiver of governmental immunity will not create a cause of action where none previously existed. *See Stafford v. Barker*, 129 N.C. App. 576, 584, 502 S.E.2d 1, 6, *disc. review denied*, 348 N.C. 695, 511 S.E.2d 650 (1998). The public duty doctrine gener-

2. As defendants Rodriguez, Frazer and Bryant were sued only in their official rather than individual capacities, defendants' claimed defense of public officers' immunity is irrelevant. *See Schlossberg v. Goins*, 141 N.C. App. 436, 540 S.E.2d 49 (2000) (the public officers' immunity doctrine shields public officials such as police officers and sheriffs from *personal* liability in their individual capacity for mere negligence in the performance of their duties).

ally bars negligence claims by individuals against a municipality or its agents in a law enforcement role, subject to two exceptions: (1) Where a special relationship exists between the injured individual and the agent or municipality; and (2) Where the agent or municipality creates a special duty by promising protection to the individual, such protection is not provided, and the individual's injury is causally related to his reliance on the promise. *See id.* at 580, 502 S.E.2d at 3. "The 'special relationship' exception must be specifically alleged, and is not created merely by a showing that the state undertook to perform certain duties." *Frazier v. Murray*, 135 N.C. App. 43, 50, 519 S.E.2d 525, 530 (1999). Arguably, a special relationship existed between Mr. Sellers and defendants, as Mr. Sellers alleges that he was injured while in police custody. *See Hull v. Oldham*, 104 N.C. App. 29, 38, 407 S.E.2d 611, 616, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991). Nonetheless, Mr. Sellers failed to specifically allege a "special relationship" sufficient to invoke this exception to the public duty doctrine. *See Frazier.*

We note further that, in addition to a county waiving its immunity under G.S. § 153A-435, a sheriff may also waive governmental immunity by purchasing a bond. *See Mellon*; N.C. Gen. Stat. § 58-76-5 (1999). G.S. § 58-76-5 "provides a plaintiff with a *statutory cause of action* in addition to a common law cause of action." *Stafford*, 129 N.C. App. 576, 585, 502 S.E.2d 1, 6. However, a sheriff's immunity is removed only where the surety is joined as a party to the action. *See Mellon*, 126 N.C. App. at 623, 486 S.E.2d at 442. Nonetheless, the failure to join the surety as a party to a G.S. § 58-76-5 action is easily corrected by amendment. *See id.*

G.S. § 58-76-5 only gives Mr. Sellers a right of action; it does not relieve Mr. Sellers of the burden of proving that defendants either intentionally engaged in neglect, misconduct or misbehavior while performing their custodial duties, or that they acted negligently in performing those duties despite a duty to do otherwise. *Stafford*, 129 N.C. App. at 585, 502 S.E.2d at 6. As noted above, Mr. Sellers has failed to sufficiently allege a negligence cause of action under the "special relationship" exception to the public duty doctrine. Furthermore, Mr. Sellers makes no allegation that either Deputy Rodriguez or Officer Frazer *intentionally* engaged in neglect, misconduct or misbehavior in the performance of his duties. *See id.* Additionally, nowhere in his complaint does Mr. Sellers mention G.S. § 58-76-5 as the basis for a cause of action.

Accordingly, we conclude that Mr. Sellers failed to present *prima facie* evidence to the trial court of a meritorious defense to defendants' summary judgment motion sufficient to support his Rule 60(b) motion to set aside the trial court's entry of summary judgment in favor of defendants. The trial court's 8 January 2001 order denying Mr. Sellers' Rule 60(b) motion to set aside the 12 April 2000 order awarding defendants summary judgment is therefore,

Affirmed.

Judges HUDSON and THOMAS concur.

JUSTIN D. JOSLYN, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, CAROL JOSLYN, PLAINTIFF v. DELMER BLANCHARD AND WIFE, UNA MAY BLANCHARD, WILLIAM LEWIS AND WIFE, BARBARA LEWIS, DEFENDANTS

No. COA01-398

(Filed 2 April 2002)

1. **Appeal and Error— appealability—partial summary judgment—multiple defendants—right to avoid two trials on same issues—substantial right**

Although plaintiff appeals from an interlocutory order granting summary judgment for two of the defendants in a negligence case against multiple defendants arising from a dog biting incident, an appeal of right lies from an interlocutory order affecting a substantial right of the parties, including the right to avoid two trials on the same issues and the right to avoid the possibility of inconsistent verdicts.

2. **Animals— dog biting—summary judgment—landlords—knowledge of vicious propensities of dog—degree of control over property**

The trial court did not err in an action alleging negligence based on a dog biting incident by granting summary judgment in favor of defendant landlords even though plaintiff asserts there exists a genuine issue of material fact as to defendants' knowledge of the vicious propensities of the dog and the degree of control defendants exercised over the property, because: (1) plaintiff failed to produce evidence that defendants managed, controlled,

or cared for the dog that injured plaintiff; and (2) defendants are not strictly liable under N.C.G.S. § 67-4.4 for allegedly owning a dangerous dog since plaintiff has produced no evidence that defendants have any type of possessory property right in the dog that injured plaintiff as required by N.C.G.S. § 67-4.1(a)(3).

Appeal by plaintiff from order entered 17 January 2001 by Judge Russell J. Lanier, Jr., in Craven County Superior Court. Heard in the Court of Appeals 10 January 2002.

Ayers & Haidt, P.A., by James M. Ayers, II, for plaintiff appellee.

Wallace, Morris & Barwick, P.A., by P.C. Barwick, Jr., and Elizabeth A. Heath, for defendant appellants William and Barbara Lewis.

TIMMONS-GOODSON, Judge.

Plaintiff appeals from the order of the trial court granting summary judgment in favor of defendants William and Barbara Lewis. For the reasons set forth herein, we affirm the judgment of the trial court.

The facts pertinent to the present appeal are as follows: On 8 March 2000, Carol Joslyn filed a complaint in Craven County Superior Court on behalf of her minor son, Justin D. Joslyn ("plaintiff"). The complaint alleged that plaintiff suffered serious injury when he was bitten in the face by a dog belonging to Delmer and Una May Blanchard ("the Blanchards"). According to the complaint, the injury occurred when the seven-year-old plaintiff accompanied his father to the Blanchard residence. Plaintiff entered the back yard of the Blanchard residence through an open gate in the fence surrounding the property. Plaintiff approached the Blanchard's dog, which was chained within the fence, and was bitten.

At the time of the incident, the Blanchards rented their residence from William and Barbara Lewis ("defendants"). The complaint alleged negligence on defendants' part in that they "were aware of the violent nature of Defendant Blanchard's dog and w[ere] very cautious when around the dog[,]" but nevertheless allowed the Blanchards to keep the dog on the property.

Defendants thereafter filed a motion for summary judgment, which was heard by the trial court on 6 November 2000. Finding no

genuine issues as to any material fact, the trial court concluded that defendants were entitled to judgment as a matter of law and therefore granted summary judgment in favor of defendants. From this order, plaintiff appeals.

The sole issue on appeal is whether the trial court properly granted summary judgment in favor of defendants. For the reasons stated herein, we conclude that summary judgment was properly granted, and we therefore affirm the trial court.

[1] We note initially that plaintiff's appeal is interlocutory, as it does not dispose of the case, but instead leaves it for further action by the trial court in order to settle and determine the entire controversy. *See Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950); *see also Cook v. Bankers Life and Casualty Co.*, 329 N.C. 488, 490-91, 406 S.E.2d 848, 850 (1991) (noting that the granting of summary judgment in favor of one defendant does not finally determine all of the claims in the case and is thus an interlocutory order). We do not generally review interlocutory appeals. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 382. Under the provisions of sections 1-277(a) and 7A-27(d) of the North Carolina General Statutes, however, an appeal of right lies from an interlocutory order affecting "a substantial right" of the parties. N.C. Gen. Stat. §§ 1-277(a), 7A-27(d) (1999). In *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), our Supreme Court stated that " 'the right to avoid the possibility of two trials on the same issues can be such a substantial right.' " *Id.* at 606, 290 S.E.2d at 595 (quoting *Survey of Developments in North Carolina Law, 1978*, 57 N.C.L. Rev. 827, 907-08 (1979)).

> This general proposition is based on the following rationale: when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

Davidson v. Knauff Ins. Agency, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (quoting *Green*, 305 N.C. at 608, 290 S.E.2d at 596), *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989).

In the instant case, we conclude that plaintiff's appeal affects a substantial right because of the possibility of inconsistent verdicts.

Plaintiff's claims arise over possible negligence by the Blanchards and by defendants. In their answer to plaintiff's complaint, defendants have reserved the defense of contributory negligence by plaintiff. It is conceivable that in a proceeding against the Blanchards alone, the jury could find that plaintiff was contributorily negligent. If, in an appeal from that verdict, plaintiff renews his appeal of the dismissal of defendants, and we were to conclude that the dismissal was improperly granted, then a second trial would be required as against defendants. It is possible that at the second trial, a jury could find that plaintiff was not contributorily negligent, thus resulting in inconsistent verdicts on the same factual issue. *See Hoots v. Pryor*, 106 N.C. App. 397, 402, 417 S.E.2d 269, 273 (concluding that an appeal from summary judgment granted in favor of one defendant in a negligence suit involving multiple defendants implicated plaintiff's substantial right to avoid the possibility of two trials on the same issue where contributory negligence on the part of plaintiff was alleged), *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992).

As we determine that there is a possibility of inconsistent verdicts if the case at bar were to be tried in two separate proceedings, we conclude that plaintiff's appeal of summary judgment in favor of defendants is not premature and should not be dismissed. We therefore address the merits of plaintiff's appeal.

[2] Plaintiff argues that the trial court improperly granted summary judgment in favor of defendants. Plaintiff asserts that there exists a genuine issue of material fact as to defendants' knowledge of the vicious propensities of the dog and the degree of control defendants exercised over the property.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999); *Johnson v. Insurance Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). Where the pleadings and proof disclose that no cause of action exists, summary judgment is properly granted. *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 534-35, 180 S.E.2d 823, 830 (1971).

In order to recover at common law for injuries inflicted by a domestic animal, a plaintiff must show both "(1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper

knew or should have known of the animal's vicious propensity, character, and habits." *Sellers v. Morris*, 233 N.C. 560, 561, 64 S.E.2d 662, 663 (1951). " 'The gravamen of the cause of action in this event is not negligence, but rather the wrongful keeping of the animal with knowledge of its viciousness[.]' " *Swain v. Tillett*, 269 N.C. 46, 51, 152 S.E.2d 297, 301 (1967) (quoting *Barber v. Hochstrasser*, 136 N.J.L. 76, 79, 54 A.2d 458, 460 (1947)). Thus, liability for injuries inflicted by animals does not depend upon the ownership of the animal, " 'but the keeping and harboring of an animal, knowing it to be vicious.' " *Id.* at 52, 152 S.E.2d at 302 (quoting *Hunt v. Hazen*, 197 Ore. 637, 639, 254 P.2d 210, 211 (1953)).

The owner of an animal is the person to whom it belongs. *See id.* at 51, 152 S.E.2d at 302. A keeper is "one who, either with or without the owner's permission, undertakes to manage, control, or care for the animal as owners in general are accustomed to do." *Id.* Nothing else appearing, the keeper of a vicious animal is liable for injuries inflicted by it upon another. *See id.* at 52, 152 S.E.2d at 302.

In *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970), the minor plaintiff filed suit against a landlord and his wife in order to recover for injuries she sustained after being thrown from a horse owned by the defendants' tenant. In her complaint, the plaintiff alleged that "the horse was cared for, stabled and used as a riding horse by the defendants . . . ; that the horse was dangerous and vicious and these traits were known to defendants; that defendants failed to exercise due care by allowing the horse to be wrongfully kept on their premises . . . ; and that plaintiff's injuries were proximately caused by defendants' negligence." *Id.* at 23-24, 178 S.E.2d at 2. The trial court subsequently denied the defendants' motion for summary judgment, and the defendants appealed to this Court.

Reversing the trial court, the *Patterson* Court concluded that the plaintiff had "failed to show that she can offer any competent evidence to prove that the defendants were the 'keepers' of the animal here involved." *Id.* at 29, 178 S.E.2d at 6. Because the defendants did not "manage, control, or care for" the horse, the plaintiff had failed to prove an essential element of her claim. The Court also concluded that the plaintiff had failed to show that the defendants knew or should have known of any vicious propensities of the animal. The Court therefore held that the trial court erred in denying the defendants' motion for summary judgment.

In the case *sub judice*, plaintiff has produced even less evidence than the plaintiff in *Patterson* that defendants managed, controlled or cared for the dog that injured plaintiff. Plaintiff's complaint and supporting affidavits contain no allegations whatsoever to support any connection between defendants and the dog, beyond the fact that they permitted the Blanchards to keep the dog on the property. As such, plaintiff has failed to prove that defendants were the "keepers" of the animal here involved, as defined by our Supreme Court in *Swain*. *See Swain*, 269 N.C. at 51, 152 S.E.2d at 302.

Plaintiff further argues that defendants are strictly liable under section 67-4.4 of our General Statutes, which provides that "[t]he owner of a dangerous dog shall be strictly liable in civil damages for any injuries or property damage the dog inflicts upon a person, his property, or another animal." N.C. Gen. Stat. § 67-4.4 (1999). Under section 67-4.1, an owner is defined as "any person or legal entity that has a possessory property right in a dog." N.C. Gen. Stat. § 67-4.1(a)(3) (1999). Plaintiff has produced no evidence that defendants have any type of possessory property right in the dog that injured plaintiff. Plaintiff's argument that defendants are strictly liable under the North Carolina General Statutes is therefore without merit.

Plaintiff having failed to show that there is a genuine issue of material fact, we hold that the trial court correctly granted defendants' motion for summary judgment. The order of the trial court is hereby

Affirmed.

Judges MARTIN and BRYANT concur.

RALPH WARREN MABRY, SR., PLAINTIFF v. PATRICIA GALE HUNEYCUTT, EXECUTOR OF THE ESTATE OF MABON FURR KIMREY, DECEASED, DEFENDANT

No. COA01-686

(Filed 2 April 2002)

1. Estates— negligence action against—statute of limitations

The trial court erred by dismissing a motor vehicle negligence action against the executrix of an estate where the three

year statute-of-limitations would have barred the action, but the driver died before the limitations period expired. Plaintiff is permitted to commence the action against the driver's personal representative or collector, but the claim must be presented by the date specified in the general notice to creditors and the record here does not establish whether defendant ever published or posted a general notice to creditors. Her failure to establish that she complied with the statutory requirements for notice to creditors precludes reliance on the statute of limitations. Furthermore, plaintiff filed the complaint prior to the earliest deadline which the executrix could have specified in the notice to creditors and within the outside time limitation established by N.C.G.S. § 28A-19-3(f) of three years after the driver's death. N.C.G.S. §§ 28A-19-3, 28A-14-1(a).

2. Estates— summary administration for widow—widow not automatically the representative

The fact that the clerk of superior court entered an order that the widow of a deceased was entitled to summary administration did not result in the widow becoming the personal representative; when a court enters an order that a surviving spouse is entitled to summary administration, the spouse does not necessarily thereby attain the status of representative or collector of the estate.

Appeal by plaintiff from an order entered 9 April 2001 by Judge Catherine Eagles in Stanly County Superior Court. Heard in the Court of Appeals 20 February 2002.

Poyner & Spruill, L.L.P., by E. Fitzgerald Parnell, III, Rebecca B. Wofford and Megan L. Tedrick; Morton, Grigg and Phillips, LLP, by Ernest H. Morton, Jr., for plaintiff-appellant.

John W. Webster and Morris York Williams Surles & Barringer, LLP, by John P. Barringer, for defendant-appellee.

HUNTER, Judge.

Ralph Warren Mabry, Sr. ("plaintiff") appeals the trial court's 9 April 2001 order dismissing this action as barred by the applicable statute of limitations. We hold that this action is not barred by the applicable statute of limitations, and we therefore reverse and remand for further proceedings.

In reviewing the grant of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule 12(b)(6)"), the allegations in the complaint are treated as true. *Cage v. Colonial Building Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994). Plaintiff's complaint and the record present the following facts.

On 27 June 1997, Mabon Furr Kimrey ("Mr. Kimrey") was operating a motor vehicle and negligently caused the vehicle to strike plaintiff causing injuries to plaintiff. Mr. Kimrey subsequently died on 7 November 1997 from causes unrelated to the accident. Mr. Kimrey's widow, Bertha H. Kimrey ("Mrs. Kimrey"), filed an application for probate and petition for summary administration of Mr. Kimrey's estate pursuant to N.C. Gen. Stat. § 28A-28-1 (1999). On 26 November 1997, the Clerk of Superior Court for Stanly County issued an order for summary administration to Mrs. Kimrey.

On 26 June 2000, plaintiff filed a complaint against Mrs. Kimrey individually, and as the personal representative of Mr. Kimrey's estate, seeking damages for injuries sustained in the car accident. On 25 August 2000, Mrs. Kimrey filed an answer in which she specifically denied that she was the personal representative of Mr. Kimrey's estate. Plaintiff then filed a "Notice of Dismissal Without Prejudice" on 18 October 2000 pursuant to Rule 41 of the North Carolina Rules of Civil Procedure.

Also on 18 October 2000, upon application by plaintiff, Patricia Gale Huneycutt ("defendant") was issued Letters Testamentary in the matter of the estate of Mr. Kimrey. Two days later, on 20 October 2000, plaintiff filed the present action against defendant as Executrix of the Estate of Mr. Kimrey. The complaint was served upon defendant on 24 October 2000. On 27 December 2000, defendant filed an answer, including a motion to dismiss plaintiff's claim as barred by the applicable statute of limitations. On 23 March 2001, after a hearing on the motion to dismiss, the trial court entered an order dismissing the claim pursuant to Rule 12(b)(6) as barred by the statute of limitations. Plaintiff appeals. On appeal, plaintiff aptly argues, and we agree, that a proper construction and application of the pertinent statutes leads to the clear conclusion that plaintiff's claim is not barred by the statute of limitations.

[1] Personal injury actions are governed by the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52 (1999). *See, e.g., Lassiter v. Faison*, 111 N.C. App. 206, 208, 432 S.E.2d 373, 374, *disc. review*

denied, 335 N.C. 176, 436 S.E.2d 381 (1993). However, when the person against whom a personal injury action may be brought dies prior to the running of this three-year period, N.C. Gen. Stat. § 1-22 (1999) may become applicable. *See id.* That statute provides, in pertinent part:

> If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative or collector after the expiration of that time; provided, the action is brought or notice of the claim upon which the action is based is presented to the personal representative or collector within the time specified for the presentation of claims in G.S. 28A-19-3.

N.C. Gen. Stat. § 1-22. N.C. Gen. Stat. § 1-22 is an enabling statute in the sense that, if the conditions of the statute are satisfied, the statute allows an action to be commenced despite the fact the generally applicable three-year period has expired. *See Lassiter*, 111 N.C. App. at 208, 432 S.E.2d at 374.

The statute referenced in N.C. Gen. Stat. § 1-22, namely N.C. Gen. Stat. § 28A-19-3, requires that a claim against a decedent's estate, which arose before the death of the decedent, must be "presented to the personal representative or collector . . . by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a)." N.C. Gen. Stat. § 28A-19-3(a) (1999).

N.C. Gen. Stat. § 28A-14-1(a) (1999) provides, in pertinent part:

> Every personal representative and collector after the granting of letters shall notify all persons, firms and corporations having claims against the decedent to present the same to such personal representative or collector, on or before a day to be named in such notice, which day must be at least three months from the day of the first publication or posting of such notice.

N.C. Gen. Stat. § 28A-14-1(a).

In the present case, the accident and alleged personal injuries in question occurred on 27 June 1997. N.C. Gen. Stat. § 1-52 would bar a personal injury action arising out of this accident after three years, or as of 27 June 2000. However, Mr. Kimrey died on 7 November 1997, at which time the three-year limitations period had not yet expired. Plaintiff's cause of action against Mr. Kimrey survived Mr. Kimrey's

death, *see* N.C. Gen. Stat. § 28A-18-1 (1999), and thus, pursuant to N.C. Gen. Stat. § 1-22, plaintiff is permitted to commence this cause of action against Mr. Kimrey's personal representative or collector, provided that either (1) it is brought within the time specified for the presentation of claims in N.C. Gen. Stat. § 28A-19-3, or (2) notice of the claim upon which the action is based is presented to the personal representative or collector within the time specified for the presentation of claims in N.C. Gen. Stat. § 28A-19-3.

As noted above, N.C. Gen. Stat. § 28A-19-3(a) requires that a claim against a decedent's estate which arose before the death of the decedent must be "presented to the personal representative or collector . . . by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1(a)," and N.C. Gen. Stat. § 28A-14-1(a) provides that the absolute earliest "deadline" date which may be specified by the personal representative or collector in the general notice to creditors is "three months from the day of the first publication or posting of such notice." N.C. Gen. Stat. § 28A-14-1(a).

In the first place, we note that the record does not establish whether defendant has ever published or posted a general notice to creditors. Where an administrator or executor fails to establish that she has complied with the notice requirements set forth in N.C. Gen. Stat. § 28A-14-1, the administrator or executor may not plead the statute of limitations in N.C. Gen. Stat. § 28A-19-3(a) as a bar because "[t]he time limitations for presentation of claims provided in G.S. 28A-19-3(a) will not aid an executor or administrator who fails to observe its requirements." *Anderson v. Gooding*, 300 N.C. 170, 174, 265 S.E.2d 201, 204 (1980); *see also Lee v. Keck*, 68 N.C. App. 320, 329-30, 315 S.E.2d 323, 329, *disc. review denied*, 311 N.C. 401, 319 S.E.2d 271 (1984). Thus, defendant's failure to establish in the record that she complied with the requirements of N.C. Gen. Stat. § 28A-18-3(a) regarding general notice to creditors precludes defendant from relying upon the statute of limitations as a bar.

Furthermore, although the record fails to disclose if or when defendant published or posted notice to creditors, the earliest date at which she could have published or posted such notice would be the day she qualified as the personal representative of Mr. Kimrey's estate, which was 18 October 2000. Assuming *arguendo* that she did publish or post notice to creditors on this date, the earliest "deadline" date which she could have specified in such notice would have been 18 January 2001 (or three months from 18 October 2000), pursuant to N.C. Gen. Stat. § 28A-14-1(a).

Plaintiff filed this complaint on 20 October 2000, and defendant was served with the complaint on 24 October 2000, both dates clearly falling before the earliest possible "deadline" date of 18 January 2001. Further, both dates were within three years of Mr. Kimrey's death, thus complying with the outside time limitation established by N.C. Gen. Stat. § 28A-19-3(f) (all claims barrable under subdivisions (a) and (b) are barred if first publication or posting of general notice to creditors under N.C. Gen. Stat. § 28A-14-1 does not occur within three years from death of decedent). Thus, plaintiff satisfied the time requirements established by N.C. Gen. Stat. § 28A-19-3 and N.C. Gen. Stat. § 28A-14-1(a), and, therefore, plaintiff complied with the conditions established by N.C. Gen. Stat. § 1-22. As a result, plaintiff's claim is not barred by the statute of limitations, and the trial court erred in dismissing the claim on this basis.

Without citing any authority, defendant appears to argue that this action was properly dismissed because: (1) the Clerk of Superior Court for Stanly County issued an order for summary administration to Mrs. Kimrey on 26 November 1997; (2) the deadline for plaintiff to have presented his claim should be calculated from this date; (3) plaintiff failed to present a claim within the permissible period as calculated from this date; and (4) plaintiff voluntarily dismissed the first action against Mrs. Kimrey. We disagree.

[2] All of the statutes discussed above (N.C. Gen. Stat. §§ 1-22, 28A-19-3(a), and 28A-14-1(a)) refer to the actions of the "personal representative" or "collector" of the estate. As astutely explained by plaintiff in his brief, when a court enters an order that a surviving spouse is entitled to summary administration pursuant to N.C. Gen. Stat. § 28A-28-1, the surviving spouse does not necessarily thereby attain the status of the personal representative or collector of the decedent's estate. The statutory scheme clearly contemplates that these roles are separate and distinct. *See* N.C. Gen. Stat. §§ 28A-28-2(a)(8), 28A-28-3, 28A-28-7 (1999). Thus, the fact that the clerk of superior court entered an order that Mrs. Kimrey was entitled to summary administration did not thereby result in Mrs. Kimrey becoming the personal representative of Mr. Kimrey's estate.

Moreover, Mrs. Kimrey in her answer to plaintiff's original complaint specifically denied that she was the personal representative of Mr. Kimrey's estate. As a result, plaintiff prudently dismissed his original complaint against Mrs. Kimrey, and, after the court issued Letters Testamentary to defendant upon plaintiff's application, plaintiff

timely filed the present action against defendant, who specifically admitted in her answer that she is the personal representative of Mr. Kimrey's estate. For these reasons, we reject defendant's argument.

We reverse and remand for further proceedings.

Reversed and remanded.

Judges WALKER and BRYANT concur.

ROBERT MASON, ET AL., PLAINTIFFS v. TOWN OF FLETCHER, ET AL., DEFENDANTS

No. COA01-290

(Filed 2 April 2002)

1. **Highways and Streets— right-of-way—maintenance by DOT—mowing**

   Testimony concerning the mowing of a highway right-of-way provided support for the trial court's finding that DOT maintained the right-of-way, through which a water line was laid in front of plaintiff's property, beyond the paved portion of the highway.

2. **Evidence— judicial notice—right-of-way width—survey from another case**

   There was competent evidence to support the trial court's finding of the width of a highway right-of-way in an action arising from a water line laid in front of plaintiff's property where the court took judicial notice of a survey of the highway and right-of-way in another case.

3. **Highways and Streets— right-of-way—water line—permitted by encroachment agreement**

   The trial court did not err by concluding that a water line was a proper use of a highway right-of-way where the right-of-way encroachment agreement between DOT and plaintiffs provided for installation of the water line.

Appeal by plaintiffs from judgment entered 29 December 2000 by Judge J. Marlene Hyatt in Henderson County Superior Court. Heard in the Court of Appeals 10 January 2002.

Westall, Gray, Connolly & Davis, P.A., by Jack W. Westall, Jr., for plaintiff appellants.

Russell & King, P.A., by Sandra M. King and David E. Peterson, for defendant appellees.

TIMMONS-GOODSON, Judge.

Robert L. Mason, Joseph D. Brigman and his wife, Margaret H. Brigman (collectively "plaintiffs"), appeal from judgment by the trial court concluding that the Town of Fletcher and City of Hendersonville (collectively "defendants") did not trespass when they installed a water line adjacent to a public road fronting plaintiffs' property. The facts pertinent to this appeal are as follows: On 25 June 1999, plaintiffs filed a complaint for trespass and inverse condemnation in Henderson County Superior Court. Plaintiffs alleged that defendants had unlawfully constructed a water line upon plaintiffs' property without plaintiffs' permission, thereby constituting a continuing trespass.

The trial court heard the matter on 9 October 2000, at which time it made the following findings of fact:

1. The Plaintiffs are owners of real property which fronts on Howard Gap Road (SR 1006) in Fletcher, Henderson County, North Carolina, pursuant to a Warranty Deed dated June 29, 1989 and recorded at Deed Book 740, Pages 373 and 374 of the Henderson County Registry.

2. The legal description in the deed referred to in finding No. 1 above states, in part, that the real property is "SUBJECT TO the right of way of Howard Gap Road."

3. Taking judicial notice of the Henderson County Superior Court File #97 CvS 586, in addition to the evidence presented in this proceeding, the undersigned finds that the right of way referred to in finding No. 2 above is 39.37 feet wide.

4. The paved portion of Howard Gap Road through Plaintiffs' property is approximately 23 feet wide.

5. In February, 1998, Defendant Town of Fletcher ("Fletcher") entered into a contract with Mattern & Craig, Inc., Engineers ("Engineers"), which provided that Engineers would make all arrangements necessary to enable Fletcher to install a water line in the margin of Howard Gap Road, a portion of which water line

would pass across the plaintiffs' property fronting on Howard Gap Road.

6. The water that was going to be used in the water line was owned by Defendant Town of Hendersonville ("Hendersonville"), so it was agreed that Hendersonville would become the owner of the water line.

7. On conflicting evidence, the North Carolina Department of Transportation ("DOT") had provided maintenance to Howard Gap Road, including mowing the hay and grass along the edges of the road to a distance of 6 to 15 feet on each side of the pavement thereof.

8. In August 1998 a DOT standard form "Right Of Way Encroachment Agreement" was entered into between Hendersonville, as owner of the water line, and DOT, as owner of the right of way on Howard Gap Road, that gave Hendersonville the right to encroach upon, and utilize, DOT's right of way for installation and use of the water line.

9. During the installation of the water line, Plaintiffs complained to Fletcher that the water line was encroaching on their property.

10. On conflicting evidence, the water line was installed within the Howard Gap Road right of way across Plaintiffs' property.

11. Howard Gap Road (SR 1006) is a state road that has been used by the public continuously and has never been abandoned.

12. Even if a trespass had occurred, the Plaintiffs suffered no damage, but rather the installation of the water line enhanced the value of their property.

Based upon the above-stated findings of fact, the trial court concluded that "[t]he construction of the water line across and through Plaintiffs' property within the DOT's right of way was a proper use of the right of way within the dedication of Howard Gap Road to public use." The trial court therefore determined that defendants had committed no trespass and entered judgment in favor of defendants. Plaintiffs now appeal to this Court.

Plaintiffs contend on appeal that the trial court erred in (1) finding and concluding that the North Carolina Department of Transportation ("DOT") had a right-of-way 39.37 feet wide; (2) con-

cluding that the construction of the water line was a proper use of the right-of-way; and (3) concluding that plaintiffs suffered no damages as a result of the installation of the water line in the right-of-way. For the reasons stated herein, we affirm the judgment of the trial court.

Upon review of judgment by the trial court, we must determine whether there was competent evidence before the court to support its findings of fact, and whether those findings of fact, in turn, support its conclusions of law. *See Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580-81, 350 S.E.2d 83, 86 (1986). "On appeal, the findings of fact made below are binding on the Court of Appeals if supported by the evidence, even when there may be evidence to the contrary." *Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 217, 447 S.E.2d 471, 473, *disc. review denied*, 338 N.C. 514, 452 S.E.2d 807 (1994).

[1] Plaintiffs argue that there was no competent evidence to support the trial court's finding that there existed a right-of-way across plaintiffs' property in favor of DOT, and that such right-of-way was 39.37 feet wide. Plaintiffs admit, however, that the warranty deed by which they acquired title to their property states that such property is "SUBJECT TO the right of way of Howard Gap Road." Further, plaintiffs do not dispute that Howard Gap Road is a public highway, and that the paved portion of Howard Gap Road is twenty-three feet in width. Plaintiffs nonetheless argue that there was no evidence to support the trial court's finding that DOT maintained the right-of-way beyond the paved portion of the road, and that such right-of-way was 39.37 feet wide. We disagree.

Competent evidence before the trial court supported the court's finding that DOT maintained the Howard Gap Road right-of-way beyond the paved portion of the highway. Mr. Clarence William Corn ("Mr. Corn"), an employee of DOT and the former mowing inspector for Henderson County where plaintiffs' property is located, testified that he was personally familiar with the Howard Gap Road right-of-way. Mr. Corn explained that DOT generally mowed the Howard Gap Road right-of-way fronting plaintiffs' property six times per year using a "bush hog mower," and that at least once per year, DOT utilized a "contour mower" to mow "approximately 10 to 15 [feet] from the ditch or the edge of the road over as far as [DOT could] mow." Although plaintiffs testified that they had never witnessed such mowing, "[i]t is well established that where the trial court sits without a

jury, the court's findings of fact are conclusive if supported by competent evidence, even though other evidence might sustain contrary findings." *Barnhardt*, 116 N.C. App. at 224-25, 447 S.E.2d at 477. Because there was competent evidence to support the trial court's finding that DOT maintained the Howard Gap Road right-of-way beyond the paved portion of the highway, the trial court did not err in finding such.

[2] As to plaintiffs' contention that the trial court erred in finding the right-of-way to be 39.37 feet wide, we note that, in its finding of fact Number Three, the trial court stated that it was taking judicial notice of another case between the parties in the Henderson County Superior Court, Case Number 97 CVS 586. Case Number 97 CVS 586 was a condemnation case brought by DOT against plaintiffs, involving a small portion of Howard Gap Road. According to the survey map completed by DOT and submitted to the trial court in that case, the Howard Gap Road right-of-way at issue in the present case extended 39.37 feet wide.

"In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." N.C. Gen. Stat. § 8C-1, Rule 201(e) (1999). Plaintiffs made no such request before the trial court, nor do they argue on appeal that the trial court could not properly take notice of its own records. "It is not the law that facts essential to a judgment can only be established by the testimony of witnesses, by exhibits introduced into evidence, or by a stipulation of the parties; they can also be established by judicial notice." *State v. Smith*, 73 N.C. App. 637, 638, 327 S.E.2d 44, 45-46 (1985); *see also* Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 26 (5th ed. 1998) (stating that "there seems little reason why a court should not notice its own records in any prior or contemporary case when the matter noticed has relevance"). We conclude that the trial court could properly take judicial notice of Case Number 97 CVS 586, and thus there was competent evidence before the trial court in the instant case to support its finding that the Howard Gap Road right-of-way was 39.37 feet wide. We overrule plaintiffs' first assignment of error.

[3] Plaintiffs further assign as error the trial court's conclusion that the construction of a water line was a proper use of the right-of-way. Plaintiffs contend that the installation of the water line "increased the servitude" of plaintiffs' property by making greater use of the

premises than was contemplated by the purpose for which the right-of-way was created. We disagree.

As stated *supra*, plaintiffs do not contest the fact that Howard Gap Road is a public highway, and as such, subject to the control and authority of the DOT. *See* N.C. Gen. Stat. § 136-18 (1999). Moreover, we have determined that the trial court properly concluded that a right-of-way existed in favor of DOT, and that it extended 39.37 feet wide. The right-of-way encroachment agreement between DOT and defendants provides for the installation of the water line within the "right-of-way of the public road." Thus, pursuant to the encroachment agreement, defendants obtained a valid right to encroach upon the Howard Gap Road right-of-way. A water line is a proper use of a right-of-way within the dedication of Howard Gap Road to public use. *See* N.C. Gen. Stat. § 136-18(10) (1999); *Watkins v. Lambe-Young, Inc.*, 37 N.C. App. 30, 32, 245 S.E.2d 202, 204 (1978). Thus, the trial court did not err in concluding that the installation of a water line was a proper use of the Howard Gap Road right-of-way. Accordingly, we overrule plaintiffs' second assignment of error.

By their final assignment of error, plaintiffs argue that the trial court erred in concluding that plaintiffs suffered no damages as a result of defendants' continuing trespass upon their property. We have determined, however, that the trial court properly concluded that defendants did not trespass when they installed the water line within the right-of-way. As defendants committed no trespass upon plaintiffs' property, plaintiffs have failed to show that defendants' actions have injured them. We therefore overrule plaintiffs' final assignment of error.

The judgment of the trial court is hereby

Affirmed.

Judges MARTIN and BRYANT concur.

JOSEPH C. SCIOLINO AND CONSTANCE F. SCIOLINO, PLAINTIFFS v. TD WATERHOUSE INVESTOR SERVICES, INC.; WATERHOUSE SECURITIES, INC.; NEIL KIRK PORTER, AND ANTHONY TYSON POPE, DEFENDANTS

No. COA01-422

(Filed 2 April 2002)

1. Appeal and Error— appealability—denial of arbitration—substantial right

Although defendants' appeal from the denial of their motion to compel arbitration is an appeal from an interlocutory order, an order denying arbitration is immediately appealable because it involves a substantial right.

2. Arbitration and Mediation— motion to compel—customer agreement not attached to signed application

The trial court did not err in an action alleging breach of contract, breach of fiduciary duty, negligence, constructive fraud, securities fraud, and conversion arising from a brokerage account by denying defendants' motion to compel arbitration even though defendants assert that plaintiffs are bound to the terms of defendants' customer agreement requiring arbitration, because: (1) defendants produced no evidence that plaintiffs actually received either customer agreement when they signed the application, and thus there was competent evidence before the trial court that defendants failed to attach a customer agreement to the account application; and (2) as the customer agreement was not attached to the application, plaintiff did not agree, under the plain language of the contract, to be bound by its terms.

Appeal by defendants from order entered 13 December 2000 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 31 January 2002.

Ellis & Winters L.L.P., by J. Anthony Penry, for plaintiff appellees.

Burns, Day & Presnell, P.A., by Daniel C. Higgins, for defendant appellants.

TIMMONS-GOODSON, Judge.

TD Waterhouse Investor Services, Inc., Waterhouse Securities, Inc., Neil Kirk Porter and Anthony Tyson Pope (collectively, "defend-

ants") appeal from an order denying their motion to compel arbitration. For the reasons stated herein, we affirm the order of the trial court.

On 29 June 2000, Joseph C. Sciolino and his wife, Constance F. Sciolino (collectively, "plaintiffs"), filed a complaint against defendants in Wake County Superior Court, alleging breaches of contract and fiduciary duty, negligence, constructive and securities fraud, and conversion. Defendants thereafter filed a motion to compel arbitration of plaintiffs' claims, which motion the trial court heard on 26 October 2000. Upon consideration of all of the evidence and arguments by the parties, the trial court made the following findings of fact:

> 1. Plaintiffs are citizens of Wake County, North Carolina. They opened a joint brokerage account with the corporate defendants. In connection therewith, plaintiffs executed a document entitled "Waterhouse webBroker New Account Application." A copy of that agreement was attached to the affidavit of Ms. Campanella, an employee of Waterhouse. Both plaintiffs signed the document on its reverse side on or about August 12, 1998. The document, at paragraph 11(5), references an attached "customer agreement."
>
> 2. Defendants attached a customer agreement to their original motion to compel arbitration, and to the affidavit of Ms. Campanella. That customer agreement is on a separate sheet from the new account application. It contains an arbitration clause. However, the customer agreement is not signed by either plaintiff or any of defendants. Defendants contend that the customer agreement was provided to plaintiffs at the time they executed the new account application.
>
> 3. Plaintiffs deny having been provided with a copy of the customer agreement. Mr. Sciolino testified, by affidavit, that he had searched his files, and did not have a copy of a customer agreement. Mr. Sciolino testified, in his affidavit, that he inquired of defendant Porter, in November, 1999, as to the existence of any documents in plaintiffs' file, and that Mr. Porter provided Mr. Sciolino with certain documents that are attached as exhibits to Mr. Sciolino's affidavit, representing that those documents constituted the account documents. The documents provided by Mr. Porter include a customer agreement, but it is not the same customer agreement that was attached to defendants' motion. In

fact, the customer agreement provided to Mr. Sciolino by Mr. Porter contains a revision date of September, 1998, which is after the date on which plaintiffs signed the new account application.

4. Plaintiffs have disputed the existence of an agreement to arbitrate. After having conducted a plenary hearing, the court finds that the existence of an agreement to arbitrate has not been demonstrated.

Based on the above-stated facts, the trial court concluded that an arbitration agreement did not exist and accordingly denied defendants' motion to compel arbitration, from which order defendants appeal.

The sole issue on appeal is whether the trial court erred in denying defendants' motion to compel arbitration. We conclude that the trial court properly denied defendants' motion.

[1] We note initially that the order denying defendants' motion to compel arbitration is interlocutory, as it is not a final judgment. *See Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Although we do not generally review interlocutory orders, *see id.*, "an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed." *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999). Thus, we review the merits of defendants' appeal in the instant case.

[2] Defendants argue that the trial court erred in denying their motion to compel arbitration. Noting the public policy which favors arbitration, defendants contend that, by signing the webBroker Account Application ("the application"), plaintiffs agreed to submit any dispute arising from their account to arbitration. The application at issue contains the following statements:

By signing this Agreement I acknowledge that:

1) I have read, understand, and agree to be bound by the terms of the attached Customer Agreement . . . .

. . . .

5) The enclosed Customer Agreement contains a pre-dispute Arbitration clause. Please see paragraph #9 of the Customer Agreement for full details.

Defendants argue that the above-stated language incorporates by reference the customer agreement containing the arbitration clause, such that plaintiffs are bound by its terms.

When a party disputes the existence of a valid arbitration agreement, the trial judge must determine whether an agreement to arbitrate exists. *See* N.C. Gen. Stat. § 1-567.3(a) (1999); *Burke v. Wilkins*, 131 N.C. App. 687, 689, 507 S.E.2d 913, 914 (1998). The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. *See Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 272, 423 S.E.2d 791, 794 (1992). Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate. *See Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991).

Before a dispute can be settled by arbitration, there must first exist a valid agreement to arbitrate. *See* N.C. Gen. Stat. § 1-567.2 (1999); *Routh*, 108 N.C. App. at 271, 423 S.E.2d at 794. As the moving party, defendants bear the burden of demonstrating that the parties mutually agreed to arbitrate their dispute. *See Blow v. Shaughnessy*, 68 N.C. App. 1, 17, 313 S.E.2d 868, 877, *disc. review denied*, 311 N.C. 751, 321 S.E.2d 127 (1984). "This Court has even suggested that an agreement to arbitrate, if contained in a contract covering other topics, must be independently negotiated. This apparent requirement for independent negotiation underscores the importance of an arbitration provision and 'militates against its inclusion in contracts of adhesion.' " *Routh*, 108 N.C. App. at 272, 423 S.E.2d at 794 (quoting *Blow*, 68 N.C. App. at 16, 313 S.E.2d at 877) (citations omitted).

In support of their motion to compel arbitration, defendants submitted two different customer agreements, one of which was revised a month after plaintiffs opened their account. Neither customer agreement bears the signatures of plaintiffs or defendants. Defendants nevertheless assert that plaintiffs are bound to the terms of the customer agreement because the arbitration clause contained in the revised customer agreement is identical to the one referenced by the application signed by plaintiffs. We disagree.

It is well established that a valid contract arises only where the parties "assent to the same thing in the same sense, and their

minds . . . meet as to all the terms." *Goeckel v. Stokeley*, 236 N.C. 604, 607, 73 S.E.2d 618, 620 (1952); *see Walker v. Goodson Farms, Inc.*, 90 N.C. App. 478, 486, 369 S.E.2d 122, 126, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 556 (1988). Where there is no mutual agreement as to all of the terms, there is no contract. *See Goeckel*, 236 N.C. at 607, 73 S.E.2d at 620. "If a question arises concerning a party's assent to a written instrument, the court must first examine the written instrument to ascertain the intention of the parties." *Routh*, 108 N.C. App. at 273, 423 S.E.2d at 795.

In the application signed by plaintiffs in the instant case, plaintiffs agreed to "be bound by the terms of the attached Customer Agreement." Plaintiffs deny, however, that defendants attached any type of document to the application. Defendants have produced two separate customer agreements, neither of which is attached to the application signed by plaintiffs and neither of which bears plaintiffs' signatures. Further, as plaintiffs note, "there is nothing on the Customer Agreement itself—no signature, no initials, no account number—to suggest that it was ever provided to plaintiffs; when it was provided; in connection with which account it was provided, whether the sole or joint account; or whether plaintiffs ever saw it at all." Although the arbitration clauses contained within the two customer agreements are identical, the remaining clauses are not identical. Defendants produced no evidence that plaintiffs actually received either customer agreement when they signed the application. Thus, there was competent evidence before the trial court that defendants failed to attach a customer agreement to the account application. As the customer agreement was not attached to the application, plaintiffs did not agree, under the plain language of the contract, to be bound by its terms. In light of the lack of evidence presented by defendants in support of their contention that plaintiffs agreed to arbitrate their claim, we hold that the trial court properly concluded that defendants failed to demonstrate that there was a valid agreement to arbitrate. We therefore affirm the trial court's order denying defendants' motion to compel arbitration.

Affirmed.

Judges BRYANT and SMITH concur.

IN THE MATTER OF THE WILL OF J.S. LAMANSKI, AKA JOSEPHINE S. LAMANSKI

No. COA01-602

(Filed 2 April 2002)

Wills— caveat—estoppel—bequest accepted

A caveator was estopped to challenge the validity of a will in a caveat proceeding by her prior petition in which she asserted entitlement to personal property bequeathed to her by the will and her acceptance of benefits under the will. Although the caveator argued that she was not estopped from contesting the will because she would be entitled to one-third of the net estate if the will was set aside, she had no right to specific property without the specific bequest in the will.

Appeal by caveator from order entered 22 January 2001 by Judge Loto Greenlee Caviness in Henderson County Superior Court. Heard in the Court of Appeals 21 February 2002.

Prince Youngblood & Massagee, by Boyd B. Massagee, Jr., and Sharon B. Alexander, for propounder-appellee.

Law Offices of E.K. Morley, PLLC, by E.K. Morley, for caveator-appellant.

MARTIN, Judge.

Josephine S. Lamanski died on 6 July 1998 in Henderson County. On 17 July 1998, a paper writing ("the will") was presented to the Clerk of Superior Court of Henderson County for probate as Mrs. Lamanski's last will and testament. Item II of the will provided:

> Item II: I give and bequeath to my sister, Mary C. Sambor, her choice of any tangible personal property in my home, if she survives me.

In Item III of her will, Mrs. Lamanski made specific bequests of cash and personal property to two brothers, a niece, and a nephew, and devised her home and the contents not otherwise bequeathed to Tracy Burns, subject to any mortgage indebtedness existing at the time of Mrs. Lamanski's death. The will named Mrs. Lamanski's attorney, Carlton M. Green of College Park, Maryland, as her Personal Representative, and Tracy Burns as successor Personal Representative if Mr. Green was unable or unwilling to serve. Mr.

Green renounced and Ms. Burns qualified as executrix of Mrs. Lamanski's estate.

Ms. Sambor selected and received numerous items of personal property pursuant to the bequest. However, a disagreement arose between Ms. Sambor and the executrix over the alleged failure of the executrix to deliver certain items to which Ms. Sambor contended she was entitled and, on 5 May 1999, Ms. Sambor filed a petition to revoke the Letters Testamentary issued to Ms. Burns. In the petition, Ms. Sambor affirmatively alleged, *inter alia*:

> 2. That the said decedent left a Last Will and Testament dated April 7, 1997, which was admitted to probate on July 17, 1998.
>
> 4. ITEM II of the Last Will & Testament of the named decedent as probated bequeaths to the decedent's surviving sister, Mary C. Sambor, her choice of any tangible personal property in decedent's home.

The petition alleged that Ms. Burns had failed to deliver certain items of personal property requested by Ms. Sambor, and that such failure warranted her removal as executrix of Mrs. Lamanski's estate. None of the items which she received as a result of the bequest was returned to the estate by Ms. Sambor.

On 15 November 1999, Ms. Sambor, as caveator, filed a caveat to the will, in which she alleged the will was made as a result of duress and undue influence exerted upon Mrs. Lamanski by Tracy Burns. Ms. Burns, as respondent-propounder, filed a response to the caveat, denying the allegations of duress and undue influence and asserting, *inter alia*, the affirmative defense that, due to her acceptance of the bequest contained in the will, Ms. Sambor is estopped to deny the will's validity.

Respondent-propounder moved for summary judgment. The trial court found there were no genuine issues of disputed fact that the caveator, Ms. Sambor, had elected to receive property under the will, and that in her petition to remove Ms. Burns as executrix, she had affirmatively pleaded her entitlement to receive property under the will. The trial court concluded that Ms. Sambor, having had previously asserted the validity of the will and accepted benefits thereunder, was estopped to challenge the will's validity through the caveat proceeding. Caveator appeals from the order allowing respondent-propounder's motion for summary judgment.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The burden is on the moving party to show the absence of any genuine issue of fact and his entitlement to judgment as a matter of law. *First Federal Savings & Loan Ass'n. v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972). A party moving for summary judgment in the defense of an action may satisfy that burden by showing that the party asserting the claim cannot overcome an affirmative defense which would bar the action. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992). In ruling on a motion for summary judgment, the court is not authorized to resolve any issue of fact, only to determine whether there exists any genuine issue of fact material to the outcome of the case. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

The issue raised by this appeal is whether appellant-caveator is estopped from maintaining a caveat proceeding denying the validity of Mrs. Lamanski's will by her earlier petition in which she asserted entitlement to property under the will and sought to remove Ms. Burns as executrix for alleged violations of her duties under the will. Guided by the decision of our Supreme Court in *In re Averett's Will*, 206 N.C. 234, 173 S.E. 621 (1934), we answer the issue adversely to appellant-caveator.

In *Averett*, the petitioners initially filed a special proceeding requesting a partition of land owned by the petitioners and the respondents, Lottie and Marvin Averett. The petitioners then amended their original petition, stating that,

> "since the filing of the original petition in this proceeding the defendant, Lottie Mize Averett, has died leaving a last will and testament, which was probated and filed in Sampson County, North Carolina, on May 2, 1933, and by the terms of which she devised all her interest in the land involved in this proceeding to her husband, Marvin Averett; that the said Marvin Averett, according to the terms of said will, is now the owner of a one-ninth undivided fee simple interest in and to said land, and that summons in this proceeding has been duly served upon said Marvin Averett."

Id. at 235-36, 173 S.E. at 621.

While the partition proceeding was pending, petitioners filed a caveat to Lottie Averett's will, alleging that the will was obtained by Marvin Averett through undue influence and duress, and that Marvin Averett was not actually the lawful husband of the decedent. *Id.* at 236, 173 S.E. at 622. The Court affirmed the trial court's dismissal of the caveat on the basis of estoppel. *Id.* at 238, 173 S.E. at 623.

> Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim, or conduct to the prejudice of another. . . . A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same, and the same questions are involved.

Id. at 238, 173 S.E. at 622-23 (citations and internal quotations omitted). Although the Court acknowledged that, at least technically, different questions were presented in the two proceedings, it nevertheless held that the caveators were estopped from contesting the validity of the will after they had taken an inconsistent position in the partition proceeding. *Id.* "A party cannot either in the course of litigation or in dealings *in pais* occupy inconsistent positions, and, where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts." *In re Lloyd's Will*, 161 N.C. 557, 559, 77 S.E. 955, 956 (1913).

In the present case, appellant-caveator is estopped from challenging the will because she previously relied on the will to assert rights to personal property bequeathed to her therein. It is undisputed that Ms. Sambor selected items of personal property from Mrs. Lamanski's home and requested that they be delivered to her. Ms. Burns, as executrix under the will, caused many of those items to be delivered to Ms. Sambor, and Ms. Sambor admitted that she was in possession of those items. Ms. Sambor then filed a petition to revoke the letters testamentary issued to Ms. Burns, claiming entitlement under the will to additional items which she contended Ms. Burns had refused to deliver to her in breach of her fiduciary duty under the will. Having judicially asserted rights consistent with the validity of the will, appellant-caveator is estopped, in a subsequent proceeding, from asserting the inconsistent position of disputing the will's validity. *See In re Averett's Will*, 206 N.C. 234, 173 S.E. 621.

Nevertheless, appellant-caveator argues that if the will were to be set aside, she would be entitled to one-third of the net estate. Thus, she contends, she can not be estopped from contesting the will because she was legally entitled to the property which she received regardless of the validity of the will. Under the facts of this case, we reject her argument.

Although it is the general rule that one who accepts and retains benefits under a will is estopped to contest the will's validity, *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970), "[o]ne cannot be estopped by accepting that which he would be legally entitled to receive in any event." *In re Peacock's Will*, 18 N.C. App. 554, 556, 197 S.E.2d 254, 255 (1973) (citation omitted). In *Peacock*, the decedent's son received a cash bequest which was less than the amount he would have been entitled to receive if the will were set aside. Since he would have been legally entitled to receive an amount in excess of that which he accepted under the will, his acceptance of the bequest did not estop him from contesting the validity of the will. *Id.* In the present case, however, appellant-caveator would have had no legal right, outside the will, to the specific personal property which she received and retained pursuant to the specific bequest in Mrs. Lamanski's will. *See* N.C. Gen. Stat. § 28A-22-8 (2001) ("Unless otherwise restricted by the terms of the will or trust, an executor or trustee shall have absolute discretion to make distributions in cash or in specific property.").

The order granting respondent-propounder's motion for summary judgment and dismissing the caveat proceeding is affirmed.

Affirmed.

Judges HUDSON and CAMPBELL concur.

STATE OF NORTH CAROLINA v. JAMES ARMSTEAD

No. COA01-146

(Filed 2 April 2002)

False Pretense— obtaining property—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of obtaining property by false pretenses even though defendant contends the indictment charged that defendant did obtain and attempt to obtain property by means of a false pretense which was "calculated to deceive and did deceive," when in fact defendant did not succeed in his attempt at deception, because the additional language in the indictment that defendant "did deceive" is surplusage and is not fatal to the indictment.

Appeal by defendant from judgment entered 22 August 2000 by Judge J. Richard Parker in Beaufort County Superior Court. Heard in the Court of Appeals 5 December 2001.

Michael F. Easley, Attorney General, by Assistant Attorney General Gaines M. Weaver, for the State.

Dennis M. Kilcoyne for defendant-appellant.

THOMAS, Judge.

Defendant, James Armstead, was found guilty in a jury trial of obtaining property by false pretenses. On appeal, he contends the trial court should have allowed his motion to dismiss since the State failed to prove all that it alleged in the indictment. We disagree and find no error.

Larry Weston's (Weston) car was broken into and his wife's purse was stolen while they were dining at a restaurant in Greenville in February of 2000. Inside the purse were checks from their personal and business banking accounts. Thereafter, some of the checks were written and negotiated without the authorization of Weston or his wife.

Later that month, a police pursuit of defendant's vehicle began at a Food Lion store in Washington and ended at a second Food Lion store where defendant wrecked his vehicle. The pursuit began when

defendant attempted to cash a forged check at the first grocery store. Washington Police Department Detective William Bell (Bell) searched defendant's car and found torn deposit slips and checks which had been stolen from Weston during the February break-in.

Lisa Harris (Harris), a cashier, testified that while she was working at the first Food Lion earlier on the day of the car chase, defendant handed her a check with initials that Harris did not recognize. According to Harris, defendant stated, "This check has already been pre-approved." Harris said she was not actually deceived since her manager never pre-approved checks. Harris immediately called for assistance and Cindy Dobbins (Dobbins), an assistant manager, responded. After Dobbins took the check to the manager's office, she saw defendant leave through the front door. Dobbins followed him and wrote down his license plate number. Dobbins also testified that she was not deceived by defendant.

At the conclusion of the State's evidence, defendant made a motion to dismiss the charge of obtaining property by false pretenses based on the fact that defendant did not succeed in his attempt at deception. The motion was denied. A motion to dismiss was again made by defendant at the close of all evidence. As before, it was denied. Defendant was later found guilty and sentenced to fifteen to eighteen months in prison.

Defendant acknowledges the holding in *State v. Wilburn*, 57 N.C. App. 40, 290 S.E.2d 782 (1982), that actual deception of a victim is not a necessary element of the crime of obtaining property by false pretenses. However, he contends in his sole assignment of error that because the indictment charged that defendant did "obtain *and* attempt to obtain" property by means of a false pretense which was "calculated to deceive *and did deceive*," the State must establish: (1) that defendant actually obtained property in addition to attempting to obtain it; and (2) the property was obtained by actual deception. Defendant argues that the State proved neither, and his conviction constitutes error. We disagree.

The indictment in the present case reads:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly and designedly intent [sic] to cheat and defraud *obtain and attempt to obtain* assorted merchandise and U.S.

> Currency from Food Lion, Inc. by means of a false pretense which was calculated to deceive *and did deceive.* The false pretense consisted of the following: The defendant represented that he was Larry Brown for the purposes of cashing a check when in fact he was not Larry Brown.

(Emphasis added). N.C. Gen. Stat. § 15A-924(a)(5) requires that every bill of indictment must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (1999). N.C. Gen. Stat. § 14-100 provides:

> If any person shall knowingly and designedly by means of any kind of false pretense . . . obtain[s] or attempt[s] to obtain from any person [or corporation or organization] . . . any . . . thing of value . . . such person shall be guilty of a felony . . . it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.

N.C. Gen. Stat. § 14-100(a) & (c) (1999).

To be effective, an indictment charging a defendant with violating section 14-100 must allege that defendant "obtained or attempted to obtain" something, since it is an essential element of the offense. *State v. Hadlock*, 34 N.C. App. 226, 228, 237 S.E.2d 748, 749 (1977) (arresting judgment of trial court where indictment failed to allege this element). Here, the indictment stated that defendant did "obtain *and* attempt to obtain." In fact, our Supreme Court addressed this issue in *State v. Swaney*:

> "Where a statute sets forth disjunctively several means or ways by which the offense may be committed, a warrant thereunder correctly charges them conjunctively." 4 Strong's N.C. Index 2d, Indictment and Warrant § 9, p. 353; *State v. Chestnutt*, 241 N.C. 401, 85 S.E.2d 297. The indictment should not charge a party disjunctively or alternatively, in such a manner as to leave it uncer-

> tain what is relied on as the accusation against him. The proper way is to connect the various allegations in the indictment with the conjunctive term "and," and not with the word "or."

Swaney, 277 N.C. 602, 611-12, 178 S.E.2d 399, 405 (1970), *appeal dismissed and cert. denied*, 402 U.S. 1006, 29 L. Ed. 2d. 428 (1971), *overruled on other grounds by State v. Hurst*, 320 N.C. 589, 594, 359 S.E.2d 776, 779 (1987). The indictment here, therefore, correctly charged that defendant did "obtain and attempt to obtain" property by means of a false pretense. In addition, an indictment charging a completed offense is sufficient to support a conviction for an attempt to commit the crime charged. N.C. Gen. Stat. § 15-170 (1999).

An indictment charging an offense under section 14-100 must also allege that defendant acted with an intent to defraud. *See State v. Moore*, 38 N.C. App. 239, 241, 247 S.E.2d 670, 672, *disc. review denied*, 295 N.C. 736, 248 S.E.2d 866 (1978). Here, the indictment includes language that defendant pretended to be someone else in order to cash a check he was not authorized to cash. It alleges that he obtained and attempted to obtain the property "by means of a false pretense which was calculated to deceive *and did deceive.*" Thus, in addition to alleging that defendant acted with an intent to deceive, the indictment charges defendant with actually deceiving his victim. The language, "and did deceive," indicating actual deception of a victim, is surplusage and is not fatal to the indictment. *See State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) ("Thus, the allegation of the indictment that defendant acted in concert . . . is an allegation beyond the essential elements of the crime charged and is, therefore, surplusage."); *see also State v. Rogers*, 30 N.C. App. 298, 303, 226 S.E.2d 829, 832 (holding additional allegation of a false promise in an indictment charging violation of section 14-100 is surplusage since it could be separated from the false representation), *disc. review denied*, 290 N.C. 781, 229 S.E.2d 35 (1976).

The indictment asserts facts supporting the essential elements that defendant feloniously attempted to obtain property with an intent to defraud. Notice to defendant was complete and, accordingly, we find no error.

NO ERROR.

JUDGES WYNN and WALKER concur.

STATE OF NORTH CAROLINA EX. REL UTILITIES COMMISSION; PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; AND ROY COOPER, ATTORNEY GENERAL—NORTH CAROLINA DEPARTMENT OF JUSTICE, PETITIONERS v. CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, AND CWS SYSTEMS, INC., RESPONDENTS

No. COA01-402

(Filed 2 April 2002)

Utilities— water service—exclusive provisions—no actual controversy

The Utilities Commission lacked jurisdiction to consider the abrogation or modification of exclusive water service provisions in contracts between a water utility and four subdivision developers where the Public Staff petitioned the Commission for a ruling on whether the provisions were contrary to the public interest, but no municipality or party potentially adverse to the rights of respondent utility complained of the provisions. There is no actual controversy ripe for review by the Commission; however, contractual provisions offending the public policy or public welfare of the state will not be enforced by the courts.

Appeal by respondent from order entered 6 November 2000 by the North Carolina Utilities Commission. Heard in the Court of Appeals 31 January 2002.

North Carolina Utilities Commission—Public Staff, by James D. Little and Kendrick C. Fentress, for petitioner-appellee.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Margaret A. Force, for intervenor-appellee.

Hunton & Williams, by Edward S. Finley, Jr., for respondent-appellant.

SMITH, Judge.

Between 10 November 1998 and 11 February 1999, respondent Carolina Water Service, Inc., (hereinafter "Carolina Water"), entered into agreements with four real estate developers to provide water service to four new subdivisions in Pender and New Hanover Counties which were adjacent to subdivisions already receiving water service from Carolina Water. The developers contracted to convey the new water mains and meters in the subdivisions to Carolina

Water. In return Carolina Water agreed to connect these water mains to its existing water mains and systems and to provide public utility water service in these new subdivisions. Relevant to this appeal, the contract also granted to Carolina Water an exclusive right to provide water service to these new subdivisions:

> Developer agrees to take water utility service solely from Utility for a period of not less than twenty-five years from the date of this agreement. Said service obligation shall be binding on successors and assigns and by recordation of this agreement will be a covenant running with the land within Property.

The Public Staff of the North Carolina Utilities Commission reviewed the notification of intent of Carolina Water to begin water service in these subdivisions and petitioned the Commission to hold the exclusive service provisions in the contracts unenforceable as contrary to public policy and the public interest. On 6 November 2000, the Utilities Commission held that the contracts violated the public policy of this State and the public interest and ordered the offending provisions deleted from the agreements. Carolina Water appeals.

Carolina Water contends the Commission erred in failing to grant its request in its response to the petition for a ruling that the Public Staff's request was premature because the agreements had not caused injury. Carolina Water thus contends the Commission was without jurisdiction to consider the abrogation or modification of the exclusive service provisions. This argument has merit.

First, we recognize that the North Carolina Utilities Commission is vested with authority to "regulate public utilities generally, their rates, services and operations." N.C. Gen. Stat. § 62-2(b). This authority includes "the prerogative to recognize private agreements that may have been entered into between parties with respect to the operation of a public utility, as such agreements may be 'in the interest of the public.' " *Matter of Application by C & P Enterprises, Inc.*, 126 N.C. App. 495, 499, 486 S.E.2d 223, 226, *disc. review denied*, 347 N.C. 136, 492 S.E.2d 36 (1997) (citations omitted). Nevertheless, "the Commission is not required to recognize these private agreements and such contracts are subject to modification or abrogation upon a showing that the contracts do not serve the public welfare." *Id.*

Notwithstanding this authority, neither the Utilities Commission nor the appellate courts of this State have the jurisdiction to review a matter which does not involve an actual controversy. *State ex rel.*

Util. Comm'n. v. Public Staff, 123 N.C. App. 43, 472 S.E.2d 193 (1996); *Funk v. Masten*, 121 N.C. App. 364, 465 S.E.2d 322 (1996). The Uniform Declaratory Judgment Act, G.S. § 1-253 through 1-267, permits the courts to review certain disputes at an *earlier stage* than was normally permitted at common law. *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949). Nevertheless, the Act

> preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. This being so, an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.

Id. at 118, 56 S.E.2d at 409. In actions involving a request for a declaratory judgment, our Supreme Court "has required that an actual controversy exist both at the time of the filing of the pleading and at the time of hearing." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585, 347 S.E.2d 25, 30 (1986) (citation omitted). In addition, our "courts have jurisdiction to render declaratory judgments only when the complaint demonstrates the existence of an actual controversy." *Wendell v. Long*, 107 N.C. App. 80, 82-83, 418 S.E.2d 825, 826 (1992) (citations omitted).

> To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough.

Id. (citations omitted). Importantly, "[t]he courts of this state do not issue anticipatory judgments resolving controversies that have not arisen." *Bland v. City of Wilmington*, 10 N.C. App. 163, 164, 178 S.E.2d 25, 26 (1970), *rev'd on other grounds*, 278 N.C. 657, 180 S.E.2d 813 (1971). In *Town of Pine Knoll Shores v. Carolina Water Service*, 128 N.C. App. 321, 494 S.E.2d 618 (1998), this Court dismissed the Town's complaint seeking relief from similar covenants granting Carolina Water an exclusive right to provide water service. The Town proposed to construct a new water system for an area serviced by Carolina Water, but had not yet begun construction on the competing system. *Id.* We held that "[s]ince our courts do not render advisory opinions," the judgment must be vacated and the case remanded for an entry of an order dismissing the action. *Id.* at 323, 494 S.E.2d at 619.

In the present case, there is no actual controversy ripe for review by the Utilities Commission. The Public Staff of the North Carolina Utilities Commission petitioned the Commission for a ruling on whether the exclusive water service provisions in the contracts between Carolina Water and the four developers were contrary to the public interest. The Commission concluded that it was authorized to review the contract provisions "pursuant to several provisions of Chapter 62." However, neither the Public Staff, the Utilities Commission, nor the Attorney General as intervenor in this case has presented evidence of any justiciable controversy which would warrant review of the contracts by the Commission. Although this Court has recently stated that provisions which grant exclusive water service rights in perpetuity are against the public policy of this State, *Carolina Water Service, Inc. of North Carolina v. Town of Pine Knoll Shores*, 145 N.C. App. 686, 551 S.E.2d 558 (2001), in the instant case, neither a municipality nor a party potentially adverse to the rights of Carolina Water has complained of the provisions. Pursuant to G.S. § 62-94(b), when reviewing decisions of the Utilities Commission, this Court is authorized to

> affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> > (2) In excess of statutory authority or jurisdiction of the Commission . . . .

Accordingly, we are bound to vacate the decision of the Utilities Commission in this case for lack of jurisdiction and remand to the Commission with instructions to dismiss the Public Staff's challenge to the exclusive water service provisions because there is no justiciable or actual controversy between the parties.

Finally, we point out that the Commission ordered the provisions in the service agreements removed from the agreements because they were found to be contrary to the public interest. When certain provisions of a contract violate the public policy of the state, however, those provisions will not be enforced by the courts. *Mazda Motors of America v. Southwestern Motors, Inc.*, 36 N.C. App. 1, 243 S.E.2d 793 (1978), *reversed in part on other grounds*, 296 N.C. 357, 250 S.E.2d 250 (1979); *C. O. Gore v. George J. Ball, Inc.*, 279 N.C. 192, 203, 182 S.E.2d 389, 395 (1971) ("A provision in a contract which is against

public policy will not be enforced."). Thus, if the Commission is correct in its determination that the provisions offend the public policy or public welfare of the state, such provisions will not be enforced by our courts.

Vacated and remanded with instructions.

Judges TIMMONS-GOODSON and BRYANT concur.

ELIZABETH DESPATHY, PLAINTIFF v. WILFRED DESPATHY, DEFENDANT

No. COA01-436

(Filed 2 April 2002)

Divorce— equitable distribution—deviation from stipulations

The trial court did not abuse its discretion in an equitable distribution case by deviating from the parties' stipulations that a 1967 Buick "should be distributed to wife" and a 1970 Buick "should be distributed to husband," because: (1) the language of the stipulations disputed by the parties in the present case failed to definitively dispose of the issue of ownership of the vehicles since the language was permissive rather than mandatory; and (2) the parties could have removed this issue from the trial court's consideration if they desired to do so.

Appeal by defendant from judgment entered 30 January 2001 by Judge Earl J. Fowler in Buncombe County District Court. Heard in the Court of Appeals 31 January 2002.

Carol B. Andres for plaintiff appellee.

Cecilia Johnson for defendant appellant.

TIMMONS-GOODSON, Judge.

On 4 August 1999, Elizabeth Despathy ("plaintiff") filed a complaint against her husband, Wilfred Despathy ("defendant"), in Buncombe County District Court seeking, among other relief, a divorce from bed and board and equitable distribution of the marital assets. The parties thereafter submitted for approval by the trial

court twenty-three stipulations regarding equitable distribution, including the following:

10. The 1967 Buick.

    This car is in Wife's possession and should be distributed to Wife.

    No lien.

11. The 1970 Buick.

    This car is in Husband's possession and should be distributed to Husband.

    No lien.

The trial court approved the stipulations. In its equitable distribution judgment filed 30 January 2001, however, the trial court deviated from the stipulations, awarding the 1970 Buick to plaintiff and the 1967 Buick to defendant. In a document entitled "Letter of Opinion," the trial judge informed the parties' attorneys that he would "distribute the more valuable '67 Buick to [defendant], and the '70 Buick to [plaintiff]" because "[defendant] is the collector, and because it helps reduce the final Distributive Award [plaintiff] will owe to him." Defendant now appeals to this Court.

The dispositive issue on appeal is whether the trial court was obligated under the terms of the pre-trial stipulations to award the 1967 Buick automobile to plaintiff and the 1970 Buick automobile to defendant. Under the facts of the present case, we conclude that the trial court was not bound by the stipulations, and we therefore affirm the order of the trial court.

The division of marital property is within the sound discretion of the trial court and will not be disturbed on appeal absent a showing by the appellant of abuse of that discretion. *See Johnson v. Johnson*, 78 N.C. App. 787, 790, 338 S.E.2d 567, 569-70 (1986). "[T]he trial court's rulings in equitable distribution cases receive great deference and may be upset only if they are so arbitrary that they could not have been the result of a reasoned decision." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986).

North Carolina General Statutes section 1A-1, Rule 16, allows a trial judge "in his discretion [to] direct the attorneys for the parties [in any action] to appear before him for a conference." N.C. Gen. Stat. § 1A-1, Rule 16(a) (1999). Further,

> [i]f a conference is held, the judge may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

N.C. Gen. Stat. § 1A-1, Rule 16 (a)(7) (1999). "An admission in a pleading or a stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury." *Crowder v. Jenkins*, 11 N.C. App. 57, 62, 180 S.E.2d 482, 485 (1971). Judicial admissions "are binding on the pleader as well as the court." *Universal Leaf Tobacco Co. v. Oldham*, 113 N.C. App. 490, 493, 439 S.E.2d 179, 181, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 412 (1994); *see also Buie v. High Point Associates Ltd. Partnership*, 119 N.C. App. 155, 158, 458 S.E.2d 212, 215 (noting that judicial admissions are conclusive upon the parties and the trial judge), *disc. review denied*, 341 N.C. 419, 461 S.E.2d 755 (1995).

Defendant argues that the stipulations entered into between the parties regarding ownership of the Buick vehicles were binding and conclusive upon the trial court, and that the trial court therefore erred in failing to abide by the terms of the stipulations. Plaintiff contends that it was within the trial court's discretion to deviate from the pre-trial order and award plaintiff the less valuable automobile. We agree with plaintiff.

The purpose of a stipulation is to "limit[] the issues for trial to those not disposed of by admissions or agreements of counsel." N.C. Gen. Stat. § 1A-1, Rule 16 (a)(7). The normal effect of a stipulation by the parties is the " 'withdraw[al] [of] a particular fact from the realm of dispute.' " *Crowder*, 11 N.C. App. at 62, 180 S.E.2d at 486 (quoting Stansbury, *N.C. Evidence* 2d § 166).

The language of the stipulations disputed by the parties in the present case, however, failed to definitively dispose of the issue of ownership of the Buick vehicles. Rather than assigning ownership of the automobiles to one party or the other, the stipulations stated that the 1967 Buick "*should* be distributed to Wife" and that the 1970 Buick "*should* be distributed to Husband" (emphasis added). As such, the stipulations regarding the automobiles did not remove the issue

of their distribution from dispute, and under the plain language of the stipulations, the trial court was not bound to abide by the parties' suggestions concerning distribution of the vehicles. The equivocal nature of the stipulations is even more apparent when contrasted with the other stipulations contained in the pre-trial order. For example, the parties stipulated that all "[p]ersonal property . . . . [h]as been divided equally." The trial court therefore did not address the issue of the parties' personal property in its equitable distribution judgment, as that issue had been properly "withdrawn from the realm of dispute." Further stipulations listed various assets and debts of the parties, followed by the words "DISTRIBUTION: HUSBAND." Accordingly, the trial court assigned such assets and debts to defendant. Thus, if the parties had desired to remove from the trial court's consideration the issue of ownership of the Buick automobiles, they could have done so. Because the language of the stipulations regarding the automobiles was permissive rather than mandatory, we hold that the trial court could properly award the automobiles according to its discretion.[1] We therefore affirm the judgment of the trial court.

Affirmed.

Judges BRYANT and SMITH concur.

GUILFORD COUNTY, BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT OFFICE, EX REL., LISA MANNING, PLAINTIFF v. TONY RICHARDSON, DEFENDANT

No. COA01-559

(Filed 2 April 2002)

Public Assistance— paternity—obligation to repay before demand letter

The trial court erred by requiring defendant to repay only the amount of public assistance child support paid after defendant was informed of his possible paternity with a demand letter. A father's duty to support his child arises when the child is born.

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1. In so holding, we note that the better practice would have been for the trial judge to have immediately notified the parties of his intent to modify the distributive award when he realized that an equitable distribution of the marital assets required a slight deviation from the apparent desires of the parties as reflected in the pre-trial stipulations, thus allowing the parties the opportunity to re-evaluate and potentially re-value the marital assets in order to reach a final award amenable to both sides.

Appeal by plaintiff from order entered 14 March 2001 by Judge Patrice Hinnant in Guilford County District Court. Heard in the Court of Appeals 18 March 2002.

Guilford County Attorney's Office, by Deputy County Attorney Michael K. Newby, for plaintiff appellant.

No brief filed for defendant appellee.

McCULLOUGH, Judge.

Plaintiff instituted this action on 11 January 2000 seeking establishment of paternity to the minor child, Cynterria N. Armstrong, born 1 February 1993, current support, and reimbursement for public assistance provided for the benefit of the minor child. After hearing evidence from both plaintiff and defendant, the trial court made the following pertinent findings of fact:

2. That the Defendant was sent a letter on 12/6/99 notifying that he had been named as the father of the above named child and requesting he contact the Child Support Enforcement Agency concerning establishing his support obligation. He did not contact the Agency and his complaint, as described above, was originally filed on January 11, 2000, amended on March 30, 2000 and served on April 5, 2000.

3. That after service of the complaint, the Defendant contacted the Child Support Enforcement Agency and requested a paternity test and the paternity tests were done finding 99.99 percent probability that the defendant was the father of the minor child named above.

4. That according to the income of the Defendant, he should be paying the amount of $248.00 per month current support under the applicable North Carolina Guidelines as shown in Exhibit A attached hereto and made a part thereof.

5. The Plaintiff has submitted evidence that $10,377.67 in past paid public assistance was provided for the support and benefit of the minor child named above until the hearing of this matter.

6. The defendant appears in court today and first acknowledges paternity of the minor child, Cynterria N. Armstrong (DOB 2/1/93). Defendant also agrees to payment of current support in the amount of $248.00 per month, however he contests the

establishment of past paid public assistance obligation in this matter. Defendant contends that the mother of the child previously indicated another man was the father and that he did not know he could be the father until contacted by Child Support Enforcement Agency. Prior to the filing of the complaint, he did not consider himself the child's father until the results of the paternity tests were received.

7. Upon the court's request, past paid public assistance was calculated from the original demand notice to the Defendant until the hearing of this matter. The court takes judicial notice that $3,645.31 has accrued after the notice from IV-D to the Defendant of his possible paternity of his child.

Based upon these findings of fact, the trial court concluded that defendant was the father of the child and that the establishment of a current support obligation in the amount of $248.00 per month was appropriate. The trial court also concluded that

4. It is appropriate that the Defendant only repay the amount of $3,645.31 and accrue past paid public assistance since he was not informed of his possible paternity until December 6, 1999 when he was served with a demand letter from the Child Support Enforcement Agency.

Based upon the foregoing, the trial court ordered defendant to pay monthly support in the amount of $248.00 and to repay a past paid public assistance debt in the amount of $3,645.31 at the rate of $52.00 per month, beginning 1 February 2001.

Plaintiff appealed from this order, contending that the trial court erred by requiring defendant to repay only the past paid amount which accrued after he was served with the demand letter on 6 December 1999. We agree. In *State ex rel. Terry v. Marrow*, 71 N.C. App. 170, 321 S.E.2d 575 (1984), the trial court limited reimbursement by the father to payments made after the date the child support enforcement agency first demanded payment of support by the father. On appeal, the father argued the trial court correctly determined that the State was not entitled to recover from him payments made "before he had any knowledge of the birth of his son and before demand was made upon him to support the child." *Id.* at 173, 321 S.E.2d at 577. The *Marrow* Court based its decision, in part, on language from *Tidwell v. Booker*, 290 N.C. 98, 225 S.E.2d 816 (1976) as follows:

> The duty of the father of an illegitimate child to support such child is not created by the judicial determination of paternity. That determination is merely a procedural prerequisite to the enforcement of the duty by legal action. The father's duty to support his child arises when the child is born.

Marrow, 71 N.C. App. at 174, 321 S.E.2d at 578 (quoting *Tidwell*, 290 N.C. at 116, 225 S.E.2d at 827). This Court ultimately rejected the father's arguments, overturned the trial court's decision, and remanded for entry of a new judgment. *Marrow*, 71 N.C. App. at 174-75, 321 S.E.2d at 578.

We conclude that *Marrow* is on point and controls the outcome of this case. We therefore reverse the order of the trial court and remand for entry of a new order in accordance with this opinion.

Reversed and remanded.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

CASES PUBLISHED WITHOUT PUBLISHED OPINIONS

FILED 2 APRIL 2002

ANDERSON v. SMITH No. 01-314	Durham (00CVD2322)	Reversed
CAVES v. N.C. DEP'T OF CORR. No. 01-681	Wake (00CVS11580)	Affirmed
COUNTY OF DURHAM ex rel. PATTERSON v. BROWN No. 01-864	Durham (96CVD3076)	Affirmed
COUSINS v. N.C. DEP'T OF CORR. No. 01-926	Ind. Comm. (TA-15361)	Affirmed
DAVIS v. GENERAL MOTORS No. 01-435	Columbus (97CVS1134)	Dismissed
DOUGLAS v. N.C. DEP'T OF CORR. No. 01-738	Ind. Comm. (TA-15479)	Affirmed
HILTON v. PEP BOYS SERV. No. 01-852	Ind. Comm. (I.C. 908923)	Dismissed
IN RE AUSTEN No. 01-1306	Davidson (00J243)	Affirmed
IN RE B.A. No. 01-313	New Hanover (00J110)	Reversed and vacated in part; affirmed in part, and remanded for a new disposition hearing
IN RE FINDLEY No. 01-239	Alexander (99J19) (99J20)	Order vacated
IN RE FISHER No. 01-362	Moore (00J13)	Affirmed
MARTIN v. BADGETT No. 01-566	Surry (00CVS1877)	Reversed
PEERLESS INS. v. CORNETT No. 01-293	Caldwell (99CVS1703)	Affirmed
STATE v. ALSTON No. 01-675	Chatham (96CRS565)	No error
STATE v. BALDWIN No. 01-923	Pasquotank (96CRS3986)	No error
STATE v. BROADY No. 01-855	Northampton (96CRS2203)	No error

STATE v. BROWN No. 01-563	Durham (98CRS50929)	No error
STATE v. BRYANT No. 01-900	Pasquotank (99CRS1424) Dare (99CRS1569)	No error in part; remanded in part
STATE v. CLARK No. 00-1321	Lenoir (98CRS9063) (98CRS2563)	No error
STATE v. DUNN No. 01-851	Haywood (99CRS6563)	Affirmed
STATE v. DUNN No. 01-592	Wake (00CRS2133) (00CRS10361)	No error
STATE v. EATON No. 01-336	Rowan (99CRS3325) (99CRS7649)	No error
STATE v. EFFINGHAM No. 01-886	Guilford (00CRS83053) (00CRS85297)	No error
STATE v. ELDERS No. 01-570	Gaston (98CRS27531) (98CRS27532) (99CRS7177) (99CRS26771)	No error
STATE v. GORDON No. 01-704	Rutherford (99CRS6413) (99CRS7372)	No error
STATE v. GREENE No. 01-229	Durham (95CRS24833)	No error
STATE v. HERRON No. 01-744	Mecklenburg (99CRS26620) (99CRS26621) (99CRS26622) (99CRS26629) (99CRS26630) (99CRS26632) (99CRS26633)	No error
STATE v. HORNE No. 01-502	Davidson (99CRS8512) (99CRS21564)	No error
STATE v. HOWELL No. 01-782	Gaston (98CRS18102) (98CRS18104) (98CRS18105)	No error

STATE v. JOHNSON No. 01-901	Iredell (99CRS18046)	No error
STATE v. JOHNSON No. 01-610	Lenoir (99CRS4924) (99CRS4925)	No error
STATE v. JOHNSON No. 01-837	Forsyth (00CRS56794) (01CRS60)	No error
STATE v. KING No. 01-759	Forsyth (99CRS37793) (99CRS54836)	No error
STATE v. LEIGH No. 01-567	Perquimans (95CRS1053) (95CRS1054)	Remanded for new sentencing hearing
STATE v. LAMBETH No. 01-909	Davidson (99CRS783) (99CRS784)	Affirmed
STATE v. MARTIN No. 01-462	Wake (99CRS67171)	No error
STATE v. MASON No. 01-1025	Durham (00CRS53060)	No error
STATE v. McCOLLUM No. 01-733	Rockingham (99CRS5774) (99CRS9800) (99CRS9801)	No error; remanded for correction of a clerical error
STATE v. MITCHELL No. 01-598	Wake (99CRS81140) (99CRS81141)	No error
STATE v. QUICK No. 01-192	Scotland (98CRS866) (98CRS867) (98CRS868) (98CRS1110) (98CRS1114)	Affirmed in part; vacated in part, new trial
STATE v. RANKINS No. 01-640	Chowan (97CRS2155)	No error
STATE v. SMITH No. 01-512	Cumberland (99CRS66106) (99CRS66107) (99CRS66108) (99CRS66109)	Possession of stolen goods: judgment arrested. Felonious larceny: remanded for resentencing.
STATE v. STITT No. 01-534	Union (00CRS1211) (00CRS3021)	No error

STATE v. SWINSON No. 01-618	Wayne (00CRS644) (00CRS2076)	No error
STATE v. TIBBETTS No. 01-643	Wake (99CRS5341) (99CRS5342) (99CRS5343)	No error
STATE v. TILLMAN No. 01-560	Richmond (00CRS4531) (00CRS4532) (00CRS4533) (00CRS4534) (00CRS4535) (00CRS4536) (00CRS4537) (00CRS4584) (00CRS4585) (00CRS4586) (00CRS4587) (00CRS4588) (00CRS4589) (00CRS6224) (00CRS6225) (00CRS6226) (00CRS6227) (00CRS6228) (00CRS6229) (00CRS6230)	No error, remanded for correction of clerical errors
STATE v. TRULL No. 01-241	Cabarrus (99CRS11458) (99CRS11495) (99CRS11496) (00CRS4950)	No error; remanded for correction of clerical error
STATE v. TUCKER No. 01-278	Durham (98CRS38137) (98CRS38138) (99CRS16024)	Case No. 98CRS38137 and Case No. 98CRS38138: No error. Case No. 99CRS16024: Reversed and remanded.
STATE v. WHITAKER No. 01-770	Ashe (00CRS521) (00CRS522)	No error
STATE v. WILKINS No. 01-902	Bertie (99CRS1119) (98CRS3472)	No error

STATE v. WILLIAMS No. 01-692	Wake (00CRS18050) (00CRS18052)	No error
WADDELL v. WILLIAMS No. 01-62	Alamance (97CVS1306)	Reversed and remanded
ZAREK v. STINE No. 01-33	Cumberland (99CVS4878)	Affirmed

DAN RHYNE AND ALICE RHYNE v. K-MART CORPORATION, SHAWN ROBERTS, AND JOSEPH HOYLE

No. COA00-1516

(Filed 16 April 2002)

1. Constitutional Law; Damages and Remedies— statute capping award of punitive damages—right to jury trial—separation of powers—open courts guarantee—special legislation—due process—equal protection—vagueness

The trial court did not err by reducing the jury's award of punitive damages to plaintiffs from $11.5 million each to $250,000 each in accordance with the cap, or limit, on the award of punitive damages under N.C.G.S. § 1D-25 and by refusing to declare the statute unconstitutional, because: (1) the statute does not violate the right to a jury trial under N.C. Const. Art. I, § 25 since jury trials are not constitutionally required in a wide range of civil cases that do not "respect" property including punitive damages; (2) the statute does not violate the principle of separation of powers by allegedly exercising the power of remittitur since a punitive damages cap and remittitur are not the same and operate under differing circumstances; (3) the open courts guarantee is not violated since actual damages are not limited; (4) the statute does not constitute special legislation, and it does not violate N.C. Const. Art. II, § 24, cl.(1)(i) or N.C. Const. Art. I, § 32; (5) the statute does not violate due process and equal protection since there can be no taking of property by placing a cap on punitive damages and no infringement on the right to enjoy the fruits of one's own labor, and plaintiffs cannot carry their burden of showing the statute bears no rational relationship to any legitimate government interest; and (6) the statute is not unconstitutionally vague since the statute provides sufficient language for uniform judicial administration.

2. Damages and Remedies— punitive damages—per plaintiff rather than per claim basis

The trial court did not err by capping punitive damages on a per plaintiff rather than a per claim basis, because: (1) N.C.G.S. § 1D-25 limits punitive damages to no more than three times the compensatory damages awarded or $250,000, whichever is greater, and all compensatory damages awarded to a party must therefore be totaled to one number for consideration of the cap;

(2) a per claim basis would improperly allow duplicate credit for one compensatory award; and (3) the language of the statute speaks to a single award for each plaintiff.

3. Damages and Remedies— punitive damages—award not excessive

The trial court did not err by determining the modified jury award of punitive damages of $250,000 was not excessive, because: (1) the ratio of actual harm to the award is approximately 30 to 1 for plaintiff husband and 23 to 1 for plaintiff wife; (2) the actions of defendant individuals were violent; (3) defendant corporation accused plaintiffs of trespassing and instituted assault charges against plaintiff husband in order to keep plaintiffs from taking out criminal charges against defendant corporation; and (4) plaintiffs suffered both physical and psychological problems as a result, and plaintiff wife now has a permanent heart condition that is arguably traceable to the incident at issue.

4. Costs— attorney fees—punitive damages case

The trial court did not err in an action seeking punitive damages by denying attorney fees under N.C.G.S. § 1D-45, because: (1) although plaintiffs discuss how defendant corporation engaged in malicious acts or practices as a corporation, plaintiffs fail to establish how defendant's defense may have been malicious or frivolous; and (2) plaintiffs failed to show an abuse of discretion by the trial court under these circumstances.

5. Appeal and Error— preservation of issues—failure to object

Although defendant corporation contends the trial court erred in an action seeking punitive damages by concluding that defendant corporation is not entitled to a new trial based on plaintiffs' introduction of evidence of defendant's discovery misconduct, defendant failed to preserve this issue for appeal because: (1) defense counsel never specifically objected to the inclusion of evidence demonstrating defendant corporation's misconduct during discovery on the grounds now argued; and (2) a party in a civil case may not raise an issue on appeal that was not raised at the trial level.

Judge GREENE concurring in part and dissenting in part.

Appeal by plaintiffs and defendant K-Mart Corporation from judgment entered 17 May 2000 by Judge Richard D. Boner in Gaston County Superior Court. Heard in the Court of Appeals 16 October 2001.

Robert S. Peck, Arcangela M. Mazzariello, and Gray, Layton, Kersh, Solomon, Sigmon, Furr & Smith, PA, by William E. Moore, Jr. for plaintiffs.

Alston & Bird, LLP, by Leigh M. Levine, James C. Grant (pro hac vice), and Nowell D. Berreth (pro hac vice), for defendant K-Mart.

Patterson, Harkavy & Lawrence, LLP, by Burton Craige for North Carolina Academy of Trial Lawyers, North Carolina Friends of Residents in Long Term Care, Inc., North Carolina Justice and Community Development Center, and American Civil Liberties Union Legal Foundation of North Carolina, Amici Curiae.

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THOMAS, Judge.

The primary issue in this case is whether North Carolina's General Assembly exceeded its constitutional authority in enacting a cap, or limit, on the award of punitive damages.

North Carolina General Statute § 1D-25 became effective on 1 January 1996 and placed a cap on the amount of punitive damages that could be awarded at $250,000 or three times the compensatory damages, whichever is larger.

Here, plaintiffs Dan Rhyne (Mr. Rhyne) and Alice Rhyne (Mrs. Rhyne), husband and wife, received verdicts for compensatory damages in the amounts of $8,255 and $10,730, respectively, against

defendant K-Mart Corporation (K-Mart). The jury then awarded each of them $11.5 million in punitive damages. In accordance with its interpretation of section 1D-25, the trial court reduced the punitive damages awards to $250,000 per claimant.

Plaintiffs appeal. They contend section 1D-25 is unconstitutional under the North Carolina Constitution in that it: (1) violates their right to a jury trial; (2) violates the separation of powers principle; (3) violates the open courts guarantee; (4) constitutes an improper form of special legislation; (5) violates principles of due process, equal protection, and the right to enjoy the fruits of one's own labor; and (6) is void for vagueness.

We disagree with plaintiffs' contentions. Based on the reasoning herein, we hold the General Assembly acted within the bounds of the North Carolina Constitution and in accordance with its legislative prerogative.

Because section 1D-25 is constitutional, we also address three other issues raised by plaintiffs and K-Mart. They are: (a) whether the $250,000 cap is to be applied per claim, per plaintiff, or per defendant; (b) whether the trial court erred in denying plaintiffs' request for attorney fees; and (c) whether K-Mart is entitled to a new trial.

The pertinent facts are as follows: On 28 April 1998, plaintiffs were walking near a store owned by K-Mart. Defendants Shawn Roberts (Roberts) and Joseph Hoyle (Hoyle), employees of K-Mart, confronted plaintiffs and asked if they had been rummaging through K-Mart's dumpsters. Plaintiffs explained they were merely walking for exercise and had not touched the dumpsters.

The next day, plaintiffs were again walking in the K-Mart parking lot when Roberts and Hoyle approached them. Roberts grabbed Mr. Rhyne, put him in a chokehold and forced him to his knees. Mrs. Rhyne screamed and jumped on Roberts's back. He shook her off, resulting in her falling to the ground. When she tried to help her husband again, Hoyle intervened and pushed her back to the ground.

Shortly thereafter, two police officers arrived. Plaintiffs told the officers they wanted to press criminal charges against Roberts and Hoyle. Meanwhile, Roberts and Hoyle told the police they had seen plaintiffs going through K-Mart's dumpsters and that plaintiffs were guilty of theft and trespass. Roberts and Hoyle subsequently admitted, however, that they had only heard a noise near the dumpsters and

assumed it must have been plaintiffs. Nonetheless, K-Mart took out two assault warrants against Mr. Rhyne. The charges were dismissed on 10 June 1998.

Following the altercation, plaintiffs sought medical attention for resulting physical injuries and psychiatric problems. They were diagnosed with adjustment disorders, prescribed medication, and advised to obtain counseling. Mrs. Rhyne also suffered a heart attack. According to expert testimony, the altercation and subsequent events contributed to her heart condition, but the relationship was "unquantifiable." Mrs. Rhyne's medical bills totaled $13,582.40, which included $11,349.50 for treatment of her heart attack. Mr. Rhyne's medical bills and lost wages amounted to $5,376.12.

Plaintiffs filed a complaint against K-Mart, Roberts and Hoyle on 31 December 1998, alleging assault, false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress. In addition, plaintiffs claimed K-Mart was negligent in the training and supervision of its security personnel. In their prayer for relief, plaintiffs asked for compensatory and punitive damages.

Pursuant to N.C. Gen. Stat. § 1D-30, the trial was bifurcated into compensatory and punitive damages stages. In the compensatory stage, Hoyle was found not liable and, although the jury determined Roberts to be liable, the trial court granted plaintiffs' motion to dismiss with prejudice all claims for damages against him. Plaintiffs did receive a favorable verdict against K-Mart, however, with the jury awarding $8,255 to Mr. Rhyne and $10,730 to Mrs. Rhyne. In the punitive damages stage, with plaintiffs proceeding only against K-Mart, the jury returned a verdict of $11.5 million for each plaintiff. Citing N.C. Gen. Stat. § 1D-25(b), the trial court reduced each punitive damages award to $250,000. Upon plaintiffs' motions, the trial court denied their requests to have the statute declared unconstitutional and for attorney fees. Both plaintiffs and K-Mart appeal.

Plaintiffs' assignments of error include: (a) the trial court's refusal to declare section 1D-25 unconstitutional; (b) the capping of punitive damages on a per plaintiff rather than a per claim basis; and (c) the denial of attorney fees. In its cross-appeal, K-Mart requests a new trial based on its claim that the trial court prejudicially erred during the punitive damages stage in allowing evidence of its discovery misconduct. In the alternative, K-Mart argues the trial court should have applied the punitive damages cap on a per defendant basis with plaintiffs splitting the $250,000.

I. The Constitutionality of Section 1D-25

[1] In their first assignment of error, plaintiffs contend section 1D-25 is unconstitutional because it: (1) violates their right to a jury trial; (2) violates the separation of powers principle; (3) violates the open courts guarantee; (4) constitutes an improper form of special legislation; (5) violates principles of due process, equal protection, and the right to enjoy the fruits of one's own labor; and (6) is void for vagueness.

Section 1D-25 provides:

> (a) In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.
>
> (b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.
>
> (c) The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury.

N.C. Gen. Stat. § 1D-25 (1999). Plaintiffs' argument is based only on the North Carolina Constitution and thus does not invite federal case law scrutiny by implicating the United States Constitution.

A. Jury Trial

Plaintiffs first contend section 1D-25 is unconstitutional because it violates their right to a jury trial pursuant to Art. I, § 25, which provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. Art. I, § 25.

Our Supreme Court has held that the right to a jury trial under Art. I, § 25 of the North Carolina Constitution applies *only:* (1) where the right to a jury trial existed at common law or by statute at the time

of the adoption of the 1868 Constitution; and (2) when the cause of action "respects property." *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 385 S.E.2d 329 (1989), *rev'd on other grounds*, 333 N.C. 81, 423 S.E.2d 759 (1992). For a cause of action originating after 1868, the right to a jury trial is contingent upon statutory authority. *Id.* (citing *Groves v. Ware*, 182 N.C. 553, 558, 109 S.E. 568, 571 (1921)).

Punitive damages were determined by juries prior to 1868. *See Gilreath v. Allen*, 32 N.C. 67, 69 (1849). The first part of the test is therefore satisfied, so we proceed to the second. The distinction between causes of action respecting property and those respecting other rights is fundamental and well-established. In *Smith v. Campbell*, 10 N.C. 595, (1825), our Supreme Court held that:

> Property is a thing over which a man may have dominion and power to do with it as he pleases, so that he violates not the law. He may give, grant, or sell it at his pleasure. A person has an *interest* in a *debt* or *duty*; but a *property* in a *thing* only, either natural or artificial. He cannot give or grant a debt or duty, because it is not property; not because, as some supposed, the law through policy will not permit a thing in action to be given or granted; it is because this thing in action is not property that it cannot be granted.

Id. at 597-98 (emphasis in original). The *Smith* court then held that the defendant was not entitled to a jury trial on the issue of nonpayment of a debt owned. *Id.*

Since *Smith*, North Carolina courts have held that jury trials are not constitutionally required in a wide range of civil cases that do not "respect" property. *See McCall v. McCall*, 138 N.C. App. 706, 531 S.E.2d 894 (2000) (equitable distribution proceedings); *State v. Morris*, 103 N.C. App. 246, 405 S.E.2d 351 (1991) (forfeiture proceedings); *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981) (child custody proceedings); *State v. Carlisle*, 285 N.C. 229, 204 S.E.2d 15 (1974) (driver's license revocation proceedings).

The purpose of punitive damages, as its nomenclature indicates, is to punish. The person aggrieved has the right to compensation for, *inter alia*, actions for pain and suffering, emotional distress, lost wages, medical bills, disability, and loss of consortium. The right to punish, meanwhile, properly resides with the State. Thus, no individual possesses the right to punitive damages as being that person's

property. *See Watson v. Dixon*, 130 N.C. App. 47, 502 S.E.2d 15 (1998), *aff'd*, 352 N.C. 343, 532 S.E.2d 175 (2000); *Lynch v. North Carolina Dept. of Justice*, 93 N.C. App. 57, 376 S.E.2d 247 (1989); *Hunt v. Hunt*, 86 N.C. App. 323, 357 S.E.2d 444, *aff'd*, 321 N.C. 294, 362 S.E.2d 161 (1987). As even the dissent in this case does not fully contest, the legislature has the power to abolish punitive damages. *See Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904). The power to abolish punitive damages necessarily carries with it the power to limit the punishment. *See generally*, *Pulliam v. Coastal Emergency Services of Richmond, Inc.*, 509 S.E.2d 307, 314 (Va. 1999); *Bagley v. Shortt*, 410 S.E.2d 738 (Ga. 1991).

Accordingly, we reject plaintiffs' contention that punitive damages are within the definitional umbrella of "respecting property" and likewise do not agree with the dissent's analysis that such a requirement has been abolished.

B. Separation of Powers

The North Carolina Constitution provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. Art. I, § 6. Plaintiffs argue section 1D-25 is unconstitutional in that it violates the principle of separation of powers by exercising the power of remittitur.

Remittitur is "[t]he procedural process by which an excessive verdict of the jury is reduced." *Black's Law Dictionary* 1295 (6th ed. 1990). It is a judicial process. However, a punitive damages cap and remittitur are not the same. In *Pulliam v. Coastal Emergency Services of Richmond, Inc.*, the Virginia Supreme Court held that:

> remittitur and the [medical malpractice damages] cap are not equivalent and do not come into play under the same circumstances. Remittitur, as well as additur, is utilized only after a court has determined that a party has not received a fair and proper jury trial. The cap, however, is applied only after a plaintiff has had the benefit of a proper jury trial.

Pulliam, 257 Va. 1, 12, 509 S.E.2d 307, 313 (1999). Likewise, the statutes in North Carolina indicate that remittitur and the punitive damages cap operate under differing circumstances. While classic remittitur is not permitted in North Carolina, the concept is governed by Rule 59 of the North Carolina Rules of Civil Procedure in which a

new trial may be granted to a party for excessive or inadequate damages appearing to have been awarded under the influence of passion or prejudice. *See* N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (1999). Section 1D-25, on the other hand, requires the award to be limited after a proper jury trial. *See* N.C. Gen. Stat. § 1D-25 (1999).

Moreover, as aforementioned, the legislature has the power to abolish punitive damages entirely. *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904). Further, the legislature has the power to create, modify, or eliminate other common law remedies. *See* N.C. Gen. Stat. §§ 1-538, 1-539.21; *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968); *Gillikin v. Bell*, 254 N.C. 244, 118 S.E.2d 609 (1961). *See also Pulliam v. Coastal Emergency Services of Richmond, Inc.*, 509 S.E.2d 307, 314 (Va. 1999); *Bagley v. Shortt*, 410 S.E.2d 738 (Ga. 1991). Therefore, the legislature necessarily has the power to limit punitive damages.

A separation of powers violation would actually occur if we were to adopt plaintiffs' argument here. Under our system of government, it is anathema for a court to act as a legislature, test the political winds, or substitute its own preferences for those of the legislative representatives of the people.

The General Assembly is where public policy is better debated. The General Assembly is where compromise, sometimes the result of years of discussion evolving over numerous sessions, can occur. The General Assembly is where lawmakers can consider scenarios broader than just the specific factors attendant to a particular case. Our authority is limited, and the acceptance of that limitation is a public trust we are bound to keep in the promotion of a properly aligned government.

> If, then, a government composed of Legislative, Executive and Judicial departments, were established by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it is void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so. . . . If, on the other hand, the Legislature of the union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the

> Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.

Calder v. Bull, 3 U.S. 386, 1 L. Ed. 648 (1798) (Iredell, J., concurring in the result). Further, the General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution. *See Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970). Absent constitutional restraint, public policy questions are for legislative determination. *Id.* at 41, 175 S.E.2d at 671.

However, there is a judicial duty to examine a statute and determine its constitutionality when the issue is properly presented. *State v. Arnold*, 147 N.C. App. 670, 557 S.E.2d 119 (2001). In doing so, the statute is presumed constitutionally valid unless and until the contrary is shown. *Id.* (citing *State v. Anderson*, 275 N.C. 168, 175, 166 S.E.2d 49, 50 (1969)). Here, the contrary has not been shown and we reject plaintiffs' contention that section 1D-25 violates the principle of separation of powers.

C. Open Courts Guarantee

The open courts provision of the North Carolina Constitution provides that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. Art. I, § 18. The "remedy by due course of law" clause has been described as a "proper and adequate remedy." *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 592, 284 S.E.2d 188, 190 (1981), *modified*, 306 N.C. 364, 293 S.E.2d 415 (1982).

Our Supreme Court has held that "the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." *Watson v. Dixon*, 352 N.C. 343, 348, 532 S.E.2d 175, 178 (2000) (citations omitted). Plaintiffs claim section 1D-25 violates this provision by offering a meaningless remedy.

In *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904), our Supreme Court held that a statute eliminating punitive damages in an action for libel was not unconstitutional under the open courts guarantee because it did not limit the recovery of *actual* damages. The *Osborn* court went on to say actual damages are those "as the plaintiff has suffered in respect to his property, business, trade, profession or

occupation." *Id.* at 634. The *Osborn* court explained that "[t]he right to have punitive damages assessed is, therefore, not property. The right to recover actual or compensatory damages *is property.*" *Id.* at 633 (emphasis in original).

In the instant case, actual damages were not limited. Accordingly, we reject plaintiffs' argument that section 1D-25 violates the open courts guarantee.

D. Special Legislation

Plaintiffs contend section 1D-25 violates two requirements of the North Carolina Constitution involving special legislation.

First, they state it violates the provision that the "General Assembly shall not enact any local, private, or special act or resolution . . . . [r]emitting fines, penalties, and forfeitures, or refunding moneys legally paid into the public treasury[.]" (sic) N.C. Const. Art. II, § 24, cl.(1)(i). As aforementioned, we have held that the damages cap does not constitute remittitur.

Second, they assert the statute violates the provision that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. Art. I, § 32. However, the punitive damages cap equally applies to all defendants. Plaintiffs have not shown that the statute creates a distinction between groups. *See infra*, Section I.E.

Consequently, we reject plaintiffs' assertion that section 1D-25 constitutes special legislation or that it violates either of these constitutional provisions.

E. Due Process and Equal Protection

The North Carolina Constitution provides that:

> 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 the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. Art. I, § 19. Plaintiffs contend the punitive damages cap: (1) constitutes a taking of property without just compensation, infringing on a fundamental right; and (2) treats similarly sit-

uated persons differently without compelling reason or rational justification.

Plaintiffs argue the punitive damages award is the fruit of their labor and therefore a form of property. Nevertheless, we have held punitive damages do not constitute property belonging to an individual. Thus, there can be no taking of property by placing a cap on punitive damages and no infringement of the right to enjoy the fruits of one's own labor. We note there is no constitutional right to a jury trial on punitive damages, as we held in Section I.A.

Because there is no fundamental right involved and the statute makes no mention of suspect classifications, section 1D-25 should be subjected to a rational basis review. In a rational basis review, the party challenging a statute must show that it bears no rational relationship to any legitimate government interest. *Department of Transp. v. Rowe*, 353 N.C. 671, 549 S.E.2d 203 (2001), *cert. denied*, 534 U.S. —, 151 L. Ed. 2d 972 (2002).

Plaintiffs complain that section 1D-25 treats similarly situated plaintiffs who receive jury verdicts that include a punitive damage award, differently. They argue it does so without rational justification by enabling some to receive the full measure of the jury verdict and others to receive only an arbitrarily derived amount that is less than the jury award. Plaintiffs assert that there is no rational relationship between the statute and a legitimate state interest because there is no punitive damages crisis in North Carolina.

Whether a statute violates due process is a question of degree of reasonableness. *Lowe v. Tarble*, 312 N.C. 467, 323 S.E.2d 19 (1984). Our Supreme Court has held that if the legislature *reasonably could have concluded* that there was a rational relationship between the punitive damages cap and the State's legitimate interest in its economic development, the rational basis review ends in the State's favor. *See Lowe v. Tarble*, 312 N.C. 467, 472, 323 S.E.2d 19, 22 (1984). Likewise, here, the legislature could have concluded that the enactment of section 1D-25 was for the legitimate public purpose of preserving and furthering the economic development of North Carolina.

Plaintiffs cannot prevail if the question is at least debatable. *See id.* Here, it is at least debatable. For the Fourth Circuit, the question was actually resolved when the court held that a punitive damages cap bore a rational relationship to a proper governmental purpose—

to limit the jury's punitive damages awards to those that punish and deter and to prevent awards that would burden the state's economy. *Wackenhut Applied Technologies Center Inc. v Sygnetron Protection Systems, Inc.*, 979 F.2d 980 (4th Cir. Va. 1992).

Additionally, there is no requirement that the legislature be only reactive. There does not have to be a present crisis in North Carolina or even in the United States. Whenever it would be reasonable, the legislature may, and should, be proactive.

Due process is a critical component of our constitutional foundation. It is an essential protection, one which should be carefully and precisely applied rather than devalued through random use as a residual depository. Due process is not an endless drama encumbered only by the limits of our collective imagination.

Plaintiffs cannot carry their burden of showing the statute bears no rational relationship to any legitimate government interest, and we reject their argument.

F. Vagueness

Plaintiffs contend section 1D-25 is unconstitutionally vague because the trial judge was unable to determine how it should be applied.

A statute is unconstitutionally vague when:

> "men of common intelligence must necessarily guess at [the statute's] meaning and differ as to its application." . . . Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.

In Re Burrus, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969), *aff'd, McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971) (citations omitted). "The statute must be examined in light of the circumstances in each case, and [the party challenging the statute has] the burden of showing either that the statute provides inadequate warning as to the conduct it governs or is incapable of uniform judicial administration." *State v. Covington*, 34 N.C. App. 457, 238 S.E.2d 794 (1977), *disc. rev. denied*, 294 N.C. 184, 241 S.E.2d 519 (1978).

"Impossible standards of clarity are not required by the constitution." *Lowe*, 312 N.C. at 469, 323 S.E.2d at 21. In *Tetterton v. Long Mfg. Co., Inc.*, 314 N.C. 44, 332 S.E.2d 67 (1985), our Supreme Court held that a statute was not vague simply because it could be interpreted three different ways. The true meaning of the statute can be deciphered using rules of statutory construction, which we employ in the next section. *See infra*, Section II.

To reason otherwise, many, if not most, of the statutes which become subject to our analysis would be unconstitutional. Few arrive at this Court when all agree on their interpretations.

After carefully examining the language of section 1D-25, in light of the facts of the instant case, we conclude that the statute provides sufficient language for uniform judicial administration. We therefore reject plaintiffs' final constitutional argument.

II. The Application of the Punitive Damages Cap

[2] We now turn to the statutory interpretation of section 1D-25. The trial court awarded each plaintiff $250,000. K-Mart argues the damages cap should be per defendant. Plaintiffs contend the punitive damages cap should be per claim.

In resolving issues of statutory interpretation, we look first to the language of the statute itself. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308, *reh'g denied*, 351 N.C. 191, 541 S.E.2d 716 (1999). Where doubt as to the meaning of the statutory language exists, our courts will then resort to judicial construction. *Richardson v. McCracken Enterprises*, 126 N.C. App. 506, 508, 485 S.E.2d 844, 846 (1997), *aff'd*, 347 N.C. 660, 496 S.E.2d 380 (1998). In these matters, the task of the Court is to ascertain and adhere to the intent of the legislature. *Brooks, Comr. of Labor v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 587, 281 S.E.2d 24, 33 (1981). To ascertain legislative intent with regard to the cap, we presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts. *Raeford Lumber Co. v. Rockfish Trading Co.*, 163 N.C. 314, 317, 79 S.E. 627, 628-29 (1913).

Again, section 1D-25 provides:

> (a) In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.

> (b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.
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> (c) The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury.

N.C. Gen. Stat. § 1D-25 (1999). By our textual analysis, we hold the cap should be applied per plaintiff.

Section 1D-25(b) limits punitive damages to no more than three times the compensatory damages awarded or $250,000, whichever is greater. N.C. Gen. Stat. § 1D-25(b). All compensatory damages awarded to a party must therefore be totaled to one number for consideration of the cap. Here, it was $8,255 for Mr. Rhyne and $10,730 for Mrs. Rhyne. Because each was far less than one-third of $250,000, the appropriate cap was $250,000. If the compensatory award had been one million dollars for Mr. Rhyne, however, and if there had been three claims subject to punitive damages, plaintiffs' argument would have resulted in the cap being the product of three times compensatory damages times the three claims. That result would allow duplicate credit for one compensatory award, a result which clearly would require a re-writing of section 1D-25.

The statute further states that "[i]n all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages." N.C. Gen. Stat. § 1D-25(a). The phrases "*an* award" and "*the* amount of punitive damages" both speak to a *single* award for each plaintiff. As to compensatory damages, "the amount of compensation for all other damages" clearly speaks of one amount for the combination of those damages. Were it otherwise, the General Assembly could easily have made plural the terms "the amount" and "an award." It did not, and we are therefore bound by the text of the statute.

To receive a verdict for punitive damages, a party must prove one or more specified aggravating factors. *See* N.C. Gen. Stat. § 1D-35

(1999). The jury then uses the full combination of those factors when arriving at one number or amount as the award. To be consistent in determining the statutory cap, there is one total for compensatory damages to be applied to one number for punitive damages.

K-Mart cites a West Virginia medical malpractice statute which provides a one million dollar cap on punitive damages. *See* W. Va. Code Ann. § 55-7B-8 (2000). In *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877 (W.Va. 1991), the West Virginia Supreme Court held the cap was constitutional and should be applied on a per defendant basis because the statute was phrased in terms of the defendant, not the plaintiff. *Id.* at 888. However, we decline to adopt that rationale because we do not believe it is consistent with the text of our statute and what our courts have determined punitive damages to represent.

"The purpose of punitive damages is to punish wrongdoers for misconduct of an aggravated, extreme, outrageous, or malicious character." *Nance v. Robertson*, 91 N.C. App. 121, 123, 370 S.E.2d 283, 284, *rev. denied*, 323 N.C. 477, 373 S.E.2d 865 (1988). "The purpose . . . is not to compensate a plaintiff for personal injuries. Instead, [punitive damages] are awarded to punish the defendant's conduct." *Kuykendall v. Turner*, 61 N.C. App. 638, 643, 301 S.E.2d 715, 719 (1983) (citing E. Hightower, *N.C. Law of Damages* § 4-1 (1981)).

K-Mart's suggestion would require joined parties to divide a punitive damages award that was subject to the cap. Our courts have encouraged parties to join in lawsuits to better consolidate and facilitate cases. *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993); *State v. Cottingham*, 30 N.C. App. 67, 226 S.E.2d 387 (1976); *Smith v. Pate*, 246 N.C. 63, 67, 97 S.E.2d 457, 460 (1957). K-Mart's proposal would *discourage* parties from joining. Plaintiffs would not take the chance that their possible recoveries would be diluted, not by any defect in their claims, but solely because there was more than one plaintiff.

In the case at bar, both plaintiffs were injured by K-Mart's wrongdoing. Consequently, K-Mart owes punitive damages in the amount of $250,000 *per plaintiff*, totaling $250,000 to Mr. Rhyne and $250,000 to Mrs. Rhyne.

[3] We must now determine if the modified award is excessive. A new trial may be granted on any issue due to "[e]xcessive or in-

adequate damages appearing to have been given under the influence of passion or prejudice." N.C. Gen. Stat. § 1A-1, Rule 59(a)(6) (1999).

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 134 L. Ed. 2d 809 (1996), the United States Supreme Court held that a punitive damages award of $2,000,000 was grossly excessive in light of a low level of reprehensibility of conduct and 500 to 1 ratio between the award and the actual harm to the victim. When an award is "grossly excessive," it violates the due process clause of the Fourteenth Amendment. *Id.* at 568. The Court stated that:

> Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense." This principle reflects the accepted view that some wrongs are more blameworthy than others. Thus, we have said that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." Similarly, "trickery and deceit," are more reprehensible than negligence. . . .
>
> The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree. . . . [W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. . . . Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. . . .
>
> [A] reviewing court engaged in determining whether an award of punitive damages is excessive should "accord 'substan-

tial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."

Id. at 576-83 (footnotes and citations omitted).

In the instant case, the ratio of actual harm to the award is approximately 30 to 1 for Mr. Rhyne and 23 to 1 for Mrs. Rhyne. We also note that the actions of Roberts and Hoyle were violent. Roberts attacked Mr. Rhyne and put him in a chokehold for several minutes. Hoyle kept Mrs. Rhyne from helping her husband and pushed her to the ground. Further, to keep plaintiffs from taking out criminal charges against it, K-Mart accused plaintiffs of trespassing and instituted assault charges against Mr. Rhyne. Plaintiffs suffered both physical and psychological problems as a result and Mrs. Rhyne now has a permanent heart condition that is arguably traceable to the incident at issue. We thus hold that in light of: (1) K-Mart's reprehensible conduct, which constituted more than mere negligence; (2) the relatively low ratio; and (3) deference given to the legislature, the awards are not grossly excessive under the *BMW* factors.

III. Attorney Fees

[4] Finally, plaintiffs argue the trial court erred by refusing to award attorney fees pursuant to N.C. Gen. Stat. § 1D-45. We disagree.

Section 1D-45 provides, in pertinent part, "[t]he court shall award reasonable attorney fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious." N.C. Gen. Stat. § 1D-45 (1999). "The purpose of providing the costs of legal representation is to encourage professional peer review by limiting the possibility of unreasonable litigation expenses." *Virmani v. Presbyterian Health Services Corp.*, 127 N.C. App. 71, 488 S.E.2d 284, *rev. denied*, 347 N.C. 141, 492 S.E.2d 38 (1997) (citing *Smith v. Ricks*, 31 F.3d 1478, 1487 (9th Cir. 1994), *cert. denied*, 514 U.S. 1035, 131 L. Ed. 2d 287 (1995)).

A defense is frivolous if "a proponent can present no rational argument based upon the evidence or law in support of [it]." *Black's Law Dictionary* 668 (6th ed. 1990). A defense is malicious if it is "wrongful and done intentionally without just cause or excuse or as a result of ill will." *Black's Law Dictionary* 958 (6th ed. 1990).

Here, plaintiffs discuss how K-Mart engaged in malicious acts or practices as a corporation, but fail to establish how K-Mart's *defense*

may have been malicious or frivolous. "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 84 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). No such abuse has been shown under these circumstances and we therefore reject plaintiffs' argument.

IV. New Trial

[5] K-Mart argues that it is entitled to a new trial because the trial court erred in allowing plaintiffs to introduce evidence of its discovery misconduct. We disagree.

Throughout the testimony in question, defense counsel never specifically objected to the inclusion of evidence demonstrating K-Mart's misconduct during discovery on the grounds now argued. Defense counsel did object several times to the form of a question regarding discovery misconduct and to certain phrases in a question such as "refused to provide," "conceal," and "did not disclose."

It is a long-standing rule that a party in a civil case may not raise an issue on appeal that was not raised at the trial level. *See* N.C.R. App. P. 10(b)(1); *Hieb v. Lowery*, 121 N.C. App. 33, 39, 464 S.E.2d 308, 312 (1995), *aff'd*, 344 N.C. 403, 474 S.E.2d 323 (1996). K-Mart did not raise this issue before the trial court. Only as an assignment of error in the record and as an issue in defendants' brief did the contention materialize. Accordingly, this assignment of error is not properly before us and we decline to proceed with its determination.

V. Conclusion

In conclusion, we hold that: (1) section 1D-25 is constitutional; (2) section 1D-25 should be applied on a per plaintiff basis; (3) the trial court did not abuse its discretion in disallowing attorney fees; and (4) K-Mart is not entitled to a new trial.

AFFIRMED.

Judge HUNTER concurs.

Judge GREENE concurs in part and dissents in part.

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

I concur in the majority opinion with respect to issues III and IV but write separately to voice my dissent regarding the constitutionality of N.C. Gen. Stat. § 1D-25(b).

The dispositive issues are whether: (I)(A) there is a constitutionally protected right to a jury trial on the issue of punitive damages in tort actions for false imprisonment, malicious prosecution, negligence and/or intentional infliction of emotional distress; if so, (B) a legislatively imposed limitation on punitive damages impermissibly infringes on this right to a jury trial; (II) the legislatively imposed limitation on punitive damages violates the due process clause of article I, section 19 of the North Carolina Constitution; and (III) the jury award of $11.5 million in punitive damages per plaintiff is excessive under the due process clause of the U.S. Constitution.

I

A

Constitutional Right to Jury Trial on Punitive Damages

The North Carolina Constitution provides in article I, section 25 that "[i]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. art. I, § 25. In construing this provision, our courts have held there is a constitutional right to a jury trial only in cases involving a cause of action (including a remedy) recognized at the time of the adoption of the 1868 North Carolina Constitution[1] and where there existed, either at common law or by statute at that time, a right to a jury trial in such instances. *Kiser v. Kiser*, 325 N.C. 502, 507, 385 S.E.2d 487, 490 (1989); *Groves v. Ware*, 182 N.C. 553, 558, 109 S.E. 568, 571 (1921).

I acknowledge some of our Supreme Court cases have employed the "in all controversies . . . respecting property" language of article I, section 25 in a manner that suggests the constitutional right to a jury depends on the existence of a claim involving "property." *See Belk's Dep't Store, Inc. v. Guilford County*, 222 N.C. 441, 447, 23 S.E.2d 897, 902 (1943) (valuation of land for taxation purposes "does not affect any right in the property"); *Smith v. Campbell*, 10 N.C. 595, 597 (1825) (debt is not property). Some recent cases have made reference to the

1. The 1868 North Carolina Constitution was adopted in April 1868. *See* John V. Orth, *The North Carolina State Constitution* 13 (1993).

"property" test as an element in determining a party's right to a jury trial without utilizing it. *See State v. Simpson*, 325 N.C. 514, 517-18, 385 S.E.2d 329, 331-32 (1989). I have not found any case since 1943 in which our appellate courts have determined a party was or was not entitled to a jury trial on the basis the claim did or did not "respect[] property." In several instances where it appears obvious the claims were "respecting property," the court did not reach the issue. *See, e.g., Kiser*, 325 N.C. at 507-08, 385 S.E.2d at 490 (analysis of right to jury trial in equitable distribution proceeding); *Kaperonis v. Highway Comm'n*, 260 N.C. 587, 595-96, 133 S.E.2d 464, 470-71 (1963) (analysis of right to jury trial in condemnation proceeding). Furthermore, in cases where the claim obviously did not involve a property question, the appellate court discussed only the question of whether the claim was in existence prior to April 1868. *See, e.g., In re Clark*, 303 N.C. 592, 607, 281 S.E.2d 47, 57 (1981) (analysis of right to jury trial in termination of parental rights proceeding); *In re Taylor*, 25 N.C. App. 642, 643-44, 215 S.E.2d 789, 790 (1975) (analysis of right to jury trial in mental health commitment proceeding). Thus, the "in all controversies . . . respecting property" language giving rise to the right to a jury trial has evolved into the single test of whether this right existed prior to April 1868. To hold otherwise would eradicate the constitutional right to a jury trial in those actions where the right was recognized prior to April 1868 simply because the cause of action is found not to involve a property interest.[2]

It may, of course, be the case that the "respecting property" prong has remained in effect all along but required no consideration because our courts have construed the phrase "in all controversies . . . respecting property" liberally so as to "include all the old forms of action at common law." 2 McIntosh, *North Carolina Practice and Procedure* § 1432, at 3 (2d ed. 1956) ("the term, 'in all controversies respecting property,' . . . would seem to include all the old forms of action at common law"); *see also Kiser*, 325 N.C. at 505 n.1, 385 S.E.2d at 488 n.1 ("all issues of fact in causes of action existing [in 1868] would be entitled to be tried by jury"). Our society's notion of property has evolved greatly since our Supreme Court rendered its decision in *Smith v. Campbell* in 1825 on which the majority relies. *See Smith v. Campbell*, 10 N.C. 595 (1825). For instance, the idea expressed in *Smith* "that property must necessarily mean dominion over things ha[s] given way to a more expanded view."

2. Thus, if the courts were to accept a limited definition of "in all controversies . . . respecting property," the legislature could, for example, adopt a statute eliminating the right to jury trials in all negligence and breach of contract actions.

1 *Valuation and Distribution of Marital Property* § 18.02[1], at 18-8 to 18-9 (2002) [hereinafter *Valuation and Distribution*]; *Smith*, 10 N.C. at 597. Property has since been regarded as "a bundle of rights, not over things, but pertaining to any valuable interest." *Valuation and Distribution* at 18-9. Apparently, what is property "bears heavily upon the sociological climate of the times." *Id.* at 18-12.

Thus, today, plaintiffs' tort claims, including their prayer for punitive damages would be considered "property" within the meaning of article I, section 25 as they derive from injuries to the person. " 'Where an injury has occurred for which the injured party has a cause of action, such cause of action is a vested property right.' " *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 442, 302 S.E.2d 868, 881 (1983) (quoting *Burmaster v. Gravity Drainage Dist. No. 2*, 366 So. 2d 1381 (La. 1978)). Furthermore, because "every man has a property in his own person," John Locke, *Second Treatise of Government* 17 (T. Peardon ed., 1952), injury to a person is injury to property and the constitutionally protected right to a jury trial attaches.

The claim for intentional infliction of emotional distress was not recognized in this State until 1979, *see Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 621-22 (1979), and thus Plaintiffs have no constitutional right to a jury trial on this claim. Claims for false imprisonment, malicious prosecution, and negligence, however, were in existence prior to April 1868. *See Arrington v. Wilmington & Weldon R.R. Co.*, 51 N.C. 68 (1858) (negligence); *Bradley v. Morris*, 44 N.C. 395 (1853) (malicious prosecution); *Sawyer v. Jarvis*, 35 N.C. 179 (1851) (false imprisonment). Prior to 1868, the right to have a jury assess punitive damages also existed for each of these claims. *See Bradley*, 44 N.C. at 397; *Sawyer*, 35 N.C. at 181; *see also Gilreath v. Allen*, 32 N.C. 67, 69 (1849) (punitive damages permitted in any tort action upon showing of "circumstances of aggravation"). Thus, a constitutional right to a jury trial exists in this State on a party's claim for punitive damages arising from any tort recognized in North Carolina prior to April 1868 in which there are genuine issues of fact showing "aggravating factors" as outlined in N.C. Gen. Stat. § 1D-15(a).[3]

3. According to our case law, the right to a jury trial hinges on the existence of aggravating circumstances. *See Gilreath*, 32 N.C. at 69. If there are no aggravating circumstances, there is no right to a jury trial. Who then determines whether there are aggravating circumstances? If we allow the jury to make this determination, the result is the grant of a jury trial in every instance where there are allegations of aggravating circumstances. This would be an unacceptable process and not consistent with article I, section 25. Thus, there must be some preliminary showing by the claimant of the existence of some aggravating circumstance. This can be satisfied upon a trial court's

Consequently, I reject K-Mart's argument that a legislative limitation on punitive damages awards is within the sole province of the legislature and does not implicate a party's right to a jury trial under article I, section 25. It may be that the legislature can *eliminate* punitive damages as a remedy in North Carolina. *See Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904) (upholding legislative elimination of punitive damages in libel cases where no aggravating circumstances exist).[4] The answer to that question, however, is more involved than the majority suggests and lies within the meaning of article I, section 18 of the North Carolina Constitution (open courts provision), *see id.* at 631, 47 S.E.2d at 812, and article I, section 19 (law of the land provision), *see Lowe v. Tarble*, 313 N.C. 460, 461, 329 S.E.2d 648, 650 (1985) (due process clause prohibits arbitrary legislation), not article I, section 25. If the legislature permits an award of punitive damages, the article I, section 25 right to a jury trial necessarily attaches and any limitation on the amount of damages rests with the jury and the trial court.[5] *See Worthy v. Shields*, 90 N.C. 192, 196 (1884) ("jury verdict cannot be disregarded"). To hold otherwise would constitute an impermissible interference with the jury's absolute right to determine a plaintiff's entitlement to punitive damages and the amount of those damages.

B

Infringement of Constitutional Right to Jury Trial

Fundamental rights include those either explicitly or implicitly guaranteed by the state or federal constitution, *see Comer v. Ammons*, 135 N.C. App. 531, 539, 522 S.E.2d 77, 82 (1999); *In re Buck*,

determination that there are genuine issues of fact on the question of aggravation. *Cf.* N.C.G.S. § 1A-1, Rule 56 (1999) (rule on summary judgment).

4. In essence, the legislative elimination of punitive damages for certain libel cases as upheld in *Osborn* merely constituted a codification of the common law, which permitted punitive damages only where aggravating circumstances existed. *See Gilreath*, 32 N.C. at 69 (punitive damages permitted in any tort action upon showing of "circumstances of aggravation").

5. Any abuse in punitive damages awards is currently addressed on a case-by-case basis as provided for at common law, *see Worthington v. Bynum*, 305 N.C. 478, 491, 290 S.E.2d 599, 607 (1982) (Britt, J., dissenting) (trial court may award new trial if damages are given "under the influence of passion or prejudice"); *Carawan v. Tate*, 53 N.C. App. 161, 165, 280 S.E.2d 528, 531 (1981) (trial court has discretion to "reduce" punitive damages award if it is "excessively disproportionate to the circumstances of contumely and indignity present in the case"), *modified and affirmed*, 304 N.C. 696, 286 S.E.2d 99 (1982), and under federal constitutional law, *see BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562, 134 L. Ed. 2d 809, 822 (1996) (Due Process Clause prohibits the imposition of a "grossly excessive" punishment against a tortfeasor).

350 N.C. 621, 626, 516 S.E.2d 858, 861 (1999) ("fundamental right to trial by jury . . . is guaranteed by our Constitution"), or those that are deeply rooted in the traditions of our people, *State v. Tolley*, 290 N.C. 349, 364, 226 S.E.2d 353, 365 (1976). As the right to a jury trial on punitive damages is guaranteed by our state constitution, *see* N.C. Const. art. I, § 25, and is firmly rooted in the traditions of our people, *see, e.g., Bradley*, 44 N.C. at 397, the right to a jury trial on punitive damages is a fundamental right. Because this fundamental right is not absolute, it can be invaded upon enactment of a statute that is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302, 123 L. Ed. 2d 1, 16 (1993); *see Department of Transp. v. Rowe*, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001) (strict scrutiny triggered by infringement of fundamental right), *cert. denied*, —— U.S. ——, ——, L. Ed. 2d ——, 70 U.S.L.W. 3395 (2002). The party asserting the constitutionality of a statute that invades a fundamental right has the burden of demonstrating its constitutionality. *Rowe*, 353 N.C. at 675, 549 S.E.2d at 207; *Dixon v. Peters*, 63 N.C. App. 592, 598, 306 S.E.2d 477, 481 (1983).

The statue before this Court in this case, Section 1D-25(b), places a legislative limitation on the amount of punitive damages a party may recover. *See* N.C.G.S. § 1D-25(b) (1999) ("[p]unitive damages . . . shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater"). This statute requires the trial court, in some instances, to "reduce the [punitive damages] award," *id.*, and thus invades plaintiffs' right to have the jury assess the amount of punitive damages. K-Mart, the proponent of the constitutionality of this statute, therefore has the burden of proving it was enacted to serve a compelling state interest and if so, that it was narrowly drawn to serve that interest. *See Reno*, 507 U.S. at 302, 123 L. Ed. 2d at 16; *Rowe*, 353 N.C. at 676, 549 S.E.2d at 208. In support of this burden, K-Mart argues the statute serves the best interest of the State by "preserving and promoting economic development in the State of North Carolina, as well as fostering [public] confidence in the civil litigation system." Admittedly, encouraging economic development and ensuring public confidence in the judicial system are legitimate state interests. There is nothing, however, in this record to show the limits on punitive damages awards serve these goals or even if they did, that the interests served are compelling.[6] Indeed, the reduction of punitive damages awarded by a

6. There are affidavits in this record from two legislators who were in the General Assembly at the time chapter 1D was adopted. The legislators affirm "[t]here was no

jury after extensive deliberations could erode public confidence in our judicial system. Accordingly, the limitation on punitive damages awards, as set forth in section 1D-25(b), is unconstitutional with respect to claims that were recognized in North Carolina prior to April 1868 where there also existed a right to have a jury assess punitive damages. As section 1D-25(b) does not attempt to distinguish between those occasions where a party has a constitutional right to a jury trial on the determination of punitive damages and where there is no such right, the statute is overbroad and thus unconstitutional. *See State v. Hines*, 122 N.C. App. 545, 552, 471 S.E.2d 109, 114 (1996) ("a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition, the practice of a protected constitutional right").

II

Substantive Due Process

The law of the land clause of the North Carolina Constitution provides in article I, section 19 that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. "Any exercise by the State of its police power is . . . a deprivation of liberty." *In re Hospital*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1972). Every deprivation of liberty, however, does not constitute a violation of a person's substantive due process rights granted under article I, section 19. A violation occurs only if the statute does not have " 'a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare.' " *Id.* at 551, 193 S.E.2d at 735 (citation omitted). In other words, the statute must be "reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of public harm." *Id.* This substantive due process right is the public's guarantee against arbitrary legislation. *Lowe*, 313 N.C. at 461, 329 S.E.2d at 650.

Section 1D-25(b), which places a limit on the amount of punitive damages a person may recover, is without question an exercise of the State's police power. But the statute also constitutes a deprivation of liberty in that it denies a party a right, recognized at common law, to have a jury determine the amount of punitive damages. *See Meyer v. Nebraska*, 262 U.S. 390, 399, 67 L. Ed. 1042, 1045 (1923) (defining liberty to include "those privileges long recognized at common law as

evidence introduced during either the committee meetings or on the floor about excessive punitive awards or the number of punitive awards in North Carolina."

essential to the orderly pursuit of happiness by free men"). Accordingly, section 1D-25(b) can be sustained against an article I, section 19 attack only if it has some rational or substantial relationship to the general welfare of this State.

K-Mart contends the general welfare of the State is served by this statute because it fosters and preserves economic development and encourages "[public] confidence in the civil litigation system." As noted in section I(B) of this opinion, K-Mart has offered nothing to show that section 1D-25(b) serves either of these general purposes. Plaintiffs, on the other hand, have produced authority on the low incidence and general stability of punitive damages awards in North Carolina. Plaintiffs further provided affidavits by two legislators revealing there had been no evidence of a punitive damages crisis presented to the General Assembly at the time it adopted section 1D-25(b). There is, thus, no "substantial relation" between section 1D-25(b) and the asserted purposes for its enactment. *See In re Hospital*, 282 N.C. at 551, 193 S.E.2d at 735. Accordingly, section 1D-25(b) violates article I, section 19 of the North Carolina Constitution because it arbitrarily denies a party the full and unconditional right to have a jury determine the amount of punitive damages.

III

Excessiveness of Punitive Damages Award

K-Mart contends that if this Court were to hold section 1D-25(b) to be unconstitutional, the punitive damages award would, consistent with the federal Due Process Clause, have to be vacated and a new trial ordered or the award reduced.

In *Gore*, the United States Supreme Court found the Due Process Clause of the Fourteenth Amendment to "prohibit[] a State from imposing a " 'grossly excessive" punishment on a tortfeasor.' " *Gore*, 517 U.S. at 562, 134 L. Ed. 2d at 818 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454, 125 L. Ed. 2d 366, 379 (1993) (citation omitted)). Whether the award is "grossly excessive" must be determined in the context of the State's interest in punishing the tortfeasor and deterring any such future misconduct. *Id.* at 568, 134 L. Ed. 2d at 822. The *Gore* court specifically noted "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose." *Id.* at 574, 134 L. Ed. 2d at 826. In order to determine "fair notice," three factors must be considered: (1) the

degree of reprehensibility of the defendant's conduct, (2) the ratio between the punitive damages award and the harm done or the potential harm that could have occurred, and (3) available sanctions for comparable misconduct. *Id.* at 575, 134 L. Ed. 2d at 826. Appellate courts should apply a *de novo* standard of review in deciding whether a punitive damages award is unconstitutionally excessive. *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 431, 149 L. Ed. 2d 674, 686-87 (2001). If excessive, the matter should be remanded to the trial court to determine an appropriate remedy, which may include a new trial or a reduction of the award after an independent determination by the trial judge. *Gore*, 517 U.S at 586, 134 L. Ed. 2d at 833.

The *Gore* court characterized the degree of reprehensibility of the defendant's conduct as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award" because punitive damages should reflect " 'the enormity of [the] offense.' " *Id.* at 575, 134 L. Ed. 2d at 826 (citation omitted). Aggravating factors associated with particularly reprehensible conduct include: malice, violence or a threat thereof, trickery and deceit, indifference to or reckless disregard for the health and safety of others, deliberate false statements, affirmative misconduct, concealment of evidence of improper motive, and even economic injury to a financially vulnerable party. *Id.* at 576, 579, 134 L. Ed. 2d at 826-27, 829.

The determination of the ratio between any actual or potential harm to the plaintiff and the amount of punitive damages is not meant as a simple mathematical formula by which punitive damages are automatically deemed excessive after a certain point. *Id.* at 582, 134 L. Ed. 2d at 830. One must establish " 'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.' " *TXO*, 509 U.S. at 460, 125 L. Ed. 2d at 381 (emphasis omitted) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 113 L. Ed. 2d 1, 22 (1991)). In *TXO*, the United States Supreme Court, in upholding the trial court's award, relied on the difference between the punitive damages award and the harm the victim could have suffered if the defendant's tortious conduct had been successful: a 10 to 1 ratio. *TXO*, 509 U.S. at 462, 125 L. Ed. 2d at 382. The *Gore* court further noted:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of

> economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Gore, 517 U.S. at 582, 134 L. Ed. 2d at 831.

The third factor analyzed for purposes of fair notice focuses on the difference between the punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases. *Id.* at 575, 583-85, 134 L. Ed. 2d at 826, 831. The reviewing court should " 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.' " *Id.* at 583, 134 L. Ed. 2d at 831 (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301, 106 L. Ed. 2d 219, 254 (1989) (O'Connor, J., concurring in part and dissenting in part)). In cases where a punitive damages award is greatly in excess of a fine that could have been imposed by statute, such an award may still stand if "imprisonment was also authorized in the criminal context." *Id.* at 583, 134 L. Ed. 2d at 831 (citing *Haslip*, 499 U.S. at 23, 113 L. Ed. 2d at 23). In considering whether a punitive damages award was justified on the ground that it serves to deter future misconduct, the reviewing court must also assess "whether less drastic remedies could be expected to achieve that goal." *Id.* at 584, 134 L. Ed. 2d at 832.

In this case, most of the aggravating factors listed in *Gore* by which to determine the reprehensibility of a defendant's conduct are present. The jury found that Mr. Rhyne had been unlawfully detained by the use of a dangerous choke-hold. The detainment was a violent encounter that showed an indifference to or reckless disregard for the health and safety of plaintiffs. In addition, Roberts and Hoyle as agents of K-Mart engaged in affirmative misconduct by making deliberate false statements to the investigating police officers. Mr. Rhyne was also found to have been maliciously prosecuted, an act that goes to malice, trickery, and deceit. As a result, this case involved a high degree of reprehensibility as opposed to *Gore*, which only dealt with economic damages. *See id.* at 576, 134 L. Ed. 2d at 827.

As K-Mart points out, the jury awarded Mr. Rhyne $8,255.00 and Mrs. Rhyne $10,730.00 in compensatory damages but $11.5 million each in punitive damages. The ratio between the compensatory and punitive damages awards is 1,393:1 for Mr. Rhyne and 1,072:1 for Mrs. Rhyne. Even though this is a staggering ratio, the potential harm plaintiffs could have suffered must also be considered. *See id.* at 581, 134 L. Ed. 2d at 830; *TXO*, 509 U.S. at 460, 125 L. Ed. 2d at 381.

According to the testimony of one of the police officers present on the scene on 29 April 1996, the hold Roberts used on Mr. Rhyne in order to detain him could have severely injured Mr. Rhyne's spinal cord, potentially paralyzing him.

North Carolina courts have upheld jury verdicts ranging from $60,000.00 in compensatory damages, *Hussey v. Seawell*, 137 N.C. App. 172, 527 S.E.2d 90 (2000) (partial paralysis), to $100,000.00, *Lowery v. Newton*, 52 N.C. App. 234, 278 S.E.2d 566 (permanent paralysis to the plaintiff's left shoulder and arm), *disc. review denied*, 303 N.C. 711 (1981); *see also Strickland v. Jackson*, 23 N.C. App. 603, 209 S.E.2d 859 (1974) (awarding $75,000.00 in compensatory damages for paralysis ranging from the plaintiff's shoulder to his hand). Thus, if Mr. Rhyne had been seriously injured during his detainment, he could reasonably have been expected to receive an award in the $100,000.00 range. In that case, Mrs. Rhyne's compensatory damages award would likely have been higher as well (due to increased emotional distress and a possible additional claim for loss of consortium). Accepting compensatory damages of $100,000.00 as representative for the potential harm Mr. Rhyne could have suffered, a ratio of 115:1 still remains. This discrepancy is much greater than the 10:1 ratio upheld in *TXO*. Finally, as to the issue of authorized or imposed sanctions for comparable misconduct, K-Mart was certainly guided by section 1D-25(b) in believing any potential liability for egregiously wrongful acts involving fraud, malice, or willful or wanton conduct would be limited to the greater of $250,000.00 or three times compensatory damages awarded against K-Mart.

While K-Mart's conduct reached a high level of reprehensibility, the punitive damages awarded in this case exceeded the reasonable relationship that is required between such an award and actual or potential harm to plaintiffs, *see Gore*, 517 U.S. at 580, 134 L. Ed. 2d at 829, and thus went beyond what was needed to achieve the State's goal of punishment and deterrence. As section 1D-25(b) further promised to set a maximum for punitive damages, K-Mart did not have fair notice of a penalty as severe as the one imposed in this case.

I would therefore hold the punitive damages award of $23 million in this case to be excessive because it transcends the constitutional limits of the federal Due Process Clause. Accordingly, I would vacate the award and remand this matter to the trial court for the entry of an appropriate remedy. *See id.* at 586, 134 L. Ed. 2d at 833.

Summary

In summary, I would hold section 1D-25(b) both unconstitutionally overbroad in that the limitation it imposes on punitive damages impermissibly infringes on a party's constitutional right to a jury trial on the determination of punitive damages for causes of action recognized prior to April 1868 and in violation of article I, section 19 of the North Carolina Constitution.[7] Invalidating the statute would necessitate the reinstatement of the jury's original $23 million punitive damages award. As this award, however, is grossly excessive under the federal Due Process Clause, I would vacate the original punitive damages award and remand this case to the trial court for the entry of an appropriate remedy.

G. WILLIAM DOBO AND WIFE, BARBARA B. DOBO, PETITIONERS v. ZONING BOARD OF ADJUSTMENT OF THE CITY OF WILMINGTON AND CITY OF WILMINGTON, RESPONDENTS

No. COA01-249

(Filed 16 April 2002)

1. Zoning— constitutional challenge—board of adjustment's authority to rule

A board of adjustment did not have the authority to rule on petitioner's constitutional challenges to the validity of a zoning ordinance in an appeal pursuant to N.C.G.S. § 160A-388(e). A board of adjustment sits in a quasi-judicial capacity and has only the authority granted by statute; in this case, the board had only the authority to reverse, affirm, or modify the enforcement officer's determination that a sawmill next to a recent, exclusive subdivision violated the ordinance. Moreover, the superior court had the statutory power to review only the issue of whether the determination was properly affirmed. Constitutional challenges to the validity of the ordinance may be appropriately adjudicated by means of a separate civil action instituted in superior court.

2. Zoning— sawmill—noncommercial use—residential area

There was competent, material, and substantial evidence in the record to support a zoning board's conclusion that, under the

7. Accordingly, I do not address the proper application of section 1D-25(b) as the majority does in section II of its opinion.

particular circumstances of the case, petitioners' sawmill in a residential area violated a zoning ordinance because it was not of a nature that is customarily incidental and subordinate to the primary residential use of the property, even though petitioners used the sawmill for noncommercial and nonindustrial purposes.

3. Zoning— board of adjustment hearing—incompetent evidence

Petitioners were not deprived of a fair hearing concerning a zoning violation where there was competent, material and substantial evidence in the record to support the board of adjustment's decision. Mere presence of incompetent evidence during a hearing does not, without more, entitle an appellant to a reversal of the board's decision.

4. Appeal and Error— preservation of issues—assignment of error—not raised below

An assignment of error was not addressed where it concerned the authority of a board of adjustment and an enforcement officer to make findings and conclusions regarding the N.C. Building Code, but petitioners did not direct the attention of the Court of Appeals to any specific place in the record indicating that the issue was previously raised and addressed before the board or the superior court.

Judge TYSON concurring in part and dissenting in part.

Appeal by petitioners from an order entered 5 October 2000 by Judge Stafford G. Bullock in New Hanover County Superior Court. Heard in the Court of Appeals 29 January 2002.

Kenneth A. Shanklin and Matthew A. Nichols, for petitioner-appellants.

City Attorney Thomas C. Pollard and Assistant City Attorney Dolores M. Williams, for respondent-appellees.

HUNTER, Judge.

G. William Dobo ("Dobo") and Barbara B. Dobo (together "petitioners") appeal the superior court's order affirming a decision of the Board of Adjustment of the City of Wilmington ("the Board") that Dobo's use of a sawmill constituted a violation of the City of Wilmington's Zoning Ordinance. We affirm.

The evidence presented at the hearing tended to establish the following facts. Dobo resides in Wilmington, North Carolina. On 23 September 1996, Dobo purchased a "super hydraulic sawmill" manufactured by "Wood-Mizer Products, Inc." ("the sawmill"). The forty-horsepower sawmill is powered by a five-gallon diesel engine, and is over twenty-four feet long, six feet wide, and seven feet high. Dobo used the sawmill on his residential property to saw trees and he used the lumber that he produced for various purposes, including: for the construction of a "hobby shop" in his backyard (for which he obtained a building permit); for woodworking; for the construction of other structures such as a walkway; for building furniture; and to give away to friends and neighbors for free. Dobo did not sell the lumber that he produced on his property using the sawmill.

On 1 March 1999, the City of Wilmington ("the City") annexed Dobo's property, which then became subject to the City of Wilmington's Zoning Ordinance ("the Zoning Ordinance"). At some time thereafter, Code Enforcement Officer Richard A. Cliette inspected petitioners' property on several occasions. Officer Cliette did not cite petitioners for violating the City's Noise Ordinance. However, on 10 January 2000, Officer Cliette sent a "Notice of Zoning Violation" to petitioners, advising them that Dobo's use of the sawmill violated Section 19-6, Article II of the Zoning Ordinance.

Section 19-38 of the Zoning Ordinance permits "accessory uses" in all residential zoning districts. Section 19-6 of the Zoning Ordinance defines the term "accessory use":

> Accessory use or structure: A use or structure on the same lot with, and of a nature customarily incidental and subordinate to, the principal use or structure (i.e. pump house, home occupation, tool shed, detached garage, storage shed, garage apartment, and other uses as determined by the Code Enforcement Officer).

Petitioners appealed Officer Cliette's determination to the Board. Following a hearing conducted before the Board, the Board entered an order upholding Officer Cliette's determination that Dobo's use of the sawmill violated the Zoning Ordinance.

On 20 July 2000, petitioners filed a petition in the Superior Court of New Hanover County seeking judicial review of the Board's decision. On 5 October 2000, the superior court entered an order affirming the Board's decision to uphold the determination that Dobo's use

of the sawmill violated the Zoning Ordinance. Petitioners appeal to this Court.

Petitioners' initial appeal of Officer Cliette's determination to the Board was taken pursuant to subdivision (b) of N.C. Gen. Stat. § 160A-388 (1999), which provides in pertinent part:

> The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Part. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city. . . . The board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the premises.

N.C. Gen. Stat. § 160A-388(b). Petitioners then appealed the Board's determination to the superior court pursuant to subdivision (e) of that same statute, which provides that: "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).

Where an appeal is taken pursuant to N.C. Gen. Stat. § 160A-388(e), the superior court "sits in the posture of an appellate court." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). The superior court "is not the trier of fact" and, therefore, "does not review the sufficiency of [the] evidence presented to it," but rather "reviews that evidence presented to the town board." *Id.* at 626-27, 265 S.E.2d at 383. The scope of review of the superior court in reviewing a town board's decision, and the scope of review of this Court on appeal from the superior court, 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. at 626, 265 S.E.2d at 383; *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 128 N.C. App. 703, 706-07, 496 S.E.2d 825, 827, *appeal dismissed and disc. review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998).

On appeal, petitioners present a number of arguments for our review. We have condensed these arguments into the following two questions: (1) whether the superior court erred in concluding as a matter of law that petitioners were not entitled to raise constitutional objections to the Zoning Ordinance in an appeal taken pursuant to N.C. Gen. Stat. § 160A-388(e); and (2) whether the superior court erred in affirming the Board's decision that Dobo's use of the sawmill constituted a violation of the Zoning Ordinance.

I.

At all times related to the present legal proceeding, petitioners have made clear that they maintain certain objections to the validity of Section 19-6 of the Zoning Ordinance on at least two separate constitutional grounds. First, petitioners have contended that Section 19-6 of the Zoning Ordinance is unconstitutionally vague. *See, e.g., State v. Elam*, 302 N.C. 157, 161-62, 273 S.E.2d 661, 664-65 (1981) (a statute or regulation is unconstitutionally vague if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly). Second, petitioners contend that Section 19-6 of the Zoning Ordinance is an unconstitutional delegation of legislative authority. *See, e.g., Jackson v. Board of Adjustment*, 275 N.C. 155, 164-65, 166 S.E.2d 78, 84-85 (1969) (the legislature may only confer upon a subordinate agency the authority or discretion to execute a law if adequate guiding standards are laid down).

The record indicates that petitioners' position on these constitutional issues was made known at the hearing before the Board, but that the Board did not directly address or rule upon these issues. In their petition for *writ of certiorari* to superior court, petitioners again set forth their constitutional arguments. However, the superior court declined to address any constitutional issues because it concluded that "[a] Petition for *Writ of Certiorari* is not the proper

proceeding to determine constitutional issues involving a municipal zoning ordinance." Petitioners contend on appeal to this Court that the superior court erred in this legal determination, and that they are entitled to challenge the constitutionality of the Zoning Ordinance in this proceeding. We disagree.

[1] In reviewing the determination of an administrative enforcement officer pursuant to N.C. Gen. Stat. § 160A-388, a board of adjustment sits in a "quasi-judicial capacity" and has only the authority it is granted under that statute. *See Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 649, 334 S.E.2d 103, 105 (1985); *Simpson v. City of Charlotte*, 115 N.C. App. 51, 55, 443 S.E.2d 772, 775 (1994). N.C. Gen. Stat. § 160A-388 provides that:

> The board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and shall make any order, requirement, decision, or determination that in its opinion ought to be made in the premises. To this end the board shall have all the powers of the officer from whom the appeal is taken.

N.C. Gen. Stat. § 160A-388(b). Thus, in the present case, the Board had only the authority to reverse, affirm, or modify Officer Cliette's determination that Dobo's use of the sawmill violated the Zoning Ordinance. The Board did not have the authority to rule on petitioners' constitutional challenges to the validity of the Zoning Ordinance itself.

Furthermore, pursuant to N.C. Gen. Stat. § 160A-388(e), the superior court had the statutory power to review only the issue of whether Officer Cliette's determination was properly affirmed. *See Simpson*, 115 N.C. App. at 55, 443 S.E.2d at 775; *Sherrill*, 76 N.C. App. at 649, 334 S.E.2d at 105. The superior court did not have the statutory authority to address petitioners' constitutional challenges to the validity of the Zoning Ordinance. We note that such issues may be appropriately adjudicated by means of a separate civil action instituted in superior court. *See Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655 (holding that petition for writ of certiorari to review town council decision denying subdivision permit was improperly joined with civil action alleging constitutional violations in denial of permit), *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990); *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 358 S.E.2d 372 (1987) (involving civil action seeking declaratory judgment that city ordinance was unconstitutional). Thus, we hold that the superior court

did not err in concluding that petitioners are not entitled to raise constitutional objections to the Zoning Ordinance in this proceeding.

II.

Petitioners' remaining assignments of error amount to three arguments in support of their general contention that the superior court erred in affirming the Board's decision that Dobo's use of the sawmill constituted a violation of the Zoning Ordinance.

A.

[2] In their first argument, petitioners contend that the Board's decision was not supported by the evidence, and that it was arbitrary and capricious. Thus, we apply the "whole record" test, which ". . . '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 (citation omitted), *writ of supersedeas denied and disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000).

The Board's fourth conclusion of law states:

> 4. The use of the sawmill on the Dobo property is of an industrial nature involving a manufacturing process and is not a permitted accessory use under Sections 19-6 and 19-38 of the Zoning Ordinance. The use is not of a nature that is customarily incidental and subordinate to the primary residential use of the property.

Petitioners argue that the Board's determination was not supported by competent, material and substantial evidence in the whole record, and that it was arbitrary and capricious, because the evidence showed that Dobo's use of the sawmill was personal and recreational, rather than "industrial" or "involving a manufacturing process." We believe this argument is without merit. Even if the Board had characterized Dobo's use of the sawmill as personal and recreational, rather than industrial or involving a manufacturing process, there would still have been competent, material, and substantial evidence to support the conclusion that Dobo's use of the sawmill was "not of a nature that is customarily incidental and subordinate to the primary residential use of the property."

Dobo's property, and the surrounding property, are zoned "R-20 Residential District," which is defined by the City Zoning Ordinance

as "a residential district in which the principal use of land is for low density residential and recreational purposes." As noted above, the forty-horsepower, "super hydraulic sawmill" is powered by a five-gallon diesel engine, and is over twenty-four feet long, six feet wide, and seven feet high. It has the capacity to cut logs twenty-one feet long by three feet in diameter. Dobo's sawmill activities also include the use of a trailer, a backhoe with front-end loader, and a dump truck, the operation of which requires a commercial license. The sawmill and trailer together weigh nearly 4,000 pounds, and the backhoe weighs 12,000 pounds. Dobo mills lumber from trees procured not only from his own property, but from the property of relatives, neighbors, and others within and without New Hanover County. Dobo is aided in his milling by other individuals, including some of the paid employees of his business operation, Dobo Well Drilling.

We hold that there was competent, material, and substantial evidence in the record to support the Board's conclusion that, under the particular circumstances of this case, Dobo's use of the sawmill was "not of a nature that is customarily incidental and subordinate to the primary residential use of the property," and, therefore, violated the Zoning Ordinance.

The dissent argues that "[t]here is no evidence that the actual use of the saw by petitioners is for industrial or manufacturing purposes," and that "[a]ll of the evidence presented shows that petitioners used the Wood-Mizer saw for non-commercial and non-industrial purposes." The dissent appears to have been distracted from the core issue before us by the Board's superfluous statement that "[t]he use of the sawmill on the Dobo property is of an industrial nature involving a manufacturing process." Even if the dissent is correct that there is no evidence that Dobo uses the sawmill for industrial, manufacturing, or commercial purposes, this fact does not necessarily dispose of the core issue in this case: whether Dobo's use of the sawmill is "of a nature customarily incidental and subordinate to, the principal use or structure."

The dissent's reliance upon *Tucker v. Mecklenburg Cty. Zoning Bd. of Adjust.*, 148 N.C. App. 52, 557 S.E.2d 631 (2001), is misplaced. The ordinance in question in *Hodges* expressly distinguished between "private" and "commercial" dog kennels, and permitted the operation of a kennel as an accessory use only if the kennel was a "private kennel" and not "operated for commercial basis." *Id.* at 57, 557 S.E.2d at 635. Unlike the ordinance in *Hodges*, the ordinance in the present

case does not require a determination as to whether the use in question is "commercial" in nature; rather, it requires that the use be "of a nature customarily incidental and subordinate to, the principal use or structure."

We also note that the Board's order contains a similarly superfluous conclusion of law: "The use of the sawmill on the Dobo property is not a permitted use during the construction of the accessory structure on the property." Again we reiterate that the core issue in this case is whether, under the circumstances of this particular case, Dobo's use of the sawmill violated the zoning ordinance. The circumstances in this case include the fact that, since purchasing the sawmill in September of 1996, Dobo has used the sawmill for a variety of purposes, only one of which is the construction of a hobby shop pursuant to the building permit he received from the City. The question before the Board, therefore, was not whether Dobo's use of the sawmill would have violated the ordinance had he used the sawmill solely for the purpose of constructing the hobby shop.

B.

[3] Petitioners also argue that they were deprived of a fair evidentiary hearing in violation of their due process rights. Petitioners' due process rights entitled them to offer evidence, to cross-examine adverse witnesses, to inspect documents, to give sworn testimony, and to have written findings of fact supported by competent, substantial, and material evidence. *See Massey v. City of Charlotte*, 145 N.C. App. 345, 349-50, 550 S.E.2d 838, 842, *cert. denied*, 354 N.C. 219, 554 S.E.2d 342 (2001). Petitioners have not alleged that they were deprived of any of these particular due process rights. Rather, petitioners contend that the hearing improperly included hearsay evidence, irrelevant evidence, and inaccurate evidence, among other things.

Even assuming *arguendo* that the evidence noted by petitioners was incompetent and, therefore, insufficient to serve as support for conclusions of the Board, *see, e.g., Sun Suites Holdings*, 139 N.C. App. at 276, 533 S.E.2d at 530, the mere presence of such incompetent evidence during a hearing does not, without more, entitle an appellant to a reversal of the Board's decision. The question is whether there is substantial evidence in *the whole record* to support the findings and conclusions. Because we have already concluded that there was competent, material, and substantial evidence in the record to support the Board's determination, we reject petitioners' argument

that the admission of other arguably incompetent evidence deprived petitioners of a fair hearing.

C.

[4] Finally, petitioners argue that the superior court erred in affirming the Board's determination because neither the Board nor a Code Enforcement Officer is authorized to find facts and make conclusions regarding any matter governed by the North Carolina Building Code. We hold that this issue is not properly before us. The assignment of error that corresponds to this argument cites the Board's order and the superior court's order, neither of which address this issue. The assignment of error also cites the entire transcript of the hearing before the superior court. Because petitioners have not directed our attention to any specific place in the record indicating that this issue was previously raised and addressed before the Board or the superior court, we decline to address this argument.

For the reasons stated herein, we affirm the superior court's order affirming the determination of the Board.

Affirmed.

Judge GREENE concurs.

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

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

I concur in the result reached by the majority in parts I, IIB, and IIC of their opinion. I respectfully dissent from part IIA of the majority's opinion as I would hold that petitioners' actual use of the Wood-Mizer portable band saw does not violate the Zoning Ordinance.

IIA.

Petitioners argue that the Board's decision was not supported by competent evidence, and is arbitrary and capricious. I agree. Section 19-6 of the Zoning Ordinance defines the term "accessory use":

> Accessory use or structure: A use or structure on the same lot with, and of a nature customarily incidental and subordinate to, the principal use or structure (i.e. pump house, home occupation, tool shed, detached garage, storage shed, garage apartment, and other uses as determined by the Code Enforcement Officer).

All of the evidence presented shows that petitioners used the Wood-Mizer saw for non-commercial and non-industrial purposes, as well as for the construction of a fully permitted hobby woodworking shop to be located on their property.

I disagree with the majority that because the saw is powered by a forty-horsepower diesel engine; is twenty-six feet four inches in length, six feet six inches wide, seven feet seven inches high; includes the use of a trailer, backhoe, front-end loader, and dump truck; and is capable of cutting logs twenty-one feet long by three inches in diameter automatically converts the use of the Wood-Mizer saw into an industrial use or involves a manufacturing process. Adopting the reasoning of the majority would allow the City to prohibit petitioners' private automobile, with a 200 horsepower engine and a twenty gallon gas tank, because it could be used as a commercial taxicab.

Construction necessarily requires heavy equipment to complete the improvements, such as bulldozers, dump trucks, and front-end loaders for clearing and grading of the land, as well as cranes to set trusses on the structure. Here, the record shows that the backhoe, front-end loader, and dump truck were also legally located on petitioners' 3.2 acre tract, as petitioners legally operate a well drilling business on their property. The Board's and majority's focus is solely on the size and possible uses of the saw, not its actual use by petitioners. Their assertions are insufficient to prohibit petitioners' non-industrial use of their saw.

The conclusion of the Board that "[t]he use of the sawmill on the Dobo property is not a permitted use during the construction of the accessory structure on the property" is not supported by substantial, competent evidence. There is no evidence in the record that petitioners' use of the Wood-Mizer saw to construct a fully permitted woodworking hobby shop is not a permitted use during construction. Testimony by the Code Enforcement Officer that the use of the saw would not be customary is speculative as he further testified that he does not enforce the building code. *See C.C. & J. Enter., Inc. v. City of Asheville*, 132 N.C. App. 550, 553, 512 S.E.2d 766, 769, *disc. review improvidently allowed*, 351 N.C. 97, 521 S.E.2d 117 (1999) (speculative assertions or mere expression of opinion about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body).

This Court in *Tucker v. The Mecklenburg Cty. Zoning Bd. of Adjust.*, 148 N.C. App. 52, 557 S.E.2d 631 (2001), addressed a similar

issue involving the operation of a dog kennel by respondents on their residentially zoned property. The zoning ordinance in *Tucker* permitted the operation of a private kennel as an accessory use and prohibited the operation of a commercial kennel. While in all respects the kennel operated by respondents could have been used as a commercial kennel, the Board of Adjustment found that because the dogs were adopted and not sold, the kennel was not a commercial kennel but a private kennel permitted as an accessory use under the zoning ordinance. *Id.* at 57, 557 S.E.2d at 635-36. This Court agreed and reversed the trial court's order finding the kennel to be a commercial kennel in violation of the zoning ordinance. *Id.* at 60, 557 S.E.2d at 636.

Here, the evidence clearly establishes that petitioners used the saw primarily for the construction of a permitted and allowed hobby woodworking shop behind their home and occasionally for the cutting of lumber for friends without charge. There is no evidence that the actual use of the saw by petitioners is for industrial or manufacturing purposes nor that it is not "of a nature that is customarily incidental and subordinate to" the residential use of their property. The actual use of the saw in this case is an accessory use and does not violate the Zoning Ordinance. Counsel for respondent conceded that the construction of the hobby shop is fully permitted and is an allowed accessory use of petitioners' residentially zoned property. Accordingly, I would hold that the Board's decision was not supported by substantial, competent evidence and was arbitrary and capricious.

Petitioners argue that if we scratch the surface facts, it is readily apparent that this action is a thinly veiled attempt by the residents of the adjoining subdivision to impose *de facto* restrictive covenants onto petitioners' property that were never bargained for nor agreed to by petitioners.

The general rule is that a zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property. *See Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966); *City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983). Zoning regulations are not a substitute for private restrictive covenants. If the subdivision residents believe that petitioners' use of their property is unreasonable, their remedy is an action in nuisance, not to enlist the City as an accomplice by incessant complaints about their neighbor.

The record shows that petitioners have owned, used, and lived on their property for half a century. The recent addition of an exclusive, walled, and gated subdivision on adjoining property does not convert petitioners' lawful use into an illegal one, simply because petitioners' use is inconsistent with the permitted uses within the adjoining subdivision.

Purchasers of lots in a subdivision development, located in formerly rural areas that are rapidly urbanizing, have the duty to inform themselves of uses on adjoining, but unrestricted, property that may not compliment the restrictions and uses that subdivision residents privately covenant among themselves and that apply solely within the confines of their development.

Petitioners further object to the irrelevant statements made by the adjoining neighbors to the Board as to noise and smell from petitioners' property, burning by petitioners on their property, and junk on petitioners' property. The record clearly shows and counsel for respondent conceded that despite numerous visits to petitioners' property, no violation of the penal noise ordinance was found or other ordinances. While there is no indication that the Board's decision was based on this testimony, speculative opinions such as these fail to constitute substantial competent evidence to support a finding that the petitioners' use was not an accessory use. *See C.C. & J.*, 132 N.C. App. at 553, 512 S.E.2d at 769. There is no competent evidence in the record that petitioners' actual use of the Wood-Mizer saw did not constitute an accessory use under the Zoning Ordinance. I would reverse the superior court's order, affirming the 3-2 decision of the Board, and dissent from part IIA of the majority's opinion.

STATE OF NORTH CAROLINA v. LEWIS EUGENE HANNAH

No. COA00-1377

(Filed 16 April 2002)

1. Assault— with a deadly weapon inflicting serious injury— lesser included offense—assault inflicting serious bodily injury

The trial court erred by submitting to the jury assault inflicting serious bodily injury as a lesser included offense of assault with a deadly weapon with intent to kill inflicting serious injury.

"Serious bodily injury" requires proof of more severe injury than "serious injury."

2. Burglary and Unlawful Breaking or Entering— intent at time of breaking and entering—infliction of serious injury—sufficiency of evidence

Substantial evidence was presented that defendant possessed the requisite felonious intent at the time of a breaking and entering to inflict serious injury and thus to support his conviction of first-degree burglary where the victim testified that defendant had threatened to kill her if she ever left him; defendant told her that she had made him hate her, that he had not realized how much he could hate someone, and that he could snap her neck in a minute; immediately prior to the assault, the two had a heated argument over the phone which ended with defendant hanging up; defendant "shattered" the victim's door when she refused to open it; and defendant immediately ran to the victim, picked her up, threw her on her bed, and began to strangle her, saying "die, bitch, die."

3. Burglary and Unlawful Breaking or Entering— first-degree burglary—lesser included offense—misdemeanor breaking and entering

There was no plain error in the trial court's failure to instruct on misdemeanor breaking and entering as a lesser included offense of first-degree burglary where there was no evidence of the lesser offense.

4. Evidence— assault—defendant's prior drug use

Evidence of defendant's prior drug use was relevant in a prosecution which resulted in convictions for first-degree murder and assault inflicting serious bodily injury because the prior drug use explains the victim leaving defendant and his ill will towards her. Moreover, testimony regarding the drug use was minimal and there was substantial evidence that defendant committed the crimes of which he was convicted.

Appeal by defendant from judgment entered 19 May 2000 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 17 October 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Rudolph, Maher, Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant.

BIGGS, Judge.

Defendant appeals his convictions of first degree burglary in violation of N.C.G.S. § 14-51, and assault inflicting serious bodily injury, in violation of N.C.G.S. § 14-32.4. For the reasons herein, we hold no error as to defendant's conviction for first-degree burglary; however, we vacate his assault conviction and order a new trial.

The evidence at trial tended to show the following: Jennifer Hannah (Hannah) and Lewis Hannah (defendant) had a turbulent marriage. Hannah left the marital home with their two children on three separate occasions, due largely to defendant's drug addiction and abusiveness. Hannah finally moved into an apartment with her children after defendant told her "that [she] had made him hate [her], and he didn't realize how much he could hate somebody, and that he could snap [her] neck in a minute."

On the evening of 31 December 1999, Hannah put her children to bed around 11 p.m. and went to bed shortly thereafter. She was awakened by a phone call from defendant, asking her to come by his trailer the following day; she refused, and an argument ensued. Defendant abruptly hung up the phone and Hannah went back to bed. Later that evening, Hannah heard a loud truck pull up to the apartment, and immediately called 911. Defendant demanded to come in, but Hannah refused; defendant, then splintered the door, burst in, ran to Hannah, picked her up by the face, threw her onto the bed, and began to strangle her. As she lost consciousness, Hannah heard defendant shouting, "[d]ie, b[], die!" Upon regaining consciousness, Hannah again called 911 and reported the incident to the operator. Shortly thereafter, a police officer arrived followed by EMS and Hannah's in-laws.

On 10 January 2000, defendant was indicted as follows: 1) first-degree burglary, in violation of N.C.G.S. § 14-51; 2) attempted murder, in violation of N.C.G.S. § 14-17; and 3) assault with a deadly weapon with intent to kill inflicting serious injury, in violation of N.C.G.S. § 14-32(a).

The jury convicted defendant of first-degree burglary in violation of N.C.G.S. § 14-51, and assault inflicting serious bodily injury, in vio-

lation of N.C.G.S. § 14-32.4. The jury acquitted defendant of attempted first-degree murder. The trial court imposed consecutive sentences for the first-degree burglary and assault convictions. Defendant filed notice of appeal on 24 May 2000.

I.

At the outset, we note that while defendant sets forth seventeen assignments of error, those that he has failed to address in his brief are deemed abandoned pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss the felony assault charge, contending that the evidence was insufficient to show the victim suffered "serious bodily injury." We need not address this contention. We hold that assault inflicting serious bodily injury, the offense for which the defendant was convicted, is not a lesser-included offense of assault with a deadly weapon with intent to kill and inflict serious injury, the offense charged in the indictment; therefore, the court committed reversible error in submitting the former to the jury. Accordingly, defendant's conviction of assault inflicting serious bodily injury must be vacated, and a new trial granted.

"[I]t is fundamental to due process that a defendant cannot be convicted of a crime with which he has not been charged." *State v. Gibson*, 333 N.C. 29, 39, 424 S.E.2d 95, 101 (1992), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993). "When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment." *State v. Hudson*, 345 N.C. 729, 732-33, 483 S.E.2d 436, 438 (1997) (citation omitted).

In the present case, defendant was charged by indictment with the offense of assault with a deadly weapon with intent to kill or inflicting serious injury, under N.C.G.S. § 14-32(a) (1999). The indictment read in pertinent part, "defendant . . . did assault Jennifer Katherine Hannah with his hands, a deadly weapon, with the intent to kill and inflicting serious injury." In addition to submitting the offense charged in the indictment to the jury, on the felony assault, the court also submitted as a lesser-included offense, assault with a deadly weapon inflicting serious injury, under N.C.G.S. § 14-32(b) (1999), and

assault inflicting serious bodily injury under N.C.G.S. § 14-32.4 (1999). While the trial court is required to submit all lesser-included offenses raised by the evidence, *State v. Conaway*, 339 N.C. 487, 453 S.E.2d 824, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995), "a defendant may not [be] lawfully convicted of an offense not embraced within the offense charged in the bill of indictment." *State v. Perry*, 18 N.C. App. 141, 142, 196 S.E.2d 369, 369 (1973).

This Court has long held that "the definitions accorded the crimes determine whether one offense is a lesser included offense of another crime." *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993). "If the lesser crime has an essential element which is not completely covered by the greater [offense], it is not a lesser[-]included offense." *Id.* Our Supreme Court rejected the argument that an offense which was not ordinarily a lesser-included offense could become a lesser-included offense under specific factual circumstances. *Id.* at 635, 295 S.E.2d at 379. In the case *sub judice*, the charge of assault with a deadly weapon inflicting serious injury is a lesser-included offense of the crime charged, and was properly submitted to the jury. *See generally*, *State v. Washington*, 142 N.C. App. 657, 544 S.E.2d 249, *disc. review denied*, 353 N.C. 532, 550 S.E.2d 165 (2001). However, we conclude that all of the essential elements of assault inflicting serious bodily injury are not fully embraced in the offense with which defendant was charged in the indictment, assault with a deadly weapon with intent to kill and inflict serious injury; thus, it was error for the court to submit to the jury the charge of assault inflicting serious bodily injury.

Assault inflicting serious bodily injury requires proof of two elements: (1) the commission of an assault on another, which (2) inflicts serious bodily injury. *State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001); *see also*, N.C.G.S. § 14-32.4 (1999). While it is clear that the first element of this offense is also an element of the indicted offense in this case, we conclude the second is not. Based on our review of the relevant statutes and case law, we conclude that "serious bodily injury" requires proof of more severe injury than the "serious injury" element of the indicted offense. *See State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (holding that victim's injuries went beyond serious injury necessary to indict for an assault with a deadly weapon with intent to kill or inflict serious injury, and constituted the permanent disfigurement contemplated by N.C.G.S. § 14-32.4).

Our Courts have declined to define "serious injury" for purposes of assault prosecutions, other than stating that " '[t]he injury must be serious but it must fall short of causing death' and that '[f]urther definition seems neither wise nor desirable.' " *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994) (quoting *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962)). In 1997, however, the legislature created the offense of assault inflicting serious bodily injury, and specifically defined serious bodily injury as:

> a bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, or 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.

N.C.G.S. § 14-32.4.

A review of the case law would suggest that our courts have found *serious injury* in situations that may not rise to the level of *serious bodily injury* as defined under N.C.G.S. § 14-32.4, for example: shards of glass in the arm and shoulder of a victim of a drive-by shooting into the victim's vehicles, coupled with an officer's observation that the victim was shaken, *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994); a bullet that pierced through the shoulder of the victim, creating two holes in his upper body, *State v. Streeter*, — N.C. App. —, 553 S.E.2d 240 (2001); gunshot wound which resulted in multiple broken bones of the victim's arm, *State v. Washington*, 142 N.C. App. 657, 544 S.E.2d 249 (2001); stab wound to the back and shoulder, *State v. Grigsby*, 351 N.C. 454, 526 S.E.2d 460 (2000); and a broken wrist, chewed fingers and a gash in the head, *State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563.

Thus, while there may be factual situations in which the elements of "serious bodily injury" and "serious injury" are in apparent identity, this does not satisfy the definitional approach required to determine whether one offense is a lesser included offense of another. *See State v. Hudson*, 345 N.C. 729, 483 S.E.2d 436 (1997). Proof of the greater offense, in this case assault with a deadly weapon with intent to kill and inflict serious injury, is not necessarily sufficient to find proof of the lesser, assault inflicting serious bodily injury. We note further, that in creating the offense of assault inflicting serious bodily injury, the legislature made it a Class F felony, while the corresponding offense of assault inflicting serious injury is a misdemeanor under N.C. Gen. Stat. § 14-33 (1999).

We conclude that, because the element of "serious bodily injury" requires proof of more severe injury than the element of "serious injury", assault inflicting serious bodily injury is not a lesser-included offense of assault with a deadly weapon with intent to kill and inflict serious injury. Accordingly, it was error for the trial court to submit assault inflicting serious bodily injury as a lesser-included offense to the jury. We vacate defendant's conviction on the felony assault charge, and remand for a new trial on that issue.

II.

[2] Defendant next assigns as error the trial court's denial of his motion to dismiss the burglary charge, arguing that the evidence was insufficient to show that he broke and entered with a felonious intent. We find no error.

First-degree burglary is defined as the unlawful breaking and entering of an occupied dwelling or sleeping apartment, in the nighttime, with the intent to commit a felony therein. Defendant contends that the State lacked compelling and direct evidence to establish that he broke into Hannah's home with intent to cause her serious injury. We find this contention without merit, for the reasons below.

A conviction of first-degree burglary requires proof that the intent to commit a felony assault existed at the time of the breaking and entering. *See generally, State v. Barlowe*, 337 N.C. 371, 446 S.E.2d 352 (1994). "Intent is a mental attitude seldom provable by direct evidence[;] [i]t must ordinarily be proved by circumstances from which it may be inferred." *State v. Bostic*, 121 N.C. App. 90, 99, 465 S.E.2d 20, 25 (1995); *State v. Brandon*, 120 N.C. App. 815, 463 S.E.2d 798 (1995). The determining factor, then, is whether there was sufficient evidence from which a reasonable juror could infer that defendant possessed the requisite intent to commit serious injury. *See, State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994) (when determining whether an element exists, a jury may rely on its common sense and knowledge it has acquired through everyday experience).

In the case *sub judice*, Hannah testified to the following: prior to the day of the assault, defendant threatened to kill her if she ever left him; defendant told her that she had made him hate her and that he did not realize how much he could hate somebody and that he could "snap [her] neck in a minute"; immediately prior to the assault the two had a heated argument over the phone, which ended abruptly

with defendant hanging up the phone; when Hannah refused to open the door, defendant "shattered" the door and broke through, running for her; defendant immediately attacked Hannah in that "[h]e picked [her] up by [the] face and threw [her] backwards into [her] bed and began to strangle [her] and [told her] to 'die, bitch, die.' "

We conclude, upon consideration of the evidence in the light most favorable to the State, that substantial evidence was presented that defendant possessed the requisite felonious intent at the time of the breaking and entering to inflict serious injury; thus, the judge properly allowed the jury to decide whether the defendant satisfied all elements of attempted first-degree burglary. Accordingly, this assignment is overruled.

III.

[3] In defendant's next two assignments, he contends that the trial court erred by failing to instruct the jury on the lesser-included offenses of misdemeanor breaking and entering as a lesser-included offense of first-degree burglary, and misdemeanor assault as a lesser-included offense of assault inflicting serious injury with intent to kill and inflict serious injury. Because we have vacated the felony assault charge, we will only address defendant's contentions related to the burglary charge.

At the outset, we note that defense counsel neither objected to the jury charges at trial, nor requested instructions on misdemeanor breaking and entering. Thus, we must review this assignment for plain error. ("In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the *judicial action questioned is specifically and distinctly contended to amount to plain error.*" N.C.R. App. P. 10(c)(4) (emphasis added)). 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. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). The North Carolina Supreme Court has chosen to review such "unpreserved issues for plain error when . . . the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

We thus consider whether the trial court's failure to instruct on a lesser included offense amounted to plain error. Our Supreme Court has held that a trial court must instruct the jury on a lesser-included offense only if there is evidence that the defendant might be guilty of the lesser-included offense. *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). Evidence of a lesser-included offense must be evidence that might convince a rational trier of fact to convict of the lesser offense. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190, 193 (1985). If the State's evidence is clear and positive as to each element of the charged offense, and if there is no evidence of the lesser-included offense, there is no error in refusing to instruct on the lesser offense. *Id.*

Defendant contends that the jury should have been instructed on misdemeanor breaking and entering as a lesser included offense of first-degree burglary because there was evidence presented from which the jury could find that the breaking and entering was done without a felonious intent. We conclude that there was no evidence of the lesser included offense, and further conclude that the trial court did not err in declining to instruct on misdemeanor breaking and entering as a lesser included offense of first-degree burglary. Accordingly, this assignment of error is overruled.

IV.

[4] Defendant next argues that the trial court erred in admitting irrelevant and unfairly prejudicial evidence about defendant's prior drug use, unrelated to the burglary and assault. We find no error.

Relevant evidence is 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.G.S. § 8C-1, Rule 401 (1999). In the context of burglary and assault, "evidence is relevant if it 'tend[s] to shed light upon the circumstances surrounding the [breaking and entering]' " with intent to commit an assault inflicting serious bodily harm. *State v. Richmond*, 347 N.C. 412, 428, 495 S.E.2d 677, 685, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998) (quoting *State v. Stager*, 329 N.C. 278, 322, 406 S.E.2d 876, 901 (1991)), *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998). Such evidence is generally admissible unless "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.G.S. § 8C-1, Rule 403. The decision

whether to exclude relevant evidence under Rule 403 lies within the sound discretion of the trial court, *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428, *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2000), and " 'its ruling may be reversed for abuse of discretion only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision,' " *State v. Richmond*, 347 N.C. at 429, 495 S.E.2d at 686 (quoting *State v. Collins*, 345 N.C. 170, 174, 478 S.E.2d 191, 194 (1996)).

The admissibility of specific acts of misconduct by the defendant is governed by N.C.G.S. § 8C-1, Rule 404(b) (1999), which provides:

> (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.

Rule 404(b) is a general rule of inclusion of relevant evidence of other crimes, and wrongs committed by a defendant and is subject to only one exception which requires exclusion of such evidence if offered only to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993). Moreover, in applying Rule 404(b), the courts have consistently held that evidence that would otherwise show "bad character" is admissible if it is offered to show something other than bad character, such as "malice . . ., intent or ill will against the victim." *State v. Alston*, 341 N.C. 198, 229, 461 S.E.2d 687, 703 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996).

In the case *sub judice*, the evidence regarding defendant's prior drug use is relevant, because it tends to explain the nature of his relationship with Hannah and to establish defendant's ill will towards Hannah. It explains Hannah's reason for leaving defendant, which led to his threats against her. Thus, the evidence is relevant to issues other than defendant's propensity to commit the crimes for which he is charged. We therefore hold that the evidence of defendant's prior drug use was admissible under Rule 404(b).

Further, assuming *arguendo* that it was error to allow testimony regarding defendant's drug use, we find such error harmless. Where there is no reasonable possibility that, had the evidence not been

admitted, a different result would have been reached at trial, then such error is harmless. *State v. Sullivan*, 86 N.C. App. 316, 357 S.E.2d 414, *disc. review denied*, 321 N.C. 123, 361 S.E.2d 602 (1987). In the present case, the testimony of Hannah regarding defendant's drug habit was minimal. We hold that there was substantial evidence that defendant committed the crimes of which he was convicted, irrespective of defendant's drug use. Accordingly, this assignment of error is overruled.

We hold that defendant is entitled to a new trial on the felonious assault, and we find no error of his conviction of first-degree burglary.

No error on burglary conviction; vacate assault conviction, new trial.

Judges McGEE and TIMMONS-GOODSON concur.

LEIGH W. WALTER, PLAINTIFF v. JAMES M. WALTER, JR., DEFENDANT

No. COA01-217

(Filed 16 April 2002)

1. Divorce— equitable distribution—home—tenants by entiety—separate property part of purchase price—presumption of donative intent

The entire value of a home acquired by the parties as tenants by the entirety during the marriage and before the date of separation must be classified as marital property, even though defendant husband had applied $32,452.50 of his separate property to the purchase of the home, where defendant offered no evidence that he had no intention of making a gift of the $32,452.50 to the marital estate and thus failed to rebut the presumption of donative intent provided by N.C.G.S. § 50-20(b)(2).

2. Divorce— equitable distribution—classification—money found in safe of marital home—separate property

The trial court did not err in an equitable distribution case by classifying the $11,000 found in the safe in the marital home as defendant husband's separate property where the husband offered testimony that the $11,000.00 came from the sale of

clocks that had been his separate properties, the wife acknowledged the original $11,000.00 as the husband's separate property but testified that funds from this source were used for marital purposes and replaced with marital funds, and the trial court implicitly resolved this conflicting testimony in the husband's favor.

3. Divorce— equitable distribution—distributional factor—wasting or converting marital assets

The trial court erred in an equitable distribution case by finding as a distributional factor that plaintiff wife wasted or converted marital assets by her post-separation misconduct in removing truckloads of property from the marital home where the parties stipulated that the items removed by plaintiff had a value of $190,000.00; the trial court found the items to be marital property and distributed them to plaintiff, assigning thereto the stipulated value; and the marital estate was thus not deprived of any property. N.C.G.S. § 50-20(c).

4. Divorce— equitable distribution—denial of credits—no abuse of discretion

The trial court in an equitable distribution case did not abuse its discretion in denying defendant husband credits for post-separation payments from separate funds for monthly mortgage obligations secured by a deed of trust on an office building, property taxes on the office building, the parties' joint income tax obligations, and the cost of repairs to a house where the office building, the house, and all the marital debt were distributed to defendant.

5. Appeal and Error— preservation of issues—failure to object

Although defendant husband contends in an equitable distribution case that the trial court erred by adopting the valuation given by plaintiff's expert regarding defendant's oral and maxillofacial surgery practice, defendant failed to preserve this issue for appeal, because: (1) defendant failed to object to the expert's opinion, and (2) defendant failed to object at trial to the valuation methodology utilized by the expert or its application to the facts of this case.

Appeals by defendant and plaintiff from judgment and order dated 4 April 2000 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 29 January 2002.

Gatto Law Offices, by Joseph J. Gatto, and Bell, Davis & Pitt, P.A., by Robin J. Stinson, for plaintiff-appellant.

White and Crumpler, by G. Edgar Parker, for defendant-appellant.

GREENE, Judge.

James M. Walter, Jr. (Defendant) and Leigh W. Walter (Plaintiff) separately appeal an equitable distribution judgment and order dated 4 April 2000.

On 21 August 1996, Plaintiff filed a complaint seeking, in pertinent part, an equitable distribution of marital property. Evidence at the equitable distribution hearing established Plaintiff and Defendant were married on 26 September 1981, separated on 21 August 1996, and divorced on 14 May 1998. No children were born of the marriage. At the time of their marriage, Defendant was employed as an associate oral surgeon with a partnership practice. Shortly following his marriage to Plaintiff, Defendant became a sole practitioner and opened his own practice of oral and maxillofacial surgery (the Practice). Plaintiff contributed to the Practice by assuming the responsibilities of an office manager.

Between 21 and 22 August 1996, after the time of the parties' separation, Plaintiff and a number of helpers were observed removing several truckloads of property from the parties' marital home. When Defendant returned from a fishing trip and saw the house, he observed that: "She took basically everything. Everything[] [is] gone."

On 16 September 1999, the parties entered into a stipulation regarding the items Plaintiff had taken from the marital home between 21 and 22 August 1996. The stipulation provided that for the purpose of equitable distribution, these items would be distributed to Plaintiff at a value of $190,000.00.[1] The stipulation further stated that

1. While the stipulation does not specifically state that the $190,000.00 was the date-of-separation value, we accept it as such. The trial court was required to value the marital property on the date of separation, *see* N.C.G.S. § 50-21(b) (1999), and neither party suggests the $190,000.00 represents the value at some other point in time or that the property decreased in value between the date of separation and the date of distribution.

it would not constitute an admission by Plaintiff that she removed or converted the items at any time or maintained possession of or control over them since the date of separation.

Defendant offered testimony and Plaintiff stipulated that Defendant had applied $32,452.50 of his separate property in addition to marital funds for the purchase of a house on Meadowbrook Road (the Meadowbrook home) that the parties had bought during their marriage and to which they took title as tenants by the entirety. Defendant further testified that $11,000.00 in cash kept in a safe in the marital home was his separate property derived from his pre-marital business of selling antique British grandfather clocks. This money remained untouched during the course of the marriage as Defendant considered it a cash reserve. Plaintiff, on the other hand, claimed the cash was used periodically over the course of their marriage for marital purposes and subsequently replaced and should therefore be considered marital property.

Defendant used his separate funds during the post-separation period but prior to the date of equitable distribution to pay for: homeowners insurance, maintenance, and other expenses with respect to the Meadowbrook home and another house that had been purchased during the marriage (the Yadkin house); the 1996 through 1999 property taxes and the mortgage on a Maplewood Avenue office building (the Maplewood office); and the parties' joint federal and state income taxes.

Defendant offered the expert testimony of Loyd R. Daniel (Daniel) and Stanley L. Pollock (Pollock) regarding the valuation of the Practice. Plaintiff offered the expert testimony of Robert N. Pulliam (Pulliam). Pulliam valued the Practice on the date of separation at $1,131,000.00. His testimony and written report were admitted into evidence without objection.

In an equitable distribution judgment and order dated 4 April 2000, the trial court found "all three of the experts presented by . . . Plaintiff and . . . Defendant qualif[ied] as experts in the area of the valuation of professional practices." The trial court adopted Pulliam's valuation of the Practice, which it found to be "not only based on accounting principles[] but also . . . grounded in solid appraisal practice and common sense" and assigned a date-of-separation value of $1,131,000.00 to the Practice. The trial court further found in finding of fact number LIV that:

A. The "Cash in Safe" is determined to be the separate property of . . . Defendant at a fair market value on the date of separation of $11,000.00.

. . . .

D. [P]ursuant to [the parties'] Stipulation[,] . . . Defendant made a contribution of $32,452.50 of his separate property to the acquisition of and improvements to [the Meadowbrook home]. . . . Defendant has established through clear, cogent and convincing evidence that he had no intention of making a gift of his separate property to the marital estate, although said property was deeded to the parties as tenants by the entiret[y]. The Court finds therefore that of the date of separation value of $145,000.00[,] . . . $32,452.50 is . . . Defendant's separate property and that the remaining sum of $112,547.50 is marital property, which is distributed to Defendant.

The trial court distributed the Meadowbrook home, the Yadkin house, the Maplewood office, and the marital debt to Defendant. The trial court granted Defendant a credit in the amount of $4,494.87 resulting from insurance paid on marital property, including homeowners insurance for the Meadowbrook home and the Yadkin house, and a credit in the amount of $4,950.00 for maintenance on the Meadowbrook home. The trial court denied Defendant a credit for post-separation mortgage payments on the Maplewood office because the office had been distributed to Defendant, "therefore providing him with full credit for the principal reduction to the mortgage balance subsequent to the date of separation." The trial court also denied Defendant credit for post-separation property tax payments on the Maplewood office for the years 1996 through 1999. The trial court further denied Defendant's request for credit in respect to the payment of joint income taxes following the parties' separation because "the items for which Defendant was requesting credit were included as marital debt under Schedule I of the Pre-Trial Order" and assigned to Defendant. Finally, the trial court denied Defendant credit for post-date-of-separation repairs and improvements to the Yadkin house, which had been awarded to Defendant, as there was "no evidence that . . . Plaintiff benefitted in any respect from . . . Defendant's acquisition of this property, nor [was] there any evidence that . . . Defendant was involuntarily forced to make repairs and improvements to the property following the parties' separation."

Among the distributional factors listed by the trial court, the trial court considered "the acts of . . . Plaintiff in wasting, neglecting and converting marital property between the date of separation and the trial of this matter, including those assets set out in the written [s]tipulation by the parties" on 16 September 1999. The trial court referred to these acts as "the most significant distributional factor." As a result, the trial court concluded that an equal distribution of the marital property would be inequitable and awarded Defendant 54.5% of the net marital estate. The assets covered by the 16 September 1999 stipulation in the amount of $190,000.00 were deemed part of the marital estate and distributed to Plaintiff.

The issues are whether: (I)(A) Defendant rebutted the presumption of a gift of $32,452.50 of his separate property to the marital estate; (B) the $11,000.00 cash in the safe was properly classified as Defendant's separate property; (II)(A) the evidence supports the finding of a distributional factor that Plaintiff wasted or converted marital assets; (B) the trial court erred in its allocation of credits; and (III) Defendant properly preserved his right to argue the trial court erred in adopting Pulliam's valuation of the Practice.

I

Classification

A

Meadowbrook Home

[1] Plaintiff claims the Meadowbrook home is marital property while Defendant contends it is partly marital and partly his separate property.[2] This property was acquired by the parties as tenants by the entirety during the marriage and before the date of separation, and Defendant applied $32,452.50 of his separate monies to the purchase price.

As the property was acquired by the parties during the marriage, before the date of separation, and was owned by them on the date of separation, Plaintiff met her burden of showing the property was marital. *See* N.C.G.S. § 50-20(b)(1) (1999). Defendant contends he acquired a portion of the Meadowbrook home in exchange for his separate monies and thus, pursuant to the "exchange provision" of

2. The burden is on the party claiming property to be marital, separate, or divisible to prove that it is so. *See Atkins v. Atkins*, 102 N.C. App. 199, 206-7, 401 S.E.2d 784, 787-8 (1991).

N.C. Gen. Stat. § 50-20(b)(2), has satisfied his burden. Plaintiff, relying on *McLean v. McLean*, 323 N.C. 543, 546, 374 S.E.2d 376, 378 (1988), contends the transfer implicates the "interspousal gift provision" of section 50-20(b)(2), and thus, Defendant made a gift of his $32,452.50 to the marital estate. The titling of the property in the entireties does indeed raise a presumption of donative intent, implicating the "interspousal gift provision"; however, it is rebuttable by clear and convincing evidence. *McLean*, 323 N.C. at 546, 374 S.E.2d at 378.

In this case, the trial court found Defendant offered "clear, cogent and convincing evidence that he had no intention of making a gift" of the $32,452.50 to the marital estate. Defendant points to no such evidence[3] in his brief, *see* N.C.R. App. P. 28(b)(5) (appellate briefs shall contain "all material facts . . . supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits"); *see also Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 316, 533 S.E.2d 501, 504 (2000) ("[a]ppellate judges find such references invaluable in directing the court's attention to the pertinent portions of the record"), nor can we find any evidence in the record to support the trial court's finding of fact. Because the trial court's finding was not supported by competent evidence, it was in error. *See Nix v. Nix*, 80 N.C. App. 110, 112, 341 S.E.2d 116, 118 (1986) (findings made by the trial court must be supported by competent evidence). Accordingly, the entire value of the Meadowbrook home must be classified as marital property and the trial court's order to the contrary is reversed. Defendant is, as a result of this holding, entitled to have the trial court consider the gift of his separate property to the marital estate as a distributional factor. *See Collins v. Collins*, 125 N.C. App. 113, 116, 479 S.E.2d 240, 242, *disc. review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997). The weight, if any, assigned to this factor is within the discretion of the trial court. *See Khajanchi v. Khajanchi*, 140 N.C. App. 552, 564, 537 S.E.2d 845, 853 (2000).

B

Cash Reserve

[2] Plaintiff argues the $11,000.00 found in the safe in the marital home was marital property. Defendant contends it was properly classified as his separate property.

3. Evidence that a gift to the marital estate was not intended "can be gathered from 'circumstances which led to the execution' of the deed and the parties' action after execution of the deed," such as the donor spouse's continued treatment of the

At trial, Defendant offered testimony that the $11,000.00 came from the sale of clocks that had been his separate properties.[4] Plaintiff acknowledged the original $11,000.00 as Defendant's separate property but testified funds from this source were used for marital purposes and replaced with marital funds.[5] In determining that the $11,000.00 in cash is Defendant's separate property, it appears the trial court implicitly resolved this conflicting testimony in Defendant's favor. As there was competent evidence in the record to support this determination, the trial court committed no error in classifying the $11,000.00 as Defendant's separate property. *See Nix*, 80 N.C. App. at 112, 341 S.E.2d at 118.

II

Distribution

A

Distributional Factors

[3] In determining whether an equal distribution of marital assets is equitable, the trial court is to consider, as a distributional factor, the post-separation "[a]cts of either party to . . . waste, neglect, devalue or convert the marital property." N.C.G.S. § 50-20(c)(11a) (1999). Plaintiff's removal of truckloads of marital property from the marital home immediately pursuant to the parties' separation constituted marital misconduct. Nevertheless, marital misconduct, consistent with *Smith v. Smith*, 314 N.C. 80, 87, 331 S.E.2d 682, 687 (1985), only supports a distributional factor if it has an economic effect on the marriage.[6] *See also Coleman v. Coleman*, 89 N.C. App. 107, 109-10,

property as his separate property following the conveyance. *Lawrence v. Lawrence*, 100 N.C. App. 1, 18, 394 S.E.2d 267, 275-76 (1990) (Greene, J., concurring in the result). Competent evidence also includes the donor spouse's intent, expressed at some point in time, not to make a gift of the property to the marital estate. *Id.*

4. If this testimony is believed, the exchange provision of section 50-20(b)(2) would require classification of the cash derived from the sale of the clocks as Defendant's separate property.

5. Had the $11,000.00 cash been replaced entirely with marital funds, it would have lost its separate property status. If replaced in part by marital funds, the replaced part would constitute marital property, with the other part retaining its separate property status. The commingling of the funds, *in this instance*, would not transmute the separate property into marital property as long as the party claiming a portion of the funds to be separate would be able to trace the initial amount deposited to the balance existing on the date of separation. *See Fountain v. Fountain*, 148 N.C. App. 329, 334, 559 S.E.2d 25, 29 (2002).

6. Marital misconduct that has no resulting economic impact may nonetheless have other consequences. *See* N.C.G.S. § 50-21(e) (1999) (spouse can be sanctioned for

365 S.E.2d 178, 180 (1988) (misconduct during the marriage that dissipates or reduces the value of the marital assets for non-marital purposes can be considered as a distributional factor). Accordingly, marital property is wasted, neglected, devalued, or converted only if it is, at the time of the distribution, either not available for distribution or has, as a result of a spouse's acts, decreased in value from its date of separation value. *Id.*; *see Smith*, 314 N.C. at 87, 331 S.E.2d at 687 (only acts or circumstances affecting the marital economy are properly considered as distributional factors).

In this case, the parties stipulated the items removed by Plaintiff from the marital home between 21 and 22 August 1996, after the time of separation, had a value of $190,000.00. The trial court found the items to be marital property and distributed them to Plaintiff, assigning the property the stipulated value. Thus, the marital estate was not deprived of any property.[7] It follows, the trial court erred in treating Plaintiff's post-separation removal of the property from the marital home as a distributional factor under section 50-20(c)(11a).

B

Credits

[4] A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (from non-marital or separate funds) for the benefit of the marital estate. *Edwards v. Edwards*, 110 N.C. App. 1, 11, 428 S.E.2d 834, 838, *disc. review denied*, 335 N.C. 172, 436 S.E.2d 374 (1993). Likewise, a spouse is entitled to some consideration for any post-separation use of marital property by the other spouse. *Becker v. Becker*, 88 N.C. App. 606, 607-08, 364 S.E.2d 175, 176-77 (1988). To accommodate post-separation payments, the trial court may treat the payments as distributional factors under section 50-20(c)(11a), N.C.G.S. § 50-20(c)(11a), or provide direct credits for the benefit of the spouse making the payments, *see Hendricks v. Hendricks*, 96 N.C. App. 462, 467, 386 S.E.2d 84, 87 (1989), *disc. review denied*, 326

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the willful obstruction of an equitable distribution proceeding); N.C.G.S. § 50-20(i) (1999) (spouse can be directed to pay for costs incurred for the return of the other spouse's separate property); N.C.G.S. § 1A-1, Rule 34(a) (1999) (property can be subject to inspection for the purpose of inventory and valuation).

7. If Plaintiff had, for example, expended marital funds to remove the property from the residence, the removal would have had some economic impact on the marital estate and to this extent would have been properly considered as a distributional factor. There is, however, no evidence in this case that marital funds were expended to remove the property from the residence.

N.C. 264, 389 S.E.2d 113 (1990). With regard to post-separation use of marital property, the trial court may treat the use as a distributional factor under N.C. Gen. Stat. § 50-20(c)(12), *see Becker*, 88 N.C. App. at 607-08, 364 S.E.2d at 176-77, or place some value on the use and provide a direct credit for the benefit of the spouse who did not use the property. If the property is distributed to the spouse who did not have the post-separation use of it or who did not make post-separation payments relating to the property's maintenance (i.e. taxes, insurance, repairs), the use and/or payments must be considered as either a credit or distributional factor. *See Loving v. Loving*, 118 N.C. App. 501, 505-06, 455 S.E.2d 885, 888 (1995) (spouse not receiving the marital debt who makes some payment on the marital debt after the date of separation and before equitable distribution is entitled to either a reimbursement from the other spouse, a credit, or an upward adjustment in the percentage distribution of the marital properties); *see also Hendricks*, 96 N.C. App. at 467, 386 S.E.2d at 87 (awarding credit to spouse for making post-separation payments on mortgage for house distributed to other spouse). If, on the other hand, the property is distributed to the spouse who had the post-separation use of it or who made post-separation payments relating to its maintenance, there is, as a general proposition, no entitlement to a credit or distributional factor. Nonetheless, the trial court may, in its discretion, weigh the equities in a particular case and find that a credit or distributional factor would be appropriate under the circumstances. *See Edwards*, 110 N.C. App. at 13, 428 S.E.2d at 840 (trial court in best position to determine the most equitable treatment of post-separation payments of marital debt).

In this case, the trial court denied Defendant credits for post-separation payments (from non-marital or separate funds) of: (1) monthly mortgage obligations secured by a deed of trust on the Maplewood office, (2) property taxes due on the Maplewood office, (3) the parties' joint income tax obligations, and (4) cost of repairs to the Yadkin house. The trial court granted Defendant credits for homeowners insurance paid on the Meadowbrook home and the Yadkin house and maintenance expenditures on the Meadowbrook home. As the Maplewood office, the Yadkin house, and all the marital debt were distributed to Defendant, it was within the trial court's discretion to either allow or deny Defendant the requested credits, and we find no abuse in the trial court's exercise of its discretion.

III

Valuation of the Practice

[5] In an equitable distribution proceeding, the trial court is to determine the net fair market value of the property based on the evidence offered by the parties.[8] *Carlson v. Carlson*, 127 N.C. App. 87, 91, 487 S.E.2d 784, 786, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 407 (1997). There is no single best method for assessing that value, *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 316-17 (1985), but the approach utilized must be "sound," *id.* at 422, 331 S.E.2d at 272. In other words, the trial court must determine whether the methodology underlying the testimony offered in support of the value of a marital asset is sufficiently valid and whether that methodology can be properly applied to the facts in issue. *State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993)). A party believing the methodology used by a witness is not valid or, if valid, is not properly applied to the facts at issue, has an obligation to object to its admission. *See* N.C.G.S. § 8C-1, Rule 103(a)(1) (1999). If a timely objection is not lodged at trial, it cannot be argued on appeal that the trial court erred in relying on this evidence in determining the value of the asset at issue. *See* N.C.R. App. P. 10(b)(1); *State v. Lucas*, 302 N.C. 342, 349, 275 S.E.2d 433, 438 (1981) (admission of evidence without an objection is "not a proper basis for appeal").

In this case, Plaintiff offered the testimony of Pulliam, who was qualified as an expert in the area of the valuation of professional practices.[9] He gave his opinion as to the value of the Practice, and Defendant offered no objection to that opinion, nor did Defendant object to the methodology utilized in reaching the opinion. On appeal, Defendant argues the methodology used by Pulliam was flawed and thus the trial court could not rely on it for the purpose of determining value. No objection was entered at trial to the valuation methodology utilized by Pulliam or its application to the facts of this case. Thus, Defendant is precluded from challenging the trial court's valuation findings based on this methodology on the ground that it failed to "reasonably approximate[] the net value of the [asset]."

8. "[A] witness qualified as an expert by knowledge, skill, experience, training, or education" may offer opinion testimony as to the value of an asset. N.C.G.S. § 8C-1, Rule 702(a) (1999).

9. Defendant does not contest the qualification of Pulliam as an expert.

Fountain, 148 N.C. App. at 338, 559 S.E.2d at 32. Accordingly, Defendant's assignments of error regarding the valuation of the Practice are overruled.[10]

Summary

In summary, (I)(A) the trial court erred in classifying the $32,452.50 payment made by Defendant on the Meadowbrook home as his separate property; (B) the trial court properly classified the $11,000.00 found in the safe in the marital home as Defendant's separate property; (II)(A) the trial court erred in finding as a distributional factor that Plaintiff wasted or converted marital assets; (B) the trial court did not abuse its discretion in its allocation of credits; and (III) Defendant failed to preserve his right to argue the trial court erred in adopting Pulliam's valuation of the Practice. On remand, the trial court must enter a new equitable distributional order consistent with this opinion and without the benefit of new evidence.

Reversed in part and remanded in part.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. CAROLYN NANCE

No. COA01-353

(Filed 16 April 2002)

Search and Seizure— warrantless seizure—neglected horses

The trial court erred in a prosecution for misdemeanor cruelty to animals by denying defendant's motion to suppress evidence seized without a warrant where animal control officers responding to a telephone call viewed defendant's horses from a road and driveway beside the pasture leased by defendant; the horses were in open areas and were not in barns or closed structures; the horses were emaciated, standing in water and mud, and were without visible food; the officers left to make arrangements for transportation and care of the horses; and they returned 3 days later and seized the horses without a warrant. Knowledge

10. We have carefully reviewed the remaining assignments of error entered by the parties and overrule them without discussion.

that officers gain from plain-view observations does not constitute a search under the Fourth Amendment, but whether such observations can justify a warrantless seizure is a separate question. Here, there were no exigent circumstances and there was ample time to secure a warrant during the 3 days in which arrangements were made for the transportation and care of the horses. However, information (such as photographs) gathered before officers entered the property would be admissible.

Appeal by defendant from judgments entered 20 September 2000 by Judge Sanford L. Steelman, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 31 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Noell P. Tin for defendant appellant.

TIMMONS-GOODSON, Judge.

On 20 September 2000, a jury found Carolyn Nance ("defendant") guilty of six counts of misdemeanor cruelty to an animal. Before trial, defendant made a motion to suppress evidence seized by animal control officers without a warrant. Specifically, defendant objected to the officers' seizure of six horses owned by defendant. Defendant's motion to suppress came before the trial court on 18 September 2000, at which time the trial court made the following pertinent findings of fact:

5. On December 18, 1998, Animal Control Officers received a telephone call . . . concerning the welfare of a herd of horses located off Old Mocksville Road in Rowan County.

6. Rowan County Animal Control Officers Frances Pepper and Animal Control Field Supervisor Robin Cook went to the Ridenhour farm located on Old Mocksville Road in Rowan County where they were met by the owner of the farm, John Ridenhour. Through investigation they learned that the horses were owned by the Defendant and that she leased barns and paddocks from Mr. Ridenhour. The Officers initially viewed the horses from the road beside the pasture. They saw horses that were extremely thin, had their bones showing, were in an emaciated condition, and appeared to be starving. They were standing in water and mud without any visible food. Some of the horses

were visible from the common driveway shared by the Kirkpatrick septic business, the Ridenhour home and the Defendant Nance's leased property. None of the horses were in closed structures, barns, behind closed doors or otherwise out of sight. The horses were located in open, accessible areas on the Defendant's leased property. The horses, and their condition were readily visible to the officers from the roadway that ran back to the septic tank business. The officers saw around 18 horses on the property that night.

7. Officers were unable to seize the horses on December 18, 1998, due to having no transportation for the horses and having no facilities for their care.

8. Animal Control Supervisor Clai Martin was advised of the situation by Officer Cook and went to the Ridenhour farm on Saturday morning, December 19, 1998. He spent only 5 minutes but in that time he saw that the horses he was able to see from the roadway that ran back to the septic tank business were in extremely poor condition, they were very thin and appeared to be starving. He . . . did not see any food for these horses.

9. Officers Martin and Cook began making arrangements for seizing some of these horses. The arrangements included getting an agreement from Rowan County and the Jaycees to allow the seized horses to be kept at the Rowan County Fairgrounds, which had inside accommodations for horses, getting transportation in the form of stock trailers for the horses and getting people who were familiar with horses to assist in the loading and unloading of the horses. The plan was to meet at the Ridenhour farm at 8:30am on Monday December 21, 1998, and to remove 9 of the horses in the worst condition, if the condition of the horses and the property was the same as seen by Officers on December 18 and 19, 1998.

10. On December 21, 1998, Animal Control Officers for Rowan County including Field Supervisor Cook and Officer Frances Pepper, Salisbury Animal Control Officer Ann Frye, Animal Control employee Kim Moore and other volunteers went to the Ridenhour farm. The horses were still located in open accessible areas on the Defendant Nance's leased property. None of the horses were located in any enclosed structure. The horses were emaciated and appeared to be starving . . . . The Animal Control Officers concluded, based upon their training and experience that

the horses were starving and in need of immediate veterinary treatment. There was no available food for these horses and Supervisor Martin was called and made the final decision to seize the horses.

. . . .

12. The Defendant came to the Ridenhour farm on December 21, 1998, and ordered Officers and others off her leased property and ordered the officers to unload her horses. The Defendant did not consent to the officers' presence or the taking of the horses.

13. The 6 horses that are involved in these cases were seized that day. The horses were in plain view and were evidence that they had been cruelly treated under G.S. 14-360. Exigent circumstance[s] existed in that if the horses were not fed and did not receive immediate veterinary treatment they might further deteriorate or even die.

14. There was no search warrant or other process obtained by the officers before their seizure of the horses on December 21, 1998. The officers did not obtain an Order under G.S. 19A-46.

. . . .

16. The Fourth Amendment protects people in their homes and the curtilage of their homes, but not within open areas outside of the curtilage of their homes. The defendant admitted living at least 1 mile from the Ridenhour farm and that there were at least 2 landowners between her personal residence and her leased property at the Ridenhour farm. The horses were not kept within the curtilage of Defendant's property.

17. The horses that are the subject of these cases were being kept in open paddocks that were surrounded by open pipe fencing; the horses were visible to anyone outside of the fence. None of the horses was kept in a closed structure or in an enclosed barn behind any type of door.

Based on the above-stated facts, the trial court concluded that, because "[t]he rental property where the horses were located was not covered by the Fourth Amendment[,]" the warrantless entry onto defendant's property and seizure of her horses did not violate defendant's constitutional or statutory rights. The trial court therefore denied defendant's motion to suppress.

Upon receiving the jury's guilty verdict, the trial court sentenced defendant to a suspended sentence of forty-five days' imprisonment and placed defendant on supervised probation for eighteen months. Defendant also forfeited the six horses to the Rowan County Animal Control, and the trial court ordered her "not to own, possess, or care for any animals while on probation." The trial court further ordered defendant to pay fines, costs and restitution to Rowan County for the care of the horses. Defendant appeals from her conviction and resulting sentence.

The issue on appeal is whether the trial court erred in denying defendant's motion to suppress the evidence seized by animal control officers without a warrant. For the reasons stated herein, we reverse the trial court.

The trial court's findings of fact following a suppression hearing are conclusive and binding on the appellate courts when supported by competent evidence. *See State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994). While the trial court's factual findings are binding if sustained by the evidence, the court's conclusions based thereon are reviewable *de novo* on appeal. *See State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992), *cert. denied*, 513 U.S. 1089, 130 L. Ed. 2d 649 (1995).

Defendant argues that the animal control officers had no right to enter her property and seize her horses without first securing a warrant. Such seizure, contends defendant, was *per se* unreasonable under the Fourth Amendment, and as such, the evidence obtained by the illegal seizure was inadmissible at trial. The State argues that, as the horses were located in plain view in an open field, their seizure did not implicate defendant's Fourth Amendment rights. Under the facts of the present case, we agree with defendant that the officers' entry onto her property and seizure of her horses violated her rights under the Fourth Amendment, and we therefore reverse the judgment of the trial court.

The Fourth Amendment provides, in pertinent part, that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 94 (1984). A search occurs when there is an

infringement upon a person's expectation of privacy that society recognizes as reasonable. *See id.* "The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *Horton v. California*, 496 U.S. 128, 133, 110 L. Ed. 2d 112, 120 (1990). Thus, whether an individual's privacy interest has been compromised is a distinct question requiring a separate analysis than the issue of whether an individual has been unreasonably deprived of dominion over his property. *See id.*

In the instant case, animal control officers seized horses that were located on defendant's property in an open field. Generally, an open field is not an area entitled to Fourth Amendment privacy protection, because an individual has no legitimate privacy interest in areas outside the home or its curtilage. *See United States v. Dunn*, 480 U.S. 294, 300, 94 L. Ed. 2d 326, 334 (1987); *State v. Tarantino*, 322 N.C. 386, 390, 368 S.E.2d 588, 591 (1988), *cert. denied*, 489 U.S. 1010, 103 L. Ed. 2d 180 (1989). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582 (1967). Thus, when officers are in a public place or some other area, such as an open field, that is not protected by the Fourth Amendment, knowledge that they gain from their plain-view observations does not constitute a search under the Fourth Amendment. *See Payton v. New York*, 445 U.S. 573, 586-87, 63 L. Ed. 2d 639, 651 (1980). Whether such plain-view observations can justify a warrantless seizure, however, is a separate question. *See Soldal v. Cook County*, 506 U.S. 56, 65-66, 121 L. Ed. 2d 450, 461-62 (1992). "If the boundaries of the Fourth Amendment were defined exclusively by rights of privacy, 'plain view' seizures would not implicate that constitutional provision at all. Yet, far from being automatically upheld, 'plain view' seizures have been scrupulously subjected to Fourth Amendment inquiry." *Id.* at 66, 121 L. Ed. 2d at 461. "That is because, the absence of a privacy interest notwithstanding, '[a] seizure . . . obviously invade[s] the owner's possessory interest.' " *Id.* (quoting *Horton*, 496 U.S. at 134, 110 L. Ed. 2d at 121) (alteration in original). Thus, in the case at bar, although the observation by animal control officers of the horses located on defendant's property in an open field was not a search entailing defendant's privacy interests, there is no question that the officers deprived defendant of her possessory interest in her horses when they removed the horses from her

property. Such deprivation clearly constituted a seizure and therefore implicated Fourth Amendment protections. As defendant's Fourth Amendment rights were implicated by the seizure, the issue becomes whether or not such seizure was reasonable under the Fourth Amendment.

Whether or not the warrantless seizure of items in plain view is reasonable under the Fourth Amendment depends on several factors. First, officers must not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. *See Horton*, 496 U.S. at 136, 110 L. Ed. 2d at 123. Second, the incriminating character of the item in plain view must be "immediately apparent." *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 29 L. Ed. 2d 564, 583 (1971). Third, "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself." *Horton*, 496 U.S. at 137, 110 L. Ed. 2d at 123; *see also Soldal*, 506 U.S. at 66, 121 L. Ed. 2d at 461 (noting that, in the absence of consent, warrantless seizures "can be justified only if they meet the probable-cause standard . . . and if they are unaccompanied by unlawful trespass") (citation and footnote omitted); *State v. Worsley*, 336 N.C. 268, 282, 443 S.E.2d 68, 75 (1994) (affirming that seizure of suspicious items in plain view inside a dwelling is lawful only if the officer possesses the legal authority to be on the premises).

Applying the above-stated factors to the officers' actions in the instant case, we first conclude that the officers did not violate the Fourth Amendment when they initially viewed the horses. The trial court's findings reveal that the officers could clearly and plainly view the horses from the officers' vantage point from the adjacent Ridenhour property and the common roadway beside defendant's property. The horses were not within any type of enclosed structure and were surrounded only by open pipe and electrical fencing that was not designed to shield the animals from view. *See Dunn*, 480 U.S. at 303, 94 L. Ed. 2d at 336 (stating that fences intended to corral livestock are not designed to prevent people from observing what lies within the enclosed area).

Second, the incriminating character of the evidence seized in the instant case was immediately apparent to the animal control officers. North Carolina General Statutes section 14-360, entitled Cruelty to Animals, provides that:

> (a) If any person shall intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal, every such offender shall for every such offense be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 14-360(a) (1999). The trial court found, and the record shows, that the horses were extremely thin and in an emaciated condition when the officers observed them. The horses' bones were showing, and they appeared to be starving. Further, the animals were standing in water and mud without any visible food. These findings by the trial court, as well as photographs of the animals included in the record, indicate that the condition of the horses was piteous to a degree open and obvious to anyone viewing them, such that the officers could reasonably conclude that section 14-360 had been violated. The incriminating character of the evidence seized was therefore immediately apparent.

In the third and final prong of the test for determining whether the warrantless seizure was reasonable, we must examine whether the officers had lawful access to the horses when they seized the animals. The United States Supreme Court has explained that the requirement of lawful access to the object seized

> is simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

Coolidge, 403 U.S. at 468, 29 L. Ed. 2d at 584; *see Horton*, 496 U.S. at 137 n.6b, 110 L. Ed. 2d at 123 n.7. The officers in the instant case had neither consent nor a warrant authorizing their entry onto defendant's property. The State argues that the officers' access to the animals was lawful on several grounds. First, the State argues that the horses were located in a public place. Second, the State asserts that "officers who are conducting a legitimate law enforcement function on property are not violating North Carolina's criminal trespass laws" and that therefore, the access was lawful. Finally, the State contends

that exigent circumstances existed such that the officers were not required to obtain a warrant. We disagree on all points.

First, although it is true that "objects such as weapons or contraband found in a public place may be seized by the police without a warrant[,]" there is no evidence whatsoever that defendant's leased property was "a public place." *Payton*, 445 U.S. at 587, 63 L. Ed. 2d at 651. The fact that defendant's property included open fields does not transform private property into public land. We therefore reject this basis as a justification for the officers' actions.

We further disagree with the State's assertion that law enforcement officers may enter private property whenever they are conducting "legitimate law enforcement functions." The State relies on two cases for its assertion, namely *State v. Tripp*, 52 N.C. App. 244, 278 S.E.2d 592 (1981), and *State v. Prevette*, 43 N.C. App. 450, 259 S.E.2d 595 (1979), *appeal dismissed and disc. review denied*, 299 N.C. 124, 261 S.E.2d 925, *cert. denied*, 447 U.S. 906, 64 L. Ed. 2d 855 (1980). Neither case stands for the proposition that law enforcement officers may enter private property without a warrant and seize evidence of a crime. Rather, both cases affirm that "[l]aw enforcement officers have the right to approach a person's residence to inquire as to whether the person is willing to answer questions[,]" *Tripp*, 52 N.C. App. at 249, 278 S.E.2d at 596, and do not trespass when they enter an individual's property "for the purpose of a general inquiry or interview." *Prevette*, 43 N.C. App. at 455, 259 S.E.2d at 599-600. Thus, officers standing on the porch of the defendant's residence in *Prevette* were lawfully on the premises when they observed in plain view marijuana inside the defendant's home. The *Prevette* Court warned, however, that "plain view of objects inside a house will furnish probable cause but will not, without exigent circumstances, authorize entry to seize without a warrant." *Id.* at 456, 259 S.E.2d at 600.

The officers in the instant case did not enter defendant's property in order to conduct a "general inquiry or interview;" rather, they entered defendant's property for the express purpose of seizing evidence of a crime. Although the trial court found that the horses were located in "accessible" areas, the evidence does not support this finding. The transcript reveals that the animal control officers were forced to remove the electrical fencing surrounding the horses in order to gain access to the animals. If the position advanced by the State were correct, law enforcement officers could enter onto private property and seize evidence of criminal activity without a warrant

whenever they had probable cause to suspect that such activity was taking place. Such a position directly contradicts repeated admonitions by the United States Supreme Court that although

> "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity[,]" [a] different situation is presented . . . when the property in open view is "situated on private premises to which access is not otherwise available for the seizing officer."

Texas v. Brown, 460 U.S. 730, 738, 75 L. Ed. 2d 502, 511 (1983) (quoting *Payton*, 445 U.S. at 587, 63 L. Ed. 2d at 651). As this Court has observed, "[t]he implication that police officers have the right to seize any item which comes into their plain view at a place they have a right to be is fraught with danger and would sanction the very intrusions into the lives of private citizens against which the Fourth Amendment was intended to protect." *State v. Bembery*, 33 N.C. App. 31, 33, 234 S.E.2d 33, 35, *disc. review denied*, 293 N.C. 160, 286 S.E.2d 704 (1977).

The State further argues that the officers' access to the horses was lawful because exigent circumstances existed to justify the warrantless seizure. Exigent circumstances exist when there is "[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures[.]" *Black's Law Dictionary* 236 (7th ed. 1999); *see also* Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* 49 (2d ed. 1992) (stating that exigent circumstances exist when immediate action is necessary). "If the circumstances of a particular case render impracticable a delay to obtain a warrant, a warrantless search on probable cause is permissible . . . ." *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979). The United States Supreme Court has approved the following exigent circumstances justifying warrantless searches and seizures: (1) where law enforcement officers are in "hot pursuit" of a suspect, *see, e.g.*, *State v. Santana*, 427 U.S. 38, 42-43, 49 L. Ed. 2d 300, 305 (1976); (2) where there is immediate and present danger to the public or to law enforcement officers, *see, e.g.*, *Warden v. Hayden*, 387 U.S. 294, 298-99, 18 L. Ed. 2d 782, 787 (1967); (3) where destruction of evidence is imminent, *see, e.g.*, *Santana*, 427 U.S. at 43, 49 L. Ed. 2d at 305; and (4) where the gravity of the offense for which the suspect is arrested is high, *see, e.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 753, 80 L. Ed. 2d 732, 745 (1984). These cases suggest that exigent circumstances exist

where the need for immediate action is so great as to outweigh the potential infringement of a defendant's rights under the Fourth Amendment, thereby justifying the officers' failure to obtain a warrant.

In the present case, the trial court stated that "[e]xigent circumstance[s] existed in that if the horses were not fed and did not receive immediate veterinary treatment they might further deteriorate or even die." The trial court's findings of fact, however, do not support its conclusion that exigent circumstances existed. The evidence and the trial court's own findings reveal that the animal control officers first viewed the horses and their condition on 18 December 1998, but "were unable to seize the horses [at that time] due to having no transportation for the horses and having no facilities for their care." During the next two days, the officers "began making arrangements for seizing some of these horses." Such arrangements included "getting an agreement from Rowan County and the Jaycees to allow the seized horses to be kept at the Rowan County Fairgrounds," obtaining "transportation in the form of stock trailers[,]" and finding "people who were familiar with horses to assist in the loading and unloading of the horses." During all of this time, however, no one secured a warrant authorizing entry onto defendant's property and seizure of the horses. The officers did not actually seize the horses until 21 December 1998, three days after initially viewing their condition.

We conclude that exigent circumstances did not exist in the instant case. Clearly, obtaining a warrant would not have presented an impracticable delay under the circumstances. Although the trial court found that the horses might further deteriorate or even die if they did not receive immediate treatment, we note that the horses did not actually receive such treatment until 21 December 1998, when they were seized. The record shows that animal control officers had ample time during the three days after viewing the horses in which to secure a warrant, but neglected to do so because they mistakenly believed it to be unnecessary. As Animal Control Department Supervisor Clai Martin explained, "it was an open field, and we went by the open field and that field was away from the curtilage of the property, and, of course, in that situation no warrant is required." Because exigent circumstances did not exist, the animal control officers did not have lawful access to the horses. The officers' entry onto defendant's property and the seizure of her horses was therefore an unreasonable seizure under the Fourth Amendment.

As the seizure of the horses violated defendant's Fourth Amendment rights, the trial court erred in denying defendant's motion to suppress evidence obtained pursuant to the illegal seizure. *See* N.C. Gen. Stat. § 15A-974 (1999) (requiring exclusion of unlawfully obtained evidence). We emphasize, however, that the animal control officers did not conduct an illegal search when they viewed the animals while standing on the adjacent property and roadway. Thus, any evidence gathered by the officers before they unlawfully entered defendant's property, including photographs of the horses, is not subject to defendant's motion to suppress.

This Court is sympathetic to the laudable efforts of animal control officers in North Carolina in preventing cruelty to animals, and in caring for and rehabilitating animals who have been neglected and abused. We are moreover mindful of the time, resource, and personnel constraints faced by such officers. "We believe, however, that the interests of all can be accommodated . . . while still respecting the integrity of the [F]ourth [A]mendment." *State v. Schwegler*, 170 Wis. 2d 487, 501, 490 N.W.2d 292, 297 (1992). In conclusion, we hold that the trial court erred in denying defendant's motion to suppress evidence admitted at trial as a result of a warrantless seizure. We therefore reverse the judgment of the trial court and remand for a new trial.

Reversed and remanded.

Judges BRYANT and SMITH concur.

DEBRA G. FRAZIER, EMPLOYEE, PLAINTIFF v. McDONALD'S, EMPLOYER, WAUSAU INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA01-457

(Filed 16 April 2002)

1. Workers' Compensation— temporary partial disability— failure to show termination for misconduct or fault unrelated to compensable injury

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee was entitled to temporary partial disability even though defendants contend

plaintiff's current inability to work is not related to her work injury but due to the fact that she violated the cash drawer policy of the employer and was terminated, because there is competent evidence in the record to support the Commission's finding and conclusion that defendants failed to show that plaintiff's termination was for misconduct or fault, unrelated to her compensable injury for which a nondisabled employee would ordinarily have been terminated.

2. Workers' Compensation— permanent and total disability— earning capacity

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff employee was entitled to permanent and total disability under N.C.G.S. § 97-29 based on plaintiff's alleged incapacity to earn wages as a direct and natural consequence of her work-related accident on 1 January 1998, because: (1) plaintiff failed to show her incapacity to earn wages was a result of her injury on 1 January 1998 when two doctors concluded plaintiff had reached maximum medical improvement as of 15 June 1998 and that her capacity to earn wages now is greater than it was prior to the accident; (2) plaintiff did not stop working for defendant based on the fact that she was physically incapable of performing her job, but instead based on defendant's termination of her employment; (3) plaintiff testified that she did not seek other employment after defendant terminated her and failed to show that she was incapable of earning wages in any other employment; and (4) although there was some evidence that the accident may have aggravated plaintiff's pre-existing condition, all the evidence shows that plaintiff is not totally incapable of earning wages.

3. Workers' Compensation— injury—direct and natural consequence of injury by accident

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff's post 15 June 1998 injuries were a direct and natural consequence of her 1 January 1998 injury by accident, because a doctor testified that: (1) plaintiff would have eventually had knee buckling problems even if she never had the compensable injury on 1 January 1998; (2) the two primary causes of plaintiff's knee pain and weakness were her two patellectomies and degenerative arthritis in her knees; (3) it was equally likely that plaintiff's subsequent falls would have occurred in the absence of her compensable fall; and (4) the

doctor had no way of knowing with any certainty whether plaintiff's pre-existing conditions, or which of the various falls she experienced, caused her knee buckling problems after 15 June 1998.

4. Workers' Compensation— temporary partial disability compensation—unpaid portions

Although the Industrial Commission did not err in a workers' compensation case by concluding defendants shall pay all unpaid portions of the temporary partial disability compensation, the case is remanded for a determination of the remaining amounts owed from temporary partial disability compensation, if any.

5. Workers' Compensation— attorney fees—costs

Although the Industrial Commission did not err in a workers' compensation case by awarding reasonable attorney fees and costs, the case is remanded for a determination of the proper amount of attorney fees and costs in light of the Court of Appeals' holding.

Appeal by defendants from the North Carolina Industrial Commission's ("Commission") opinion and award entered 26 January 2001. Heard in the Court of Appeals 22 January 2002.

Raymond M. Marshall, for plaintiff-appellee.

Orbock Bowden Ruark & Dillard, PC, by Barbara E. Ruark and Stephanie Britt Woods, for defendants-appellants.

TYSON, Judge.

McDonald's (individually "defendant") and Wausau Insurance Company (collectively "defendants") appeal from the Commission's opinion and award, which awarded Debra Frazier ("plaintiff") (1) ongoing total disability compensation, (2) all unpaid portions of temporary partial disability compensation, (3) all medical expenses, and (4) reasonable attorney fees and costs. We affirm the Commission's opinion and award in part and reverse and remand in part.

I. Facts

Defendant employed plaintiff as a cashier during May of 1997. Plaintiff suffered from a pre-existing knee condition. In 1974, plaintiff underwent "patellectomy" surgery to remove both her kneecaps. Plaintiff experienced various knee-related problems and surgeries

subsequent to 1974, including episodes of falling, oftentimes sustaining additional injuries.

Evidence in the record shows that patients who experienced patellectomies suffer from (1) pain and weakness in their knees, (2) a "buckling sensation", (3) falls as a result of buckling and collapsing of the knee, and (4) "degenerative arthritis," which exacerbates all symptoms. The evidence indicates that plaintiff has fallen many times injuring her knees, ankles, shoulder, and back prior to beginning employment with defendant. The evidence also shows that plaintiff has fallen many times after defendant terminated her employment. Dr. Walton Curl ("Dr. Curl"), plaintiff's orthopedic surgeon, testified that each injury to her knees aggravates her pre-existing knee condition.

Plaintiff is forty-four years old and obese. Plaintiff testified that prior to beginning work for defendant, she experienced swelling in her knee, discomfort, and knee buckling problems.

In February of 1997, Dr. Curl informed plaintiff that she would be disabled for the next six months due to knee problems. Dr. Curl testified in his deposition that plaintiff should not have been working during that six month period. Dr. Curl further testified that plaintiff was completely disabled and could not work from August 1993 until August 1997 as a result of her pre-existing condition. Despite this diagnosis, plaintiff accepted employment with defendant in May 1997. Plaintiff testified that she continued to experience discomfort in her knee after she started to work for defendant, but that she "tolerated it."

Plaintiff continued to see Dr. Curl off and on throughout 1997, including a visit on 8 July 1997 for knee pain stemming from her pre-existing condition and aggravation from having mis-stepped into a hole and fallen prior to beginning employment with defendant. Plaintiff testified that she was complaining about increased pain and stiffness in her right knee.

Plaintiff fell while working for defendant on 2 August 1997. On 6 August 1997, plaintiff saw Dr. Curl complaining of neck, low back and right knee pain. Dr. Curl noted that plaintiff had advanced degeneration in her right knee with some valgus deformity. Dr. Curl saw plaintiff again on 29 October 1997 and placed permanent work restrictions of "no bending, stooping, climbing, or lifting over fifteen pounds. Patient may return as cashier." It is unclear from

the record if Dr. Curl restricted plaintiff to four or eight hours per day at that time.

Plaintiff again fell and aggravated her right knee and injured her neck on 1 January 1998 while at work. This injury is at issue on appeal. Dr. Curl examined plaintiff, and he concluded that she sustained a "contusion or a bruise to her right knee and a right neck strain" as a result of the 1 January 1998 fall at work. Plaintiff was currently attending physical therapy. Dr. Curl "told her to continue with physical therapy for her right knee and her neck with heat and ultrasound . . . rehabilitation."

Defendants paid plaintiff temporary total disability until plaintiff returned to work on 12 February 1998, part-time with work restrictions per Dr. Curl's instructions. Defendants' payments were made pursuant to Form 63, Notice to Employee of Payment of Compensation without Prejudice to Later Deny the Claim Pursuant to N.C. Gen. Stat. § 97-18(d), which defendants had signed on 23 January 1998. (*See Shah v. Howard Johnson*, 140 N.C. App. 58, 535 S.E.2d 577 (2000) for the implications and proper use of Form 63.) Plaintiff's work restrictions were the same as those in October of 1997, with the exception that plaintiff was not to work more than 4 hours per day. Plaintiff testified that she worked "about thirty-something" hours per week at that time. Defendants then paid plaintiff temporary partial disability compensation based on her reduced earning capacity.

Plaintiff was terminated on 11 March 1998 after her cash register drawer was short by $44.83. Defendants continued to pay plaintiff partial disability compensation. Plaintiff testified that she has not sought employment after she was terminated. Plaintiff also testified that she had received a "certificate from community college" when she "went to school to be [a] nurse . . . [and that she] worked at Winston-Salem Convalescent Center." She worked as a "sitter" with "patients that needs [sic] someone to be in the room with them."

On or about 18 July 1998, defendants filed a Form 24, Application to Terminate or Suspend Payment of Compensation Pursuant to N.C. Gen. Stat. § 97-18.1. The claim was assigned for hearing on 3 September 1998. The case was heard by Deputy Commissioner Morgan S. Chapman ("Deputy Chapman") on 6 April 1999. Deputy Chapman filed an opinion and award on 14 December 1999. The award granted plaintiff compensation for (1) temporary partial disability from 11 March 1998 through 15 June 1998 pursuant to 97-29 and 97-30, subject to a credit for compensation previously paid by

defendants, (2) permanent partial disability pursuant to 97-31(13) and (19) for a one percent permanent partial disability rating to her right arm at a rate of $131.82 per week for 2.4 weeks, (3) all of plaintiff's medical expenses that resulted from the compensable injury, and (4) costs.

Plaintiff filed her notice of appeal to the Commission on 17 December 1999. The Commission reconsidered the evidence, reversed Deputy Chapman's opinion and award, and filed a new opinion and award on 26 January 2001. The Commission's award granted plaintiff (1) ongoing total disability compensation of $131.82 per week for the period 11 March 1998 until she returns to work or until further order of the Commission pursuant to G.S. § 97-29, (2) all unpaid portions of the temporary partial disability compensation to which she is entitled, (3) all medical expenses, and (4) reasonable attorney fees and costs. Defendants appeal.

II. Issues

Defendants assign nineteen errors to the Commission's opinion and award. Defendants argue in their brief two issues: (1) that plaintiff's current inability to work is not related to her work injury, and (2) that plaintiff's injuries after 15 June 1998 were not a direct consequence of her 1 January 1998 work injury. All other assignments raised but not argued are abandoned. N.C.R. App. P. 28(b)(5) (2001).

III. Standard of Review

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). The judgment of credibility of the witness and the weight to be given their testimony is entirely with the Commission. *Melton v. City of Rocky Mount*, 118 N.C. App. 249, 255, 454 S.E.2d 704, 708 (1995) (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, 282 S.E.2d 458 (1981). We cannot uphold the Commission's award if not supported by competent evidence. *Horn v. Sandhill Furniture Co.*, 245 N.C. 173, 176, 95 S.E.2d 521, 523 (1956).

IV. Plaintiff's Inability to Work and Earning Capacity

A. Termination

[1] Defendants contend that "[p]laintiff is no longer able to work at McDonald's not as a result of her injury, but due to the fact that she violated the cash drawer policy of McDonald's," and was terminated. Defendants argue that plaintiff has constructively refused to accept suitable employment and is not entitled to benefits.

To substantiate their argument, defendants "must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated." *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996).

The Commission found as fact that "[d]efendants have failed to produce credible evidence that plaintiff's termination on 11 March 1998 was for misconduct or fault for which a non-disabled employee would also have been terminated," and concluded that "plaintiff did not constructively refuse employment."

Plaintiff was reprimanded in writing for drawer shortages on two occasions prior to her compensable injury and prior to her termination. Plaintiff was given an "Employee Warning" written notice after her second shortage on 18 December 1997. Under "Action To Be Taken" on the notice, plaintiff's supervisor wrote: "the next time you are short, you will get a week off without pay." Billy Scales, a supervisor with McDonald's, testified that those words, written on plaintiff's "Employee Warning" notice, established the termination policy for plaintiff.

Plaintiff's drawer was again short $44.83 on 9 March 1998, after the 1 January 1998 compensable injury. Instead of being punished with a week off without pay, plaintiff's employment was terminated. Billy Scales testified that the fair response would have been to suspend plaintiff for one week rather than terminate her. We hold that there is competent evidence in the record to support the Commission's finding and conclusion that defendants failed to show that plaintiff's termination was for misconduct or fault, unrelated to her compensable injury, "for which a nondisabled employee would ordinarily have been terminated." *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401.

Plaintiff is therefore entitled to receive compensation for temporary partial disability from 11 March 1998 through 15 June 1998 as

set forth in the Commission's opinion and award. According to the award, plaintiff is entitled to "have defendants pay to her temporary partial disability at the rate of two-thirds difference between her former average weekly wage of $197.75 and the weekly wages she was able to earn from 10 February 1998 through 15 June 1998." Plaintiff was terminated on 9 March 1998. Defendants were unable to satisfy its burden that plaintiff constructively refused to work. Plaintiff did not earn wages from 11 March 1998 until 15 June 1998. Therefore, plaintiff is entitled to two-thirds of her former average weekly wage of $197.75 from 11 March 1998 until 15 June 1998. That portion of the Commission's opinion and award is affirmed. We remand for a proper determination of the remaining amounts owed, if any.

B. Plaintiff's Earning Capacity

[2] Defendants contend that the Commission erred in its conclusion of law that plaintiff was entitled to "ongoing total disability." Defendants argue that no competent evidence exists in the record to show that plaintiff was incapable of earning wages as a direct and natural consequence of her 1 January 1998 accident. Defendants claim that competent evidence shows that plaintiff's wage earning capacity is greater now than it was from between August 1993 and August 1997.

The dispositive issue here is whether plaintiff is totally incapable of earning wages as a result of her 1 January 1998 injury. "Under the Workers' Compensation Act, disability is defined by a diminished capacity to earn wages, not by physical infirmity." *Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997). To support a conclusion of diminished earning capacity, the plaintiff must prove and the Commission must find that: (1) after the injury plaintiff was incapable of earning the same wages earned before the injury in the same, or other employment, and (2) plaintiff's incapacity to earn wages was caused by the injury. *Saums*, at 346, 763, 487 S.E.2d 746, 749 (citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)).

> A claimant who asserts that he is entitled to compensation under N.C. Gen. Stat. § 97-29 has the burden of proving that he is, as a result of the injury arising out of and in the course of his employment, totally unable to "earn wages which . . . [he] was receiving at the time [of injury] in the same or any other employment."

Burwell v. Winn-Dixie Raleigh, Inc., 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (quoting *Tyndall v. Walter Kidde Co.*, 102 N.C. App.

726, 730, 403 S.E.2d 548, 550, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991)). The Workers' Compensation Act "was never intended to provide the equivalent of general accident or health insurance." *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951).

After careful review of the entire record, we hold that no competent evidence exists upon which the Commission could have relied to support its finding of fact that plaintiff has no earning capacity as a direct result of plaintiff's 1 January 1998 injury.

The Commission made the following finding of fact:

> 23. As the result of her 1 January 1998 injury by accident and related conditions, plaintiff has been unable to earn wages in her former position with defendant-employer or in any other employment from 11 March 1998 through the present and continuing.

The Commission concluded that "plaintiff is entitled to have defendants pay to her ongoing total disability compensation . . . for the period of 11 March 1998 through the present and continuing until such time as she returns to work or until further order of the Commission. G.S § 97-29." The competent evidence in the record, considered as a whole and viewed in the light most favorable to the plaintiff, proves otherwise.

First, plaintiff failed to show her incapacity to earn wages was a result of her injury on 1 January 1998. Dr. Curl testified that plaintiff had severe and continuing problems with her knee buckling before the 1 January 1998 accident. Dr. Curl testified that plaintiff was completely disabled and unable to work from August 1993 until August 1997. Dr. Curl also testified that during that period plaintiff should not have been working.

Dr. Curl testified that plaintiff had a permanent partial disability rating prior to the 1 January 1998 accident based on her pre-existing condition. Dr. Curl also testified that "I don't think that I intended to raise her permanent partial disability rating above what she already had . . ." as a result of plaintiff's 1 January 1998 accident. Dr. Curl further testified that on 29 October 1997, before her 1 January 1998 accident, he placed permanent restrictions on plaintiff's ability to work: "no bending, stooping, climbing, or lifting over fifteen pounds. Patient may return as cashier." Dr. Curl testified that the work restrictions he had given plaintiff remained in effect when he saw her on 25

March 1998, and that the restrictions, with respect to her knee, had not changed.

Dr. Walter Davis ("Dr. Davis"), who specializes in workers' compensation cases and occupational injuries, issued a report about plaintiff's condition on 19 May 1998. Dr. Curl summarized that report and testified as to what Dr. Davis had concluded. In May of 1998, Dr. Davis refused to administer a new "functional capacity evaluation" as requested by Dr. Curl. Dr. Curl testified that Dr. Davis had opined that "since she had had a prior FCE . . . and that her condition at this time was about the same as what she'd had prior to her fall, that he did not think a new functional capacity evaluation would add anything to her assessment." Dr. Davis "released [plaintiff] to work eight hours a day, forty hours a week at light physical demand classification [work] . . . ." Dr. Davis and Dr. Curl both concluded that plaintiff had reached maximum medical improvement as of 15 June 1998.

Dr. Curl was asked by plaintiff's counsel "given that she had a pre-existing condition in her right knee, do you believe the fall [of 1 January 1998] caused an acceleration of that degenerative process to occur." Dr. Curl responded "[n]o I think it just aggravated it. I don't think it necessarily accelerated the process." Dr. Curl testified that while the 1 January 1998 accident "may have aggravated [plaintiff's] pre-existing condition, it hasn't necessarily aggravated her capacity to earn wages." Dr. Curl agreed that plaintiff's capacity to earn wages "now" is greater than it was prior to the accident.

Second, plaintiff did not stop working for defendant because she was physically incapable of performing the job. She stopped because defendant terminated her employment. There is no evidence in the record that plaintiff was unable to work for defendant, under the same work restrictions, had she not been terminated.

Third, plaintiff testified that she did not seek other employment after defendant terminated her. Plaintiff failed to show that she was incapable of earning wages in any other employment. She testified that she has a nursing certificate, and that she once worked as a "sitter" in patients' rooms. This evidence suggests that nurse "sitting" would satisfy Dr. Curl's and Dr. Davis' work restrictions.

Although there was some evidence that the 1 January 1998 accident may have aggravated her pre-existing condition, all the evidence shows that plaintiff is not totally incapable of earning wages. The

competent evidence shows that after 15 June 1998, plaintiff's wage earning capacity was greater than or equal to that prior to 1 January 1998.

Accordingly, no finding of fact supports the Commission's conclusion of law that plaintiff is entitled to permanent and total disability pursuant to G.S. § 97-29.

V. Plaintiff's Injuries After 15 June 1998

[3] Defendants contend that "while the fall [compensable injury] may have aggravated plaintiff's condition symptomatically it did not aggravate the underlying condition of her knee," and that plaintiff's injuries after 15 June 1998 were not a "direct and natural consequence of her January 1, 1998 accident." We agree.

"In order to obtain compensation under the Workers' Compensation Act, the claimant has the burden of proving the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986); *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 684. One way plaintiff may meet this burden is by "the production of medical evidence that [she] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment . . . ." *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted) (emphasis supplied).

The Commission found as fact and concluded that plaintiff's injuries sustained as a result of her 29 July 1998 and 9 September 1998 incidents were a "direct and natural consequence of her 1 January 1998 injury by accident." We do not find any competent evidence in the record to support this finding or conclusion.

Dr. Curl testified that plaintiff would have eventually had knee "buckling" problems even if she never had the compensable injury on 1 January 1998. Dr. Curl also testified that the two primary causes of plaintiff's knee pain and weakness were her (1) two patellectomies and (2) degenerative arthritis in her knees. Dr. Curl was asked "is it equally likely that [plaintiff's subsequent falls after 15 June 1998] would have occurred in the absence of the fall at McDonald's in . . . January of '98?" He responded affirmatively. Dr. Curl further testified that he had no way of knowing with any certainty whether plaintiff's pre-existing conditions, or which of the various falls she experienced, caused her knee buckling problems after 15 June 1998.

We thoroughly reviewed the entire record and hold that there is no competent evidence in the record to support the Commission's finding of fact and conclusion of law that plaintiff's post 15 June 1998 injuries were a direct and natural consequence of her 1 January 1998 compensable work injury.

VI. Conclusion

[4],[5] We affirm that portion of the award that defendants "shall pay all unpaid portions of the temporary partial disability compensation . . . ." We also affirm the award for reasonable attorney's fees and costs. We remand for a determination of the proper amount of attorney's fees and costs in light of our holding, and for a determination of the remaining amounts owed from temporary partial disability compensation, if any. We reverse the Commission's award for ongoing total disability compensation.

We affirm the opinion and award in part and reverse and remand in part.

Affirmed in part, reversed in part and remanded.

Judges GREENE and HUNTER concur.

IN RE: JAKEL PITTMAN, A MINOR CHILD, DOB: 10-03-99

No. COA01-349

(Filed 16 April 2002)

1. Child Abuse and Neglect— dispositional hearing—Miranda rights

The trial court did not err by denying defendant's motion to suppress a mother's statement to officers in a juvenile abuse and neglect dispositional hearing where the mother contended that the statement was obtained in violation of her Miranda rights. While the mother may attempt to suppress her statement in any subsequent criminal proceeding, she is barred from doing so in this civil proceeding where the overriding consideration is protection of the child's interests.

2. Confessions and Incriminating Statements— juvenile dispositional hearing—parent's statement—voluntary

A mother's statement to officers was admissible in a dispositional hearing to determine whether custody should remain with DSS where, assuming that Miranda applies, the mother was not a criminal defendant, was not in custody when she gave the statement, and the statement was voluntarily given.

3. Child Abuse and Neglect— neglected juvenile—sufficiency of evidence

The whole record presented clear, cogent, convincing, and competent evidence to support the court's ultimate findings and conclusions that a child was an abused juvenile, that his mother had inflicted serious, non-accidental injury, that his father had created or allowed a substantial risk of serious physical injury to the juvenile by other than accidental means, that the child was a neglected juvenile in that he lived in an injurious environment, and that his parents did not provide him with proper care.

Appeal by respondents from order entered 5 September 2000 by Judge Robert A. Evans in Nash County District Court. Heard in the Court of Appeals 22 January 2002.

Nash County Department of Social Services, by Jayne B. Norwood, and Guardian Ad Litem Program, by Attorney Advocate Judith L. Kornegay, for petitioner-appellees.

Etheridge, Sykes, Britt & Hamlett, LLP, by J. Richard Hamlett, II, and Massengill & Bricio, PLLC, by Francisco J. Bricio, for respondent-appellants.

EAGLES, Chief Judge.

James Pittman ("the father") and Lekeshia Harris ("the mother") appeal from a juvenile disposition order granting continued custody of their son, Jakel Pittman ("Jakel"), to the Nash County Department of Social Services ("DSS") and relieving DSS from making further reunification efforts with both parents. On appeal, the father and the mother assign error to the trial court's denial of the mother's motion to suppress and the court's findings of fact and conclusions of law. After a careful review of the record, briefs, and arguments of counsel, we affirm.

The evidence tends to show the following. Jakel was born on 3 October 1999. When Jakel was born, the father and the mother were unmarried, but living together. From 3 October 1999 to 6 January 2000, a three month period, Jakel was cared for by a number of individuals including the father, the mother, Jessie Pittman (paternal grandmother), Tecia Bryant, Catherine Carnegie, and Brenda Williams. As early as November 1999, Jessie Pittman noticed that Jakel had problems that required medical attention. Additionally, other caretakers noticed that Jakel experienced seizures and exhibited evidence of discomfort and distress. Jakel's caretakers brought his medical condition to both parents' attention.

On 6 January 2000, Jakel experienced a seizure while he was with his mother, however, the mother did not seek immediate medical attention for him. Instead, the mother drove to Rocky Mount, where she visited with relatives for several hours. Four hours after his first seizure, Jakel experienced a second seizure. The mother then took Jakel to Nash General Hospital's emergency room. On 7 January 2000, Jakel, three months old at the time, was transferred and admitted to Pitt County Memorial Hospital, where he was diagnosed with injuries to the head, legs (fractures), and spine. Doctors determined that the fractures of the right leg were older than those of the left leg. They also deemed Jakel's injuries non-accidental, and possibly the result of severe shaking, jamming, pushing, pulling, and jabbing.

Upon receipt of a Child Protective Services' referral, DSS began investigating Jakel's case. Due to the severe nature of the injuries, the Sharpsburg Police Department was included in the investigation. On 12 January 2000, Officer Joel Batchelor of the Sharpsburg Police Department and Kendra Holley of DSS interviewed Jakel's parents. Both parents denied harming the child.

Subsequently, on 27 January 2000, Officer Batchelor interviewed the parents again. In separate interviews, the father again denied harming Jakel, however the mother started crying and signed a statement that stated in part:

> Jakel was cr[y]ing and I was tr[y]ing to get him to sleep. I was having a hard time getting him to sleep. It was frustrating. While I was rocking Jakel I rocked and bounced him to[o] hard. After I calmed down the baby calmed down. Shortly after this is when the baby started having seizures. . . . I never told any of the doctors I rocked and bounced Jakel to[o] hard. I'm sorry I hurt my

> baby and I didn't do it on purpose. I would like to get some help so I don't hurt my baby any more.

Though the statement was in Officer Batchelor's handwriting, it was signed by the mother.

As a result of the investigation, the mother was charged criminally with felony child abuse, and DSS filed a juvenile petition alleging that Jakel was abused and neglected. Ultimately, an adjudicatory hearing for the abuse and neglect allegations was held on 8 and 16 June 2000 in Nash County District Court, the Honorable Robert Evans presiding. During the hearing, evidence was presented that the mother injured Jakel by non-accidental means and that both parents were negligent and reckless in caring for Jakel. At the conclusion of the hearing, the trial court entered an adjudicatory order concluding that

> 2. The minor child . . . is an abused juvenile as defined by N.C.G.S. § 7B-101(1)a in that his mother . . . inflicted upon him a serious physical injury by other than accidental means.
>
> 3. The minor child . . . is an abused juvenile as defined by N.C.G.S. § 7B-101(1)b in that his father . . . created or allowed to be created a substantial risk of serious physical injury to the juvenile by other than accidental means.
>
> 4. The minor child . . . is a neglected juvenile as defined by § 7B-101(15) in that his parents . . . do not provide him with proper care and in that he lives in an environment injurious to his welfare,

and ordering custody of Jakel remain with DSS pending disposition.

On 18 July 2000, a dispositional hearing was held before Judge Evans. By order entered 5 September 2000, the trial court concluded that it was in the best interest of Jakel that he remain in the legal custody of DSS, and the court relieved DSS of further reunification efforts with the parents. Both parents appeal.

As a preliminary matter, we note that both the father's and the mother's notices of appeal indicate that the parents are appealing from the trial court's dispositional order entered on 5 September 2000. However, in their briefs, the parties assert and argue alleged error arising from the trial court's earlier adjudicatory order. Nevertheless, in our discretion under Rule 21 of the North Carolina

Rules of Appellate Procedure, we choose to address the merits of the parents' appeal.

[1] In the parents' first assignment of error, the mother argues that the trial court erred in denying her motion to suppress the statement that she made to Officer Batchelor. Specifically, the mother contends that the statement was obtained in violation of her Fifth Amendment right against self-incrimination as defined by *Miranda v. Arizona*, 384 U.S. 436, 444-45, 16 L. Ed. 2d 694, 706-07 (1966). We disagree.

Here, the issue is whether *Miranda* is applicable to a civil juvenile abuse and neglect proceeding. *See State v. Adams*, 345 N.C. 745, 748, 483 S.E.2d 156, 157 (1997) ("The filing of a petition alleging abuse and neglect commences a civil proceeding"). The Fifth Amendment of the United States Constitution provides that no person "shall be compelled *in any criminal case* to be a witness against himself." (Emphasis added.) By its own terms, the Fifth Amendment applies only to criminal cases.

In our legal system, a criminal defendant is entitled under the Fifth Amendment, "as incorporated by the Fourteenth Amendment, to remain silent and to refuse to testify." *State v. Ward*, 354 N.C. 231, 250, 555 S.E.2d 251, 264 (2001); N.C. Const. art. I, § 23. To ensure these rights, the United States Supreme Court developed procedural safeguards to protect a person's right not to be compelled to incriminate himself under the Fifth Amendment. *Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 706-07. These *Miranda* warnings are required when a criminal defendant is subjected to a custodial interrogation, and failure to give the required warnings prior to interrogation precludes admission of statements obtained during the interrogation. *See State v. Young*, 65 N.C. App. 346, 348, 309 S.E.2d 268, 269 (1983).

Generally, *Miranda* applies only when the defendant is subject to a criminal proceeding. 2 Wayne R. LaFave, *Criminal Procedure* § 6.10(e), at 625-26 (2d ed. 1999). Because a juvenile abuse and neglect proceeding is a civil proceeding, we hold that *Miranda* is inapplicable. *See State v. Adams*, 345 N.C. 745, 483 S.E.2d 156 (holding defendant's Sixth Amendment right to counsel, which applies only to criminal cases, did not attach when juvenile petition for abuse and neglect was filed).

We acknowledge the mother's argument that because an abuse and neglect proceeding can result in removal of a child from a par-

ent's custody, a parent's constitutionally protected interest is at stake. However, the common thread running throughout the Juvenile Code, § 7B-100 *et seq.*, is that the court's primary concern must be the child's best interest. *See In re Shue*, 63 N.C. App. 76, 81, 303 S.E.2d 636, 639 (1983), *modified*, 311 N.C. 586, 319 S.E.2d 567 (1984). When determining the best interest of a child,

> any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child.

In re Shue, 311 N.C. 586, 597, 319 S.E.2d 567, 574.

Here, the child's interest in being protected from abuse and neglect is paramount. While the mother is not prevented from attempting to suppress her statement to Officer Batchelor in any subsequent criminal proceeding, the mother is barred from doing so in this civil proceeding where the protection of the child's interests, as distinguished from the mother's interests, is the overriding consideration. *See Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997) (a parent's well-established constitutional "interest in the custody and care of the child is balanced against the state's well-established interest in protecting the welfare of children").

Additionally, we note the mother's contention that G.S. § 7A-631 applies to protect her right against self-incrimination. Section 7A-631 provided that the trial court in an adjudicatory hearing shall protect a parent's privilege against self-incrimination, *inter alia*; however, § 7A-631 was repealed effective 1 July 1999. 1998 N.C. Sess. Laws ch. 202, § 5. Here, the events surrounding Jakel's injuries and the trial all transpired after 1 July 1999. Hence, we are not persuaded by the mother's argument.

[2] Nevertheless, even assuming arguendo that *Miranda* applies here, we still hold that the mother's statement is admissible because the mother is not a criminal defendant in this proceeding, she was not in custody when she gave the statement, and the statement was voluntarily given. Prior to the adjudicatory hearing, the mother filed a motion to suppress her statement to Officer Batchelor on the grounds that her *Miranda* rights were violated and the statement was "involuntary and coerced." After a *voir dire* hearing on the motion, the trial

court denied the motion to suppress and found that the mother "voluntarily gave" the statement and concluded that "[l]ooking at the totality of the circumstances . . . I am going to allow the statement in."

This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law. *See State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993); *see also State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). The review here, assuming arguendo that *Miranda* applies, should be no less stringent.

On appeal, the mother first argues that the trial court erred in failing to find whether she was "in custody." The appropriate inquiry in determining whether a defendant is "in custody" for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828.

Our review of the record shows that on 27 January 2000, Officer Batchelor telephoned the mother and asked her to come to the police station. The mother agreed and voluntarily drove herself there. Once she arrived, Officer Batchelor took her to his office for questioning. During the questioning, the mother again denied harming Jakel. Then, in the mother's presence, Officer Batchelor asked another officer to pick up the father and bring him in for questioning. When the father arrived, the mother was accompanied by an officer to a neighboring building where she was left by herself in an unlocked room. During his questioning, the father again denied harming Jakel.

After questioning the father, Officer Batchelor went to the neighboring building to accompany the mother back to his office. While walking back to the office, the mother saw the father getting into a police squad car. During her subsequent questioning, the mother started crying and gave a statement to Officer Batchelor, which he reduced into writing and she signed, admitting that she injured Jakel by non-accidental means.

We recognize that the mother presented testimony that Officer Batchelor used duress, coercion, and harassment to obtain her state-

ment. However, Officer Batchelor testified and denied the mother's claims. "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982). Here, the trial court resolved the conflict by finding the mother's testimony about alleged duress, coercion, and harassment not credible.

Accordingly, we conclude that based on the totality of the circumstances the mother was not subjected to a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." In fact, the mother admitted on two occasions during her *voir dire* testimony that she believed that she was free to leave the police station at any time. Since the mother did not argue custody below and competent evidence supports the fact that the mother was not "in custody," we conclude that the trial court did not err in failing to make explicit findings on the custody issue. *See State v. Hicks*, 79 N.C. App. 599, 601, 339 S.E.2d 806, 808 (1986) ("Where the court's decision is clear from the record, the absence of a formal ruling is not prejudicial").

The mother next argues that the trial court erred in denying her motion to suppress the statement based on voluntariness. The test to determine the admissibility of a defendant's confession under *Miranda* is whether the confession is voluntary under the totality of the evidence in the case. *See State v. Leak*, 90 N.C. App. 351, 354, 368 S.E.2d 430, 432 (1988). Here, competent evidence in the record reflects that based on the totality of the evidence the mother voluntarily drove herself to the police station and voluntarily gave the statement. Accordingly, we conclude that the trial court's findings are supported by competent evidence and those findings support the court's conclusions in denying the motion to suppress.

[3] In the parents' remaining assignments of error, the father and the mother contend that there was insufficient evidence to support certain findings of fact and conclusions of law of the trial court. After careful review, we disagree.

Allegations of abuse and neglect must be proven by clear and convincing evidence. *See* G.S. § 7B-805. "A proper review of a trial court's finding of [abuse and] neglect entails a determination of (1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the

findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "In a non-jury [abuse and] neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). "Our review of a trial court's conclusions of law is limited to whether they are supported by the findings of fact." *Id.*

Here, the parents argue that the evidence was insufficient to support the following findings of the trial court: (1) that the "parents were unable to reconstruct for *social worker Kendra Holley, law enforcement, and medical personnel* with consistent credible information who cared for [Jakel] during that three month period, which given the child's young age the court finds incredible;" (2) that the parents could not construct for the court a scenario whereby Jakel could have sustained such serious physical injuries; (3) that the manner in which the parents sought out care for Jakel was negligent, reckless, and inconsistent with the proper care and nurturing of an infant Jakel's age; (4) that Jakel did not receive proper care from his parents and lived in an environment injurious to his welfare; (5) that given Jakel's age, the nature of his injuries, and the volatile relationship between the parents, the father knew or should have known, and created or allowed to be created, a substantial risk of serious physical injury to Jakel by other than accidental means; (6) that the father knew or should have known that Jakel was in need of medical attention; (7) that on the day Jakel was admitted to the hospital, the mother did not immediately seek medical attention but rather visited with relatives for four hours before taking Jakel for medical care; (8) that the mother inflicted upon Jakel serious physical injury by other than accidental means; (9) that the mother freely and voluntarily, without coercion, gave a statement to law enforcement admitting that she had shaken Jakel too hard and that she never told doctors that she had injured Jakel; and (10) that in light of her admission, the mother failed to give medical personnel sufficient information to make medical decisions regarding Jakel. Additionally, the parents object to the court's conclusions of law that Jakel was abused and neglected within the meaning of G.S. §§ 7B-101(1)a, 7B-101(1)b, and 7B-101(15). After a careful review of the record, we conclude that the parents' arguments are without merit.

While there may be some evidence in the record that might support contrary findings, the whole record presents clear, convincing,

competent evidence to support the trial court's ultimate findings, and the trial court's findings support its conclusions. Here, the parents stipulated at the adjudicatory hearing that "there are days, and . . . even weeks, where the investigation will not be able to answer . . . who had possession [of Jakel] other than the days [social worker Holley] indicated." Furthermore, as evidenced in DSS reports, social worker Holley's testimony, Officer Batchelor's testimony, Dr. Rebecca Coker's testimony, and Jakel's medical records, the parents failed to furnish a detailed account or proper medical history to credibly explain Jakel's injuries.

Moreover, the record reflects that Jakel was three months old when he was admitted to the hospital; that the father, the mother, and Jakel lived in the same residence; that the father and the mother had a volatile relationship and were involved in multiple arguments; that both parents were aware that Jakel had a medical condition; that on 6 December 1999, the father was contacted and notified that Jakel "stiffened up like he wasn't breathing;" that the father took Jakel to the hospital; that on 3 January 2000 the father and the mother took Jakel to the emergency room because Jakel "stiffen[ed] up and was crying almost inconsolably;" that after several hours the parents left the emergency room without Jakel being seen by medical personnel because they were "tired of waiting;" that neither parent obtained later treatment for Jakel after the 4 January visit; that on 6 January 2000 Jakel had two seizures; that the mother visited with relatives for four hours before taking Jakel to the hospital; that the nature of Jakel's injuries was serious; and that Jakel's injuries had been inflicted over a period of time as shown by their different stages of healing. This clear and competent evidence supports the trial court's findings. Additionally, the remaining findings regarding the mother's statement to police and the mother's non-accidental injuring of Jakel, which we discussed in depth above, are supported by ample clear, convincing, competent evidence in the record. Accordingly, we hold that there was sufficient competent evidence to support the trial court's ultimate findings of fact. We also hold that the trial court's findings support its conclusions that Jakel was abused and neglected within the meaning of G.S. §§ 7B-101(1)a, 7B-101(1)b, and 7B-101(15).

We have considered the father's argument that the evidence was insufficient to support the findings and conclusions that he abused, neglected, or negligently provided care for Jakel. However, there is competent evidence showing that the father lived in the same residence with Jakel; that the father knew his son had a medical condi-

tion; that the father took Jakel to the hospital; that the father left the hospital on a second occasion without Jakel being seen; that the father did not obtain subsequent medical treatment for his son; and that Jakel's injuries were serious and had been inflicted over a period of time. "In general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful." *In re Thompson*, 64 N.C. App. 95, 99, 306 S.E.2d 792, 794 (1983). Moreover, "[i]t is settled law that nonfeasance as well as malfeasance by a parent can constitute neglect." *In re Adcock*, 69 N.C. App. 222, 224, 316 S.E.2d 347, 348 (1984). Here, evidence of the father's nonfeasance supports the court's findings and conclusions as to him.

Finally, the mother argues that the evidence was insufficient to support certain findings of fact and conclusions of law in the trial court's dispositional order. At the disposition stage, the trial court solely considers the best interests of the child. *See In re Dexter*, 147 N.C. App. 110, 114, 553 S.E.2d 922, 924 (2001); *see also* G.S. § 7B-1110. "Nonetheless, facts found by the trial court are binding absent a showing of an abuse of discretion." *Id.* at 114, 553 S.E.2d at 924-25. Here, we conclude that the trial court did not abuse its discretion, and there is sufficient evidence to support the trial court's findings and conclusions on disposition.

In sum, we hold that a parent is prevented from invoking *Miranda* in a civil juvenile abuse and neglect proceeding. Here, even assuming arguendo that *Miranda* applies, we conclude that the trial court made appropriate findings of fact and conclusions of law in ruling that the mother's rights under *Miranda* were not violated. Additionally, we hold that the trial court's findings of fact are supported by clear, competent evidence in the record, and the trial court's findings support its conclusions. Thus, we affirm the trial court's adjudication and disposition in this matter.

Affirmed.

Judges CAMPBELL and SMITH concur.

STATE OF NORTH CAROLINA v. KEITH SAMUEL EVANS, DEFENDANT

No. COA01-296

(Filed 16 April 2002)

1. Appeal and Error— preservation of issues—objection not ruled upon

An assignment of error to testimony that defendant had emerged from an apartment holding two children as a shield was not preserved for review in a first-degree murder prosecution where the trial court did not rule on defendant's motion to strike and defendant never asked the court to instruct the jury to disregard the testimony. Moreover, the subsequent testimony that defendant was holding the children up and in front and that they weren't wearing jackets at 3:00 a.m. constituted a description of events the witness had observed.

2. Evidence— hearsay—not prejudicial

There was no prejudicial error in a first-degree murder prosecution from the admission of an officer's testimony that a witness had been reluctant to talk with police because she was afraid. The testimony was hearsay because the witness did not testify regarding her reluctance to speak with the police, but not prejudicial because her statement was that she was afraid of talking to the police, not that she was afraid of defendant.

3. Homicide— first-degree murder—instruction on involuntary manslaughter refused

The trial court did not err in a first-degree murder prosecution by refusing to give an instruction on involuntary manslaughter where defendant did not dispute that the State presented evidence of each element of first-degree murder and defendant's statement, even if believed, indicates that the shooting was deliberate rather than accidental or the result of negligence.

4. Criminal Law— flight—evidence sufficient

The trial court did not err in a first-degree murder prosecution by instructing the jury on flight where defendant claimed that the evidence showed only that he went to his sister's apartment after the shooting, but there was sufficient evidence that defendant was attempting to escape apprehension in that defendant came out of the apartment carrying his nephews as a shield after police tracked him down.

Appeal by defendant from judgment entered 3 March 2000 by Judge William H. Freeman in Guilford County Superior Court. Heard in the Court of Appeals 23 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General James P. Longest, Jr., for the State.

Frederick G. Lind, Assistant Public Defender, for defendant-appellant.

HUDSON, Judge.

Defendant appeals his conviction and sentence for first degree murder. We find no prejudicial error.

At trial, the State presented evidence tending to show, *inter alia*, that Kathleen Lynn House ("Kathy" or "House") was shot in the chest at close range and that another bullet grazed her head. She died at the scene of the shooting from the chest wound.

Lakeisha Diane Sides testified that on the night of the shooting, she was babysitting the children of defendant's sister, Tashaunda. Stephen Hall ("Steve") and defendant were both at Tashaunda's apartment with Sides. Sides testified that the children went to bed at about 10:00 p.m., and she lay down in the other room. Sometime after midnight, Sides woke up and found Steve and defendant with a white girl named Kathy. They were eating in the kitchen. When she got up again about fifteen or twenty minutes later, the three were gone.

Mark Rorie, also known as "Fellow," lived near Tashaunda and was also defendant's mother's boyfriend. Rorie testified that at about 11:30 p.m. on the night of the shooting, he was outside Tashaunda's apartment and saw Steve with a white girl talking about money. Later, defendant asked Rorie to go to the store and change a $20 bill. Rorie came back to the apartment with the change. Defendant was sitting at the kitchen table, and Stephen was in the bathroom with the white girl. Defendant told Rorie to keep $15 and give the remainder of the change to Steve. When Rorie gave Steve the money, he saw that the white girl was giving Steve oral sex. Rorie left and went to a nearby apartment. He later heard gunshots. He returned to Tashaunda's apartment to find Steve on the porch wiping off a .380 handgun and acting nervous. Defendant came running up to the apartment. He was wearing a brown coat with a white fur collar. Defendant was yelling to Steve, "Come here, Man. Why you do that, Man? Come here." Rorie testified that Steve put the gun down on the porch and left, and that

Rorie, followed by defendant, went into the apartment at about the time the police arrived. In the statement Rorie made to police soon after the incident, Rorie stated that he went into the apartment shortly before defendant came running up.

Michael Bennett, a witness who lived in the vicinity where House was killed, testified that he looked out his window and saw a man chasing a white woman, who was screaming. The witness saw a man grab the woman from behind and shoot her in the chest. After the woman fell, the man fired another shot towards her head. Bennett described the shooter as a black male, wearing a brown coat with a white collar.

Pamela Baldwin, who also lived in the vicinity of the shooting, testified that she woke up after midnight hearing a woman screaming. She looked out the window and saw a man run across the street and hide behind a tree. Another man, wearing a brown coat, was running behind him. The second man yelled, "Steve, Steve, did you do it? Did you get it?" Steve held up a dark object. Steve then ran after the woman, followed by the man in the brown coat, and they all disappeared from Baldwin's view. Baldwin heard two gunshots and then saw Steve running away. The man in the brown coat then ran off in the same direction, yelling, "Steve, Steve, where are you."

Witnesses interviewed by police at the scene of the shooting reported that they heard a man and woman arguing, heard a woman screaming and then gunshots, and then saw a black man wearing a brown coat with a white collar running away. Police broadcast a description of the shooter over the radio.

As he was driving to the scene of the shooting, Officer N.S. Edwards observed a man fitting the description, later identified as defendant, running with his hands inside his coat. Officer Edwards saw defendant enter an apartment, which was later identified as Tashaunda's apartment. Officer Edwards requested assistance and watched the apartment until other police units arrived. Officer Edwards shined his flashlight into an open side window of the apartment. Officer Edwards testified that "there were a lot of police cars out in the front." While the other officers covered the front and side of the apartment, Officer Edwards attempted to contact the communications center so they could make a call into the apartment. While Officer Edwards was doing this, defendant came out of the building holding two children. Police officers told defendant to put the children down. Defendant looked at the officers around him, held the

children for a few seconds, and then put them down. Police took defendant into custody.

A .380 semi-automatic handgun was found on the ground near where defendant was apprehended. Police officers later returned with a search warrant to search the apartment. They found a nine millimeter pistol in a clothes basket and the brown coat defendant had been wearing when spotted by Officer Edwards. The bullet extracted from House's body matched the nine millimeter gun taken from Tashaunda's apartment. Two nine millimeter shell casings were recovered from the ground near House's body. Several .380 millimeter shell casings were found between the shooting site and Tashaunda's apartment.

After he was taken into custody, defendant gave a statement to police, which he amended. Both versions were read to the jury. The amended statement reads as follows:

> Earlier this morning I was at my sister's house. I had been there all day. Steve Hall and Fellow [Rorie] came in with a girl. I was in bed. Steve and Fellow got the girl there to [give them] oral sex. The girl was about my height. I think she was white or mixed or something. She had on a black shirt. Fellow and Stephen asked me for $20, and I gave Fellow $20. Steve went into the bathroom. He came out in a few minutes. Steve was pissed because she didn't finish [giving him oral sex]. Fellow went in with the lady and they came out. Fellow and Steve and me were in the front room. I think the lady on the front porch. Steve was talking about robbing her. I told him she didn't have but the $20. We had given her something to eat and drink. Steve wanted to get the money back because she didn't finish it. Steve, Fellow, and the lady walked over toward Hampton. They were by the basketball court and I heard a shot, and I heard her scream. I ran over there and I got up with Steve and Fellow by the apartment near the court. I had put on my coat, my fur coat. It's brown. She was somewhere near the building. She was several yards ahead of us. Steve took off first. I think Fellow left. I caught up with Steve. The lady was hollering. Steve said he was going to shoot her. Steve took off running, and I was jogging behind. Steve told me to go behind the other side of the building. Steve told me to go get her. I ran around the building. I caught up with her and I grabbed her sweater. She turned around swinging her arms. Steve got there and the shot went off. I was dazed. She ran again. She ran into the

street. She was hollering. I took the gun from Steve. It was a black and gray Ruger P95-DC. It wasn't supposed to happen. I got scared. I shot her again because I was scared because of the alcohol. I don't know how to control alcohol. I'm sorry this happened. It shouldn't have happened to the lady. She was doing what she did to make her living. She was just trying to make a hustle. I had over two six-packs of beer earlier before this happened.

I.

[1] Defendant first argues that the trial court erred in failing to instruct the jury to disregard part of Officer Edwards's testimony in which he described the manner in which defendant was holding the children. Officer Edwards testified for the State that while he was outside Tashaunda's apartment, he heard other officers shout "Put the child down. Put the child down." Officer Edwards's testimony continued as follows:

Q. And how did you react?

A. I looked around the side of the building to see exactly what's going on. That's when I see the first individual exit the apartment holding the two children.

Q. Can you describe how he's holding these children?

A. Uh, there was no question in my mind that the children were being held up in front of him as a shield.

MR. RUMSEY [Defense Counsel]: Well, objection, Your Honor.

MR. LEE [Defense Counsel]: Objection.

MR. RUMSEY: Move to strike.

MR. COLE [District Attorney]: Question was asked, Your Honor.

THE COURT: Well, I'll sustain that objection.

Q. Can you describe the manner in which the children were being held?

A. They were held in front and up.

Q. All right.

A. It's 3:00 in the morning. The children don't have any jackets on—

MR. RUMSEY: Objection, Your Honor. This is not relevant. He's—

MR. COLE: He's describing his observations, Your Honor.

THE COURT: Overruled. Go ahead. Go ahead.

A. They don't have any jackets on. The children are—I do not have any children. I do not know how old they were, but they are big enough that if you were going to take them somewhere, you would lead them by the hand. Okay, there was no question in my mind what I was observing.

Defendant contends that the jury should have been instructed to disregard Officer Edwards's response that defendant was holding the children "as a shield."

The State argues that this assignment of error was not preserved for review because, although defense counsel moved to strike the testimony, the trial court did not rule on the motion, and defense counsel never asked the court to instruct the jury to disregard the testimony. We agree and hold that the absence of such an instruction was not error. Moreover, the testimony following defendant's first objection and motion to strike is unobjectionable, as it constitutes the witness's description of the events he observed. Therefore, the trial court did not err in overruling defendant's second objection. Accordingly, this assignment of error is overruled.

II.

[2] In his second assignment of error, defendant asserts that the trial court erred in admitting hearsay evidence over his objection. Corporal John Barrow of the Greensboro Police Department testified for the State that he had interviewed Pamela Baldwin, who lived in the area of the shooting. Corporal Barrow testified that Baldwin was initially reluctant to talk with police because she was afraid. The relevant exchange was the following:

Q. . . . Now, Corporal, in speaking with Ms. Baldwin, she initially indicated she was somewhat reluctant to talk; is that right? Or be identified in any way.

A. Yes, sir.

Q. And her reasons for that, if you know?

A. She had concerns with her well-being regarding—

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: You want to rephrase that?

Q. In speaking with Ms. Baldwin did she express any concerns about being identified?

[DEFENSE COUNSEL]: Well, objection to what she expressed. About her concerns as well, Your Honor.

THE COURT: Overruled. You can tell what she expressed.

A. She expressed concern that anyone knew that she was giving information on this case.

Defendant objected to the testimony and moved to strike on the ground that the testimony was hearsay and violated N.C. Rule of Evidence 404. *See* N.C. Gen. Stat. § 8C-1, Rules 404, 802 (1999). The court overruled the objection and denied defendant's motion to strike. We agree that the admission of the evidence was error, but we hold that the error was not prejudicial.

We disagree with defendant that the admission of the testimony in question violated Rule 404. Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Rule 404(b) was not violated here, because Baldwin's statement did not relate to defendant's prior conduct. Thus, the cases cited by defendant are inapposite. *See State v. Shane*, 304 N.C. 643, 285 S.E.2d 813 (1982); *State v. Sanders*, 295 N.C. 361, 373-75, 245 S.E.2d 674, 682-83 (1978).

Similarly, admission of the testimony did not violate Rule 404(a), which provides in relevant part that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." Defendant argues that the testimony was tantamount to a statement that Baldwin was afraid of defendant, which "impl[ies] that the defendant was a bad and dangerous person." We do not believe Baldwin's statement regarding her concerns for her well-being if she talked to the police is evidence of defendant's character. Even if the statement could be construed as evidence of defendant's character, we hold below that the admission of the testimony did not prejudice defendant.

Although admission of the testimony did not violate Rule 404, we hold that it was error, because the testimony in question was hearsay. *See* N.C. Gen. Stat. § 8C-1, Rules 801, 802 (1999). The State does not argue that this hearsay was admissible under an exception to the hearsay rules. We note that Baldwin had testified earlier, and, if Corporal Barrow's testimony were corroborative of Baldwin's earlier testimony, then Corporal Barrow's testimony would have been admissible for corroborative, nonhearsay purposes. *See, e.g., State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998); *State v. Warren*, 289 N.C. 551, 557, 223 S.E.2d 317, 321 (1976). However, Baldwin did not testify regarding her concerns or her reluctance to speak with the police. Therefore, this evidence was inadmissible hearsay, and the trial court erred in overruling defendant's objection and in denying his motion to strike. *See Warren*, 289 N.C. at 557-58, 223 S.E.2d at 321.

Despite the error, defendant is not entitled to a new trial, because he has not shown that he was prejudiced. To establish prejudice, a defendant has the burden of showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (1999). Defendant here has failed to carry his burden.

Corporal Barrow testified only that Baldwin was reluctant to be identified as a witness. The concerns Corporal Barrow attributed to Baldwin did not relate directly to defendant. Baldwin's statement was not that she was afraid of defendant, as defendant suggests, but rather, that she was afraid of talking to the police. Defendant does not explain how the admission of the statement prejudiced him, and, in light of the direct evidence supporting defendant's conviction, in particular, his own statement, we do not think there is a reasonable possibility that the jury would have reached a different result had this testimony been stricken.

Defendant cites *State v. Warren* in support of his contention that the error was prejudicial. *Warren* is distinguishable, however. In *Warren*, that part of the hearsay testimony that was not corroborative of the witness's earlier statement went directly to the defendant's guilt. Moreover, the hearsay testimony was contradictory in part to the witness's earlier statement. *See Warren*, 289 N.C. at 556-57, 223 S.E.2d at 320-21. Here, the content of the hearsay testimony is peripheral to defendant's guilt. We conclude that defendant was not prejudiced by the error.

III.

[3] In his third assignment of error, defendant contends that the trial court erred in refusing to give a jury instruction on involuntary manslaughter. We disagree.

Involuntary manslaughter is "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Wingard*, 317 N.C. 590, 600, 346 S.E.2d 638, 645 (1986) (internal quotation marks omitted).

> In ruling on whether to charge the jury on a lesser included offense, the trial judge must make two determinations. The first is whether the lesser offense is, as a matter of law, an included offense of the crime for which defendant is indicted. . . . The second is whether there is evidence in the case which will support a conviction of the lesser included offense.

State v. Thomas, 325 N.C. 583, 590-91, 386 S.E.2d 555, 559 (1989); *see* N.C. Gen. Stat. § 15-170 (1999). Involuntary manslaughter is a lesser included offense of first degree murder. *See Thomas*, 325 N.C. at 591, 386 S.E.2d at 559. However, there is not evidence here to support an instruction on involuntary manslaughter.

The only evidence defendant proffers in support of the involuntary manslaughter instruction is the statement he made to police. Defense counsel quoted it in relevant part as follows:

> I caught up with her and grabbed her sweater. She turned around swinging her arms. Steve got there and the shot went off. I was dazed. She ran again. She ran in the street. She was hollering. I took the gun from Steve. It was a black and gray Ruger P95-DC. It wasn't supposed to happen. I got scared. I shot her again because I was scared because of the alcohol.

Defendant argues that this statement would allow a jury to find that he did not intend to kill the victim, but "acted in a negligent or even criminally negligent manner and recklessly discharged a firearm," thereby causing her death.

The test to be used in determining whether to instruct on a lesser included offense, however, "is not whether the jury could convict defendant of the lesser crime, but whether 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 crime charged."

State v. Strickland, 307 N.C. 274, 283, 298 S.E.2d 645, 652 (1983) (footnote omitted), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Our Supreme Court further elaborated as follows:

> [T]he mere fact that the evidence might support a verdict on the lesser crimes does not dictate that the trial judge instruct on the lesser grades. His decision rests on whether the evidence is sufficient to support the charge; that is, whether, in a murder case, the evidence raises a question with respect to premeditation and deliberation or malice, either under the facts or as raised by defendant's defenses.

Id. at 283 n.1, 298 S.E.2d at 652 n.1. Here, defendant does not dispute that the State presented evidence as to each element of first degree murder. Defendant's statement does not contradict the State's evidence. Even if the jury believed defendant's statement that he shot House because he "was scared because of the alcohol," the statement still indicates that the shooting was deliberate rather than accidental or as a result of negligence. Accordingly, we do not find that the statement creates a conflict in the evidence. The trial court did not err in refusing to give an instruction on involuntary manslaughter.

IV.

[4] In his fourth and final assignment of error, defendant argues that the trial court erred in overruling his objection to the instruction on flight. "[A] trial court may not instruct a jury on defendant's flight unless there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (internal quotation marks omitted). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

Defendant claims that the evidence showed that he went to his sister's apartment after the shooting and nothing more. He argues that his case is factually similar to *State v. Hutchinson*, 139 N.C. App. 132, 532 S.E.2d 569 (2000). We disagree. We summarized the relevant evidence in *Hutchinson* as follows:

> [T]he evidence showed that after defendant entered the house, he made no attempt to leave. Defendant remained on the back porch

after Jeffrey Watson confronted him. Even after Wendy Watson informed defendant that she had called the police, defendant walked away but did not attempt to hide or flee. In addition, when the police arrived, defendant did not attempt to avoid the police.

Id. at 139, 532 S.E.2d at 574. Here, in contrast, the State presented evidence that defendant went to his sister's apartment following the shooting, and, when police tracked him down there, he came out of the apartment carrying his nephews as a shield. This is sufficient evidence to support an inference that defendant was attempting to escape apprehension. *See State v. Beck*, 346 N.C. 750, 758, 487 S.E.2d 751, 757 (1997) (evidence that defendant took cab from crime scene to his residence but told cab driver to leave area after seeing police there was sufficient to support flight instruction). The trial court did not err in instructing the jury on flight.

No prejudicial error.

Judges WYNN and THOMAS concur.

BLAIR HARROLD, O.D., AND ALLAN BARKER, O.D., PLAINTIFFS V. RICHARD C. DOWD, AND ERNST & YOUNG, LLP, DEFENDANTS

No. COA01-529

(Filed 16 April 2002)

1. Statutes of Limitation and Repose— claims against accountants—last act giving rise to cause of action

Plaintiffs' claims for accounting malpractice, negligence, and breach of contract against accountants arising from the merger of their optometry practice with a third party were barred by the three year statute of limitations where the wrongful act, broken promise, and last act giving rise to the cause of action occurred on 27 October 1995, when plaintiffs agreed to the merger, and plaintiffs began this action on 6 July 1999. N.C.G.S. §§ 1-52(1), (5), 1-15(c).

2. Accountants and Accounting— fraud—allegations insufficient

The trial court correctly granted a Rule 12(b)(6) dismissal of a fraud claim against accountants arising from the merger of an optometry practice where the first two allegations failed to conform to Rule 9(b) particularity requirements in that they failed to identify the person making the representation, failed to identify what was obtained as a result of the fraudulent representation, and failed to plead any facts to support the allegation that the representation was false.

3. Accountants and Accounting— negligent misrepresentation—pleadings insufficient

The trial court correctly granted a Rule 12(b)(6) dismissal of a negligent misrepresentation claim against accountants arising from the merger of optometry practices where nothing in the pleadings reflected that defendants negligently supplied information for the guidance of plaintiffs with respect to the merger transaction.

4. Accountants and Accounting— breach of fiduciary duty—no fiduciary relationship

The trial court correctly granted a Rule 12(b)(6) dismissal of a breach of fiduciary duty claim against accountants arising from the merger of optometry practices where plaintiffs failed to show that a fiduciary relationship existed between the parties. There is no case stating that the relationship between an accountant and client is per se fiduciary in nature, and allegations of dual representation and the desire to represent the newly merged company do not establish a breach of fiduciary duty by themselves.

5. Accountants and Accounting— breach of agency agreement—statute of limitations

The trial court correctly granted a Rule 12(b)(6) dismissal of a claim for breach of an agency agreement against accountants arising from the merger of optometry practices where the engagement of the accountants would have been completed as by 27 October 1995 and plaintiffs began this action on 6 July 1999. The claim was barred by the 3 year statute of limitations.

6. Pleadings— motion to amend—12(b)(6) hearing—same day

The trial court did not abuse its discretion by not allowing plaintiffs' motion to amend their complaint, which was filed the same day as the hearing on defendants' Rule 12(b)(6) motion.

7. Civil Procedure— brief—timely service

A brief in support of a Rule 12(b)(6) motion was timely served where it was undisputed that the hearing was calendared for Monday and the brief was served on the previous Thursday. The brief was served at least two days before the hearing on the motion as required by N.C.G.S. § 1A-1, Rule 5(a1). N.C.G.S. § 1A-1, Rule 6(a).

Appeal by plaintiffs from order entered 6 February 2001 by Judge Cy A. Grant, Sr. in Nash County Superior Court. Heard in the Court of Appeals 20 February 2002.

Nigle B. Barrow, Jr., for plaintiffs-appellants.

Parker, Poe, Adams & Bernstein, L.L.P., by Robert W. Spearman and Ernst & Young, LLP, by J. Andrew Heaton, for defendants-appellees.

TYSON, Judge.

I. Facts

Blair Harrold, O.D. and Allan Barker, O.D. (collectively "plaintiffs") are licensed optometrists practicing in Nash County, North Carolina. Plaintiffs engaged Richard C. Dowd and Ernst & Young, LLP (collectively "defendants") to advise them on business opportunities, including mergers and acquisitions.

In 1995, plaintiffs received a merger proposal from PrimeVision Health, Inc. ("PrimeVision"). Defendants initially advised plaintiffs against the merger. After investigating the merger proposal, defendants later advised plaintiffs to consider the proposal. Plaintiffs agreed to the merger with PrimeVision on 27 October 1995 by a Letter of Intent. After the merger, plaintiffs learned of misrepresentations made by PrimeVision and its agents.

Plaintiffs initially filed a complaint against defendant Dowd. The initial action was dismissed without prejudice by order of the court. Plaintiffs filed an amended complaint against defendants within one

year from the dismissal without prejudice. Plaintiffs allege in their amended complaint: (1) accounting malpractice, (2) fraud, (3) negligence in providing information, (4) common law fraud, (5) negligent misrepresentation, (6) breach of contract, (7) breach of agency agreement, (8) negligence, and (9) breach of fiduciary duty.

Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs filed a motion to amend their complaint on 29 January 2001. The motion to dismiss was heard on 29 January 2001. The court granted defendants' motion to dismiss plaintiffs' amended complaint pursuant to Rule 12(b)(6) on 6 February 2001. Plaintiffs appeal. We affirm.

II. Issues

The issues raised on appeal are whether: (1) the trial court erred in dismissing plaintiffs' complaint pursuant to Rule 12(b)(6), (2) the trial court abused its discretion in failing to allow plaintiffs' motion to amend the complaint before ruling on defendants' motion to dismiss, and (3) the trial court erred in considering defendants' brief in support of their motion to dismiss.

III. Rule 12(b)(6)

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991). On a Rule 12(b)(6) motion to dismiss, the trial court must determine whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999). Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiffs' claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats the plaintiffs' claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985). A claim should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 123, 401 S.E.2d 133, 135 (1991).

Defendants' brief in support of its motion to dismiss raises: (1) the statute of limitations as a bar to plaintiffs' malpractice, breach of contract, breach of agency agreement, and negligence claims (first, third, sixth, seventh and eighth claims), (2) failure to state a claim

and with the specificity required by Rule 9(b) of the North Carolina Rules of Civil Procedure as a bar to plaintiffs' fraud and misrepresentation claims (second, fourth, and fifth claims), (3) failure to allege a fiduciary relationship between the parties as a bar to plaintiffs' breach of fiduciary duty claim (ninth claim), (4) failure to allege that an act or omission of defendants proximately caused plaintiffs' injuries bars all plaintiffs' claims, and (5) attempt to obtain a double recovery bars all plaintiffs' claims.

A. Statute of Limitations

[1] The applicable statute of limitations for professional malpractice, negligence, and breach of contract is three years. *See* N.C. Gen. Stat. §§ 1-52(1) and (5), 1-15(c) (1999). The question presented is when the statutes of limitations commenced.

The statute of limitations for a malpractice claim begins to run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant. *See* N.C. Gen. Stat. § 1-15(c); *NationsBank of N.C., N.A. v. Parker*, 140 N.C. App. 106, 111, 535 S.E.2d 597, 600 (2000). A cause of action based on negligence accrues when the wrong giving rise to the right to bring suit is committed, even though the damages at that time be nominal and the injuries cannot be discovered until a later date. *Pierson v. Buyher*, 101 N.C. App. 535, 537, 400 S.E.2d 88, 90 (1991) (citing *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957)). The statute of limitations for a breach of contract claim begins to run on the date the promise is broken. *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) (citing *Pickett v. Rigsee*, 252 N.C. 200, 113 S.E.2d 323 (1960)).

Plaintiffs argue that the statute of limitations began to run as to all claims on 3 July 1996, the date the merger with PrimeVision was completed. Defendants argue that taking plaintiffs' own allegations within their amended complaint as true, that the statute of limitations began on 27 October 1995, the date plaintiffs agreed to the merger by Letter of Intent.

Plaintiffs' amended complaint alleges that defendants failed to investigate PrimeVision, its agents, and its financial situation, and failed to advise plaintiffs concerning the results of the merger. Accordingly, the wrongful act, broken promise, and the last act of defendants giving rise to the cause of action occurred on 27 October 1995. Plaintiffs commenced this action on 6 July 1999. Plaintiffs'

claims for accounting malpractice, negligence, and breach of contract are barred by the three year statute of limitations.

B. Failure to State a Claim and Plead with Particularity

[2] Defendants argue that plaintiffs failed to allege all of the elements of fraud and failed to state with particularity the circumstances constituting fraud as required under Rule 9(b) of the North Carolina Rules of Civil Procedure.

Plaintiffs correctly state that the essential elements of actionable fraud are: (1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party. *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974) (citations omitted).

Allegations of fraud are subject to more exacting pleading requirements than are generally demanded by "our liberal rules of notice pleading." *Stanford v. Owens*, 76 N.C. App. 284, 289, 332 S.E.2d 730, 733 (1985) (citations omitted). Rule 9(b) of the North Carolina Rules of Civil Procedure provides in relevant part that: "In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." N.C. Gen. Stat. § 1A-1, Rule 9(b) (1999). In *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981), our Supreme Court instructed that "in pleading actual fraud the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent act or representations." This formula ensures that the requisite elements of fraud will be pleaded with the specificity required by Rule 9(b). *Brandis v. Lightmotive Fatman, Inc.*, 115 N.C. App. 59, 64, 443 S.E.2d 887, 889 (1994).

Plaintiffs argue that the following allegations in the complaint were sufficient to withstand defendants' Rule 12(b)(6) motion to dismiss: (1) defendants intentionally, carelessly, wantonly, and/or negligently misrepresented material facts, made untrue statements, and failed to disclose other material facts necessary to make other representations to plaintiffs accurate; (2) defendants omitted to state a number of material facts necessary to make other representations not misleading and untrue; and (3) defendants specifically represented that they had performed a due diligence background check and inves-

tigation of PrimeVision and failed to perform or if performed, such investigations were not performed properly.

The first two allegations are merely bare assertions and fail to conform to Rule 9(b) particularity requirements. *See Sharp v. Teague*, 113 N.C. App. 589, 597, 439 S.E.2d 792, 797 (1994) ("Mere generalities and conclusory allegations of fraud will not suffice.") While the latter allegation provides the content of the allegedly fraudulent representation, it fails to identify the person making the representation, it fails to identify what was obtained as a result of the fraudulent representation, and plaintiffs fail to plead any facts to support their allegation that the representation was false or untrue. *See Terry*, 302 N.C. at 85, 273 S.E.2d at 678.

[3] Plaintiffs' alternative claim for negligent misrepresentation also fails. "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988).

Nothing in the pleadings reflect that defendants negligently supplied information for the guidance of plaintiffs. Plaintiffs argue in their brief that defendants negligently misrepresented that PrimeVision owned and controlled nine ophthalmology practices. This argument is without support in the record. The amended complaint specifically states that "Waite and others representing PrimeVision misrepresented that they represented, owned, and controlled nine ophthalmology practices." The remaining allegations referred to by plaintiffs specifically state that defendants "failed to provide," failed to advise," or "failed to investigate." There is no allegation in plaintiffs' amended complaint that defendants negligently supplied any information with respect to the merger transaction.

C. Breach of Fiduciary Duty and Agency Agreement

[4] Plaintiffs allege a breach of fiduciary duty by defendants. For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984). In their brief, plaintiffs cite *Smith v. Underwood*, 127 N.C. App. 1, 10, 487 S.E.2d 807, 813 (1997), for the proposition that this State has recognized the existence of a fiduciary relationship between accountant and client. While defendant John C. Proctor & Co. was an accounting firm and defendant Sullivan a certi-

fied public accountant, nowhere in the *Underwood* opinion does this Court state that there existed a fiduciary relationship between accountant and client. Sullivan and John C. Proctor & Co. had done accounting for the trusts since their inception and had prepared tax filings for plaintiffs' various trusts, corporations, and personal returns throughout said time. *Id.* at 6, 487 S.E.2d at 811. This Court stated "[a]lthough plaintiffs have adequately alleged the circumstances surrounding the formation and development of the alleged confidential relationship between plaintiffs and defendants Sullivan and John C. Proctor & Co., they have failed to identify the specific transactions alleged to have been procured by means of constructive fraud." *Id.* at 10, 487 S.E.2d at 813. We have found no case stating that the relationship between accountant and client is *per se* fiduciary in nature.

A fiduciary duty exists when "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). " '[I]t extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.' " *Id.* (quoting 25 C.J. Fiduciary § 9, at 1119 (1921)). In *Underwood* the defendants obviously had acquired a special confidence in preparing tax documents for the trusts, corporations, and individual plaintiffs.

At bar, plaintiffs contend that defendants breached a fiduciary duty owed in (1) failing to investigate, (2) failing to advise, (3) accepting employment by PrimeVision while working for plaintiffs, and (4) that defendants desired to represent the new company after the merger. The allegations of failure to investigate and failure to advise are actually malpractice claims, time barred under N.C.G.S. § 1-15(c). *See Sharp*, 113 N.C. App. at 592, 439 S.E.2d at 794 ("Because claims 'arising out of the performance of or failure to perform professional services' based on negligence or breach of contract are in the nature of 'malpractice' claims, they are governed by N.C. Gen. Stat. 1-15(c)") (citations omitted).

Taking the allegations raised in their amended complaint as true, plaintiffs fail to allege circumstances sufficient to show that a fiduciary relationship existed between the parties. *See Terry*, 302 N.C. at 83, 273 S.E.2d at 677 ("It is necessary for plaintiff to allege facts and circumstances (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the

transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff."); *Underwood*, 127 N.C. App. at 10, 487 S.E.2d at 813. The remaining allegations of dual-representation and desire to represent the newly merged company do not establish a breach of fiduciary duty by themselves. *See Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 667, 488 S.E.2d 215, 224 (1997) (fact that accountant and accounting firm obtained the benefit of their continued relationship with plaintiffs was insufficient to establish claim for constructive fraud).

[5] Plaintiffs also alleged a breach of agency agreement in that defendants undertook to act as agents for plaintiffs in negotiating the merger. A principal-agent relationship arises upon two essential elements: "(1) [a]uthority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Colony Assocs. v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637, 300 S.E.2d 37, 39 (1983). Plaintiffs allege that they engaged defendants to advise them regarding mergers and acquisitions. Based on plaintiffs' amended complaint, this engagement would have been completed as of 27 October 1995, the date plaintiffs agreed to the merger with PrimeVision. The Letter of Intent executed by the parties established the terms of the merger and specifically states that plaintiffs' attorney would prepare the Reorganization Agreement. Accordingly, this claim is barred by the three year statute of limitations under N.C.G.S. § 1-52.

IV. Motion to Amend the Complaint

[6] Plaintiffs assign error to the trial court's failure to allow their motion to amend their complaint filed the same day as the Rule 12(b)(6) hearing.

Once an answer has been served, plaintiffs must seek leave of court to amend their complaint, and "leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (1999). A motion to amend, however, is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent proof that the judge manifestly abused that discretion. *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E.2d 444, 448 (1982). Where the court's reason for denying leave to amend is not stated in the record, " 'this Court may examine any apparent reasons for such denial.' " *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985) (quoting *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 42-43, 298 S.E.2d 409, 411 (1982)). Reasons warranting a denial of leave to amend include "(a) undue delay, (b)

bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Id.*

In response to the allegations of defendants' motion to dismiss, plaintiffs filed a motion to amend their complaint for a second time. We find no abuse of discretion by the trial court in failing to allow plaintiffs' last minute motion to amend the complaint on the date calendared for defendants' motion to dismiss. *See Gunter v. Anders*, 115 N.C. App. 331, 334, 444 S.E.2d 685, 687 (1994) (not an abuse of discretion to deny motion to amend complaint where plaintiffs knew of the facts prior to hearing and did not seek amendment until defendants moved to dismiss based upon plaintiffs' failure to so plead). This assignment of error is overruled.

V. Defendants' Brief in Support of their Motion to Dismiss

[7] Plaintiffs contend that defendants' brief in support of their motion to dismiss was untimely served and should not have been considered by the trial court.

Rule 5(a1) of the North Carolina Rules of Civil Procedure provides in pertinent part: "In actions in superior court, every brief or memorandum in support or in opposition to a motion to dismiss . . . shall be served upon each of the parties *at least two days before the hearing* on the motion . . . ." N.C. Gen. Stat. § 1A-1, Rule 5(a1) (2000) (emphasis added).

Rule 6(a) of the North Carolina Rules of Civil Procedure provides in pertinent part that:

> In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. *When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded from the computation.*"

N.C. Gen. Stat. § 1A-1, Rule 6(a) (2000) (emphasis added).

It is undisputed that the hearing was calendared for Monday and that the brief was served on plaintiffs on the previous Thursday. The

brief was served "at least two days before the hearing on the motion." This assignment of error is overruled.

VI. Conclusion

We hold that the trial court properly dismissed this action under Rule 12(b)(6) in that plaintiffs' complaint disclosed that its claims are either barred by the applicable statute of limitations or lack facts sufficient to state a claim for relief. *See Oates*, 314 N.C. at 278, 333 S.E.2d at 224.

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

PAMELA BECKER v. GRABER BUILDERS, INC., GRABER HOMES, INC., DWIGHT E. GRABER AND DOUGLAS BAER

No. COA01-178

(Filed 16 April 2002)

Corporations— contract to build a home—disregard the corporate form—original dissolved corporation—successor corporation

The trial court did not err in an action arising out of a contract to build a home by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's claims to disregard the corporate form for breach of contract, breach of implied warranty of habitability, negligence, fraud, and unfair and deceptive trade practices against two of the defendants including the successor corporation and the person who controlled it, but did err by dismissing the claims against the two defendants including the original dissolved corporation and the person who controlled it, because: (1) the general rule is that a corporation that purchases all, or substantially all, of the assets of another corporation is not liable for the old corporation's debts, and plaintiff failed to allege facts that would allow her to bring an action against the successor corporation or the individual allegedly exercising complete domination and control over it; (2) plaintiff alleged sufficient facts to sustain the claims against the original corporation or the individual

allegedly exercising complete domination and control over it based on the allegations that those defendants failed to install a septic tank system suitable for a four-bedroom house and to procure the appropriate building permit; and (3) although defendants contend there is an arbitration agreement requiring the dismissal of plaintiff's claims, defendants have neither made a motion to stay the action pending arbitration nor asserted the arbitration clause as a defense.

Appeal by plaintiff from judgments entered 18 and 26 October 2000 by Judge Loto G. Caviness in Jackson County Superior Court. Heard in the Court of Appeals 5 December 2001.

Brown Queen Patten & Jenkins, PA, for the plaintiff-appellant, by Frank G. Queen.

Kelly & Rowe, P.A., for the defendants-appellees Graber Builders, Inc. and Dwight E. Graber, by James Gary Rowe.

Coward, Hicks & Siler, P.A., for the defendants-appellees Graber Homes, Inc. and Douglas Baer, by William H. Coward.

THOMAS, Judge.

Plaintiff, Pamela Becker, appeals the trial court's dismissal of her claims for breach of contract, breach of implied warranty of habitability, negligence, fraud, and unfair and deceptive trade practices against two corporations and two building contractors. By five assignments of error, she argues that the dismissal of her claims was improper. For the reasons discussed herein, we affirm in part, and reverse and remand in part.

Plaintiff alleges the following: In October of 1994, she entered into a contract with defendant Graber Builders, Inc., controlled by defendant Dwight E. Graber, to build a four-bedroom house. Sometime thereafter, Graber Builders, Inc., was administratively dissolved. The "successor corporation" is defendant Graber Homes, Inc., controlled by defendant Douglas Baer.

Plaintiff's then vacant lot already had a two-bedroom septic tank system. According to plaintiff, defendants obtained a permit in January, 1995, for a two-bedroom septic system that they never installed. Defendants then obtained a permit to build a two-bedroom residence on plaintiff's property.

In July of 1996, defendants obtained a certificate of occupancy by Jackson County for the two-bedroom house using the septic certificate of completion for the previously installed two-bedroom septic system. Defendants then finished the residence by completing two additional bedrooms without getting another building permit or installing an adequate septic system. Plaintiff alleges she discovered what happened after 31 October 1997 while attempting to sell the house.

Plaintiff filed her initial complaint on 3 January 2000 and amended her complaint on 21 July 2000. The amendments added Graber Homes, Inc. and Douglas Baer as defendants, and alleged that both Dwight Graber and Douglas Baer exercised complete control and domination over Graber Builders Inc. and Graber Homes, Inc., respectively. Defendants never filed answers to the complaint but instead filed motions to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court granted the motions and plaintiff appeals.

For our purposes, we combine plaintiff's five assignments of error, which all go to the validity of the dismissals.

Dismissal of a complaint is proper under 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). In general, "a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (*quoting* 2A James W. Moore et al., *Moore's Federal Practice*, § 12.08, at 2271-74 (2d ed. 1975)). After reviewing plaintiff's complaint in accordance with this standard, we conclude that the trial court erred in granting the motion to dismiss of Graber Builders, Inc. and Dwight Graber, but properly granted the 12(b)(6) motion of Graber Homes, Inc. and Douglas Baer.

The alleged contract, incorporated by reference in both complaints, contains three pages of general language regarding the rights and duties of the "Contractor" and the "Owner." The heading of each page reads, "GRABERS BUILDERS, INC.." On the fourth page, the signature page, "Dwight E. Graber" is signed above a line titled, "GRABERS BUILDERS, INC.," and "Pamela Becker" is signed above

the line, "Owner." The date reads: 10-4-94. The contract identifies no other parties. It contains no information regarding the building of a specific residence. It does, however, cap the labor "charged at gross cost to the contractor" at $141,838.00, and states that: "Any increase in building material from the date of the bid to the date of the purchase will be additional to the contract price."

Plaintiff also alleges in her amended complaint that the corporate form of Graber Builders, Inc. should be disregarded because Dwight E. Graber "exercised complete control and domination" over the company with respect to this contract. Plaintiff alleges the same with respect to Graber Homes, Inc. and Douglas Baer.

Our courts will "disregard the corporate form" and "pierce the corporate veil" where an individual exercises actual control over a corporation, operating it as a mere instrumentality or tool. *Postell v. B & D Construction Co.*, 105 N.C. App. 1, 11, 411 S.E.2d 413, 419, *disc. review denied*, 331 N.C. 286, 471 S.E.2d 253 (1992). Under these circumstances, the controlling individual is liable for the torts of the corporation. *Id.* The "instrumentality rule" has been set forth by our Supreme Court as follows:

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

Henderson v. Finance Co., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). Liability may be imposed on an individual controlling a corporation as an "instrumentality" when he had:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Glenn v. Wagner, 313 N.C. 450, 455, 329 S.E.2d 326, 330 (1985).

Plaintiff alleges that Dwight Graber: (1) exercised "complete domination and control" over Graber Builders, Inc.; (2) that such control was used to violate the North Carolina Building Code and commit fraud against defendant; and (3) that the aforesaid control and the violation of the Code proximately caused damages to plaintiff in that she was required to install a new septic system. Accordingly, the allegations in plaintiff's complaints are sufficient to state a claim for disregard of the corporate entity.

The amended complaint does not allege specific facts concerning the administrative dissolution of Graber Builders, Inc. Under the North Carolina Business Corporation Act, dissolution of a corporation does not "[p]revent the commencement of a proceeding by or against the corporation in its corporate name. . . ." N.C. Gen. Stat. § 55-14-05 (1999). The liability of a dissolved corporation continues for a period of five years after publishing notice of its dissolution. N.C. Gen. Stat. § 55-14-07 (1999). We do not know when Graber Builders, Inc. was administratively dissolved or if it published notice of its dissolution. Since no facts are disclosed which will necessarily defeat plaintiff's claims against Graber Builders, Inc., it is a viable defendant against whom plaintiff may assert claims at this stage of the proceedings.

Regarding plaintiff's claims against Graber Homes, Inc. and and Douglas Baer, the trial court based the granting of the motion to dismiss as to these defendants on a violation of the applicable statute of limitations. However, under any circumstances plaintiff clearly failed to allege facts that would allow her to bring an action against the successor corporation or the individual allegedly exercising complete domination and control over it.

The general rule is that a corporation that purchases all, or substantially all, of the assets of another corporation is not liable for the old corporation's debts. *G.P. Publications, Inc. v. Quebecor Printing-St. Paul, Inc.*, 125 N.C. App. 424, 432, 481 S.E.2d 674, 679, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 800 (1997). Plaintiff alleges no facts supporting one of the four well-settled exceptions to this general rule against successor liability. *See id.* at 432-33, 481 S.E.2d at 679 (setting forth the four exceptions: "(1) where there is an

express or implied agreement by the purchasing corporation to assume the debt or liability; (2) where the transfer amounts to a *de facto* merger of the two corporations; (3) where the transfer of assets was done for the purpose of defrauding the corporation's creditors; or (4) where the purchasing corporation is a 'mere continuation' of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers.").

Consequently, plaintiff fails to allege a claim upon which relief may be granted against Graber Homes, Inc. or Douglas Baer. Since the motion to dismiss can be sustained on the ground that the defendants are not viable defendants, it is unnecessary to review the dismissal further. *Cf. Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (summary judgment will not be disturbed where any grounds exist to support the trial court's dismissal).

We now proceed to determine which claims against Graber Builders Inc. and Dwight Graber survive the motion to dismiss.

Plaintiff first alleges a claim against defendants for breach of contract. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). Plaintiff states in her complaint that she entered into a "Building Construction Contract" with defendants. She alleges the existence of a contract for construction of a conforming four-bedroom house. She contends defendants breached the contract by failing to install a septic system suitable for a four-bedroom house and in compliance with the applicable building code and the Jackson County Health Department regulations. In total, plaintiff sufficiently pled her claim for breach of contract.

Plaintiff further alleges defendants breached an implied warranty of habitability. The doctrine of implied warranty of habitability requires that a dwelling and all of its fixtures be "sufficiently free from major structural defects, and . . . constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction." *Hartley v. Ballou*, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974). The warranty arises by operation of law and imposes strict liability on the builder-vendor. *Medlin v. FYCO, Inc.*, 139 N.C. App. 534, 541, 534 S.E.2d 622, 627 (2000), *disc. review denied*, 353 N.C. 377, 547 S.E.2d 12 (2001). Here, plaintiff alleges that defendants breached the implied warranty of habitability by failing to install a septic system sufficient to serve a four-bedroom

residence and in violation of both the building code and health department regulations. We agree with plaintiff that the dismissal of this claim by the trial court is error.

Plaintiff next alleges a claim based on negligence. In order to establish negligence, plaintiff must show that defendants owed a duty to her, breached that duty, and that such breach was an actual and proximate cause of her injuries. *Pulley v. Rex Hospital*, 326 N.C. 701, 704-05, 392 S.E.2d 380, 383 (1990). Plaintiff alleges that defendants had a contractual duty to construct the residence with a septic system sufficient to serve a four-bedroom house and to conform to the requirements of the applicable building code and rules or regulations of the Jackson County Health Department. She then alleges that the defendants were negligent in failing to do so, and that such negligence was the proximate cause of her damages. Her pleadings are sufficient. The trial court erred in dismissing plaintiff's claim for negligence.

As to plaintiff's claim for fraud, in order to survive a motion to dismiss pursuant to Rule 12(b)(6), the complaint must allege with particularity all material facts and circumstances constituting the fraud, although intent and knowledge may be averred generally. *Carver v. Roberts*, 78 N.C. App. 511, 513, 337 S.E.2d 126, 128 (1985); N.C.R. Civ. P. 9(b). The essential elements of actionable fraud are: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). There is no requirement, however, that any certain language be used. *Carver*, 78 N.C. App. at 513, 337 S.E.2d at 128. "It is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts." *Id.* (*quoting Manufacturing Co. v. Taylor*, 230 N.C. 680, 686, 55 S.E.2d 311, 315 (1949)).

Plaintiff alleges that defendants obtained the certificate of occupancy with the intent to deceive her, that she did not learn of their deception until after 31 October 1997 while attempting to sell the house, and that, as a result of this fraud, plaintiff has suffered damages. She also re-alleges all of the circumstances surrounding defendant's building of the house without installing an adequate septic tank.

Although plaintiff does not allege that such conduct was reasonably calculated to deceive, the allegations are sufficient to support the requisite element that defendants' knowledge of the insufficiency and concealment of its existence was calculated to deceive plaintiff. Thus, plaintiff's claim for fraud survives the motion to dismiss.

Chapter 75 of the North Carolina General Statutes declares unlawful "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1 (1999) (the "Act"). In the present case, proof of fraud would constitute a violation of the prohibition against unfair and deceptive acts. *See Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991).

Even without the claim for fraud, plaintiff's complaint sufficiently alleges a claim under the Act. In order to establish a *prima facie* claim for unfair 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. *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). A practice is unfair when it offends established public policy and is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. *Id.* Under section 75-1.1, a mere breach of contract does not constitute an unfair or deceptive act. *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). Egregious or aggravating circumstances must be alleged before the provisions of the Act may take effect. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989). Aggravating circumstances include conduct of the breaching party that is deceptive. *Poor*, 138 N.C. App. at 28, 530 S.E.2d at 845. Finally, in determining whether a particular act or practice is deceptive, its effect on the average consumer is considered. *Peterson v. State Employees Credit Union (In re Kittrell)*, 115 Bankr. 873 (Bankr. M.D.N.C. 1990).

Plaintiff alleges defendant's actions and misrepresentations were in or affecting commerce, constitute unfair and deceptive trade practices, and caused her damages in excess of $10,000.00. Plaintiff realleges the circumstances surrounding defendant's failure to install the second septic tank system and to procure the appropriate building permit. These pleadings adequately allege aggravating circumstances attending the breach of contract. Thus, plaintiff's claim for unfair and deceptive trade practices is sufficient to survive the 12(b)(6) motion to dismiss.

In further contravention of plaintiff's action surviving their 12(b)(6) motion, Graber Builders Inc. and Dwight Graber argue that plaintiff's claims necessarily fail because of an arbitration clause in the contract. The paragraph provides: "Any controversy or claim arising out of or relating to this contract, or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . ." However, arbitration is a contractual right that may be waived. *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). Here, defendants have neither made a motion to stay the action pending arbitration nor asserted the arbitration clause as a defense. Accordingly, a dismissal pursuant to Rule 12(b)(6) based on an alleged arbitration agreement is improper.

For the foregoing reasons, we affirm the dismissal of plaintiff's claims against Graber Homes, Inc. and Douglas Baer.

Plaintiff's allegations were adequate, however, to avoid a successful 12(b)(6) motion as to disregard of the corporate form involving Graber Builders, Inc. and Dwight Graber. She also adequately alleged claims on which relief may be granted against them for breach of contract, breach of implied warranty of habitability, negligence, fraud, and unfair and deceptive trade practices. We therefore reverse the trial court's order dismissing these claims, and remand the case for further proceedings in accordance with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges WYNN and WALKER concur.

STATE OF NORTH CAROLINA v. VICTOR WAYNE WILLIAMS

No. COA01-632

(Filed 16 April 2002)

1. Drugs— cocaine possession—residue in crack pipe

The trial court did not err in a prosecution for possession of cocaine by denying defendant's motion to dismiss for insufficient evidence where the prosecution was based on residue found in a piece of tubing used to smoke crack and defendant argued that

the residue left after the crack vaporized was not itself cocaine and that he could not possess something that could not be held and weighed separate and apart from the pipe. An SBI chemist testified that the residue was cocaine and did not testify that it could not be weighed, only that it was not weighed under SBI reporting procedures. N.C.G.S. § 90-95(a)(3) makes it unlawful for a person to possess a controlled substance without regard to quantity.

2. Constitutional Law— double jeopardy—possession of cocaine—possession of paraphernalia—pipe containing residue

Double jeopardy was not violated by convictions for possession of drug paraphernalia and possession of cocaine based on possession of a pipe containing cocaine residue. Each conviction requires proof of a fact or element that the other does not.

3. Appeal and Error— preservation of issues—motion in limine—no objection at trial

The denial of a motion in limine was not properly preserved for appellate review where defendant did not object to the introduction of the evidence at the time it was offered at trial.

4. Sentencing— habitual offender statute

All of defendant's arguments for dismissal of his habitual felon indictment were rejected in other opinions.

Appeal by defendant from judgment entered 9 January 2001 by Judge Melzer A. Morgan, Jr. in Moore County Superior Court. Heard in the Court of Appeals 13 March 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Anne M. Middleton, for the State.

Cunningham, Dedmond, Petersen & Smith, L.L.P., by Bruce T. Cunningham, Jr. for defendant-appellant.

HUNTER, Judge.

Victor Wayne Williams ("defendant") appeals judgment entered upon jury verdicts finding him guilty of felonious simple possession of a schedule II controlled substance (cocaine) and of being an habitual felon. We find no error in defendant's trial.

Evidence presented at trial tended to establish that on 3 April 1998, law enforcement officers apprehended defendant at a known drug house after he absconded with a house arrest unit around his ankle. After a brief chase, defendand was apprehended and arrested. A search incident to the arrest uncovered the house arrest unit and a pipe with copper tubing commonly known as a "straight shooter" used to ingest crack cocaine. Gary McDonald, Chief of Police for the Cameron Police Department, testified that he recognized the pipe to be an "item of drug paraphernalia" that had been burned to ingest crack cocaine. McDonald further testified that the interior of the pipe contained a residue which, based on his training and experience, he knew to be cocaine.

The pipe was sent to the State Bureau of Investigation ("SBI") for analysis. SBI forensic chemist Irving Allcocks testified that although the substance contained in the pipe was not weighed on a scale, "[t]here is no doubt" that the substance was cocaine. He explained that when smoked in such a pipe, crack cocaine vaporizes from a solid into a gas. The person smoking the pipe inhales the vapors, and the inside of the pipe is left coated with cocaine residue.

The State was permitted to introduce the testimony of Officer Rodney Hardy of the Southern Pines Police Department regarding a 1994 incident involving defendant. Officer Hardy testified that defendant initiated contact with him, informed him that he was having difficulty dealing with his crack cocaine addiction, and requested to be placed "somewhere where he could dry out." Officer Hardy told defendant that he could not arrest him based on this information, and that defendant should voluntarily commit himself to hospital treatment. Defendant then removed from his pocket a "straight shooter" pipe and two baggies containing what Officer Hardy believed to be crack cocaine. Defendant was then placed under arrest. The trial court allowed Officer Hardy's testimony under the limiting instruction that it was only to be considered to the extent it might show defendant was in knowing possession of cocaine on 3 April 1998.

On 9 January 2001, a jury returned verdicts of guilty on charges of felonious possession of a schedule II controlled substance and of being an habitual felon. The trial court entered judgment thereon on 9 January 2001, sentencing defendant to 80 to 105 months in prison. Defendant was convicted earlier of possession of drug paraphernalia for his possession of the pipe, and was sentenced on 27 May 1998 to 120 days' imprisonment. Defendant does not appeal that judgment.

Defendant appeals the 9 January 2001 judgment entered upon his convictions for possession of cocaine and being an habitual felon.

Defendant makes four arguments on appeal: (1) the trial court erred in denying his motion to dismiss the possession charge for insufficient evidence; (2) his right to be free from double jeopardy was violated when he was convicted both of possessing drug paraphernalia (the pipe), and possessing the cocaine inside the pipe; (3) the trial court erred in denying his motion *in limine* to exclude evidence of the 1994 incident involving Officer Hardy; and (4) the trial court erred in denying his motion to dismiss the habitual felon indictment. For the reasons discussed below, we hold defendant received a fair trial.

I.

[1] Defendant first argues the trial court erred in denying his motion to dismiss the possession charge for insufficient evidence. The State must present substantial evidence of each element of the crime charged. *State v. Fleming*, 350 N.C. 109, 142, 512 S.E.2d 720, 742, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). "When ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State; and the State is entitled to every reasonable inference to be drawn therefrom." *Id.*

Defendant was convicted under N.C. Gen. Stat. § 90-95(a)(3) (1999), which makes it unlawful for any person "[t]o possess a controlled substance." N.C. Gen. Stat. § 90-95(a)(3). The essence of defendant's argument is that he cannot be found guilty of possession of cocaine where the substance found in the pipe was merely residue left after the crack cocaine had vaporized, and thus was not itself cocaine, and that he cannot "possess" something that cannot itself be held and weighed separate and apart from the pipe. We disagree.

Although SBI forensic chemist Allcocks testified that the residue in the pipe resulted from the crack cocaine vaporizing from a solid into a gas, he clearly stated that the residue was nonetheless cocaine itself. Moreover, Allcocks did not testify that the cocaine was physically incapable of being weighed on any scale; rather, he stated that the cocaine was not weighed because SBI reporting procedures require that items be weighed to the tenth of a gram, and the residue quantity at issue fell somewhere between 1 to 100 milligrams.

This Court has previously held that a residue quantity of a controlled substance, despite its not being weighed, is sufficient to con-

vict a defendant of possession of the controlled substance under N.C. Gen. Stat. § 90-95(a)(3). *See State v. Thomas*, 20 N.C. App. 255, 201 S.E.2d 201 (1973), *cert. denied*, 284 N.C. 622, 202 S.E.2d 277 (1974). In *Thomas*, the arresting officers confiscated a bottle cap that dropped from the defendant's pocket. *Id.* at 256, 201 S.E.2d at 202. The bottle cap, which contained a residue substance, was sent to the SBI laboratory for testing. *Id.* An SBI chemist testified that although the residue was not weighed, it contained the substance heroin. *Id.* The chemist testified that he would estimate the weight of the residue at " 'a few milligrams,' and that while he did not quantitate the residue, 'only a small part of it was heroin.' " *Id.* The defendant argued that he could not be convicted of possession of such a minuscule amount of heroin under N.C. Gen. Stat. § 90-95(a)(3). *Id.* at 257, 201 S.E.2d at 202. This Court rejected the argument, noting that N.C. Gen. Stat. § 90-95(a)(3) makes it unlawful for any person to possess a controlled substance "without regard to the amount involved." *Id.*

As in *Thomas*, we observe that the plain language of N.C. Gen. Stat. § 90-95(a)(3), pursuant to which defendant was convicted, makes it unlawful for a person to "possess a controlled substance" without regard to quantity. Defendant has failed to cite any authority establishing that a residue quantity of cocaine is insufficient to support his conviction. The trial court properly denied defendant's motion to dismiss.

II.

[2] Defendant next argues his right to be free from double jeopardy was violated when he was convicted both of possession of drug paraphernalia based on his possession of the pipe, and of possession of cocaine, based on the cocaine residue present in the pipe. Defendant has failed to show that he objected on this basis at trial, the result being that this assignment of error is not properly preserved for appellate review. *See* N.C.R. App. P. 10(b)(1). In any event, defendant's right to be free from double jeopardy cannot be violated by these convictions where each conviction requires proof of a fact or element that the other does not. *See State v. Perry*, 305 N.C. 225, 232, 287 S.E.2d 810, 814 (1982) (". . . 'if proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of [double] jeopardy cannot be sustained . . . .' " (citation omitted)).

III.

[3] By his third argument, defendant argues the trial court erred in denying his motion *in limine* to exclude the testimony of Officer Hardy regarding the 1994 incident in which defendant removed from his pocket a crack pipe and two baggies containing what appeared to be crack cocaine. The trial court permitted the testimony under the limiting instruction that it was for the sole purpose of establishing defendant's knowing possession of cocaine in April 1998. Defendant failed to object during trial when Officer Hardy's testimony was offered.

This Court has recently held that an objection to the denial of a motion *in limine* is insufficient to preserve for appeal the issue of admissibility of the evidence. *See State v. Gaither*, 148 N.C. App. 534, 539-40, 559 S.E.2d 212, 215 (2002); *see also State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (rulings on motions *in limine* "are preliminary in nature and subject to change at trial, . . . and 'thus an objection to an order granting or denying the motion "is insufficient to preserve for appeal the question of the admissibility of the evidence" ' " (citations omitted)).

In *Gaither*, we stated that when a party appeals the denial 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.' " *Gaither*, 148 N.C. App. at 539, 559 S.E.2d at 215-16 (citation omitted). Thus, in order to preserve the issue of admissibility for appeal, a party must object to introduction of the evidence at the time it is offered at trial. *Id.* at 539, 559 S.E.2d at 215. Here, defendant failed to do so, and we decline to address this argument not properly preserved for our review.

IV.

[4] In his final argument, defendant sets forth five "claims" as to why the trial court should have dismissed his habitual felon indictment. These exact "claims" have already been addressed and rejected by this Court. First, defendant argues that the Structured Sentencing Act implicitly repealed the Habitual Felon Act because there is an irreconcilable conflict between the two, namely, that the laws conflict as to what kind of habitual offender deserves the most punishment. We specifically rejected an identical argument in *State v. Parks*, 146 N.C.

App. 568, 553 S.E.2d 695 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 220, 560 S.E.2d 355 (2002), wherein we stated: "We find no 'irreconcilable conflict' between the two Acts and note that North Carolina appellate courts have repeatedly upheld the use of the two Acts together, as long as different prior convictions justify each." *Id.* at 572, 553 S.E.2d at 697.

Second, defendant argues that the simultaneous application of the Structured Sentencing Act and the Habitual Felon Act violates his constitutional right to be free from double jeopardy. This specific argument has likewise been rejected. *See State v. Brown*, 146 N.C. App. 299, 301, 552 S.E.2d 234, 235 (noting our appellate courts have previously addressed and rejected double jeopardy challenges to this State's Habitual Felon Act), *appeal dismissed and disc. review denied*, 354 N.C. 576, 559 S.E.2d 186 (2001). In *Brown*, we observed that

> neither structured sentencing nor the Habitual Felons Act was used to punish the defendant for his prior convictions. Rather, both laws were used to enhance the defendant's punishment for his current offense. Therefore, we conclude the Habitual Felons Act used in conjunction with structured sentencing did not violate the defendant's double jeopardy protections.

Brown, 146 N.C. App. at 302, 552 S.E.2d at 236.

Third, defendant maintains that the Habitual Felon Act, as applied to him personally, violates his equal protection rights. Specifically, defendant argues that Moore County's general policy of indicting all eligible offenders as habitual felons, as opposed to exercising its discretion on a case by case basis, violates equal protection because not all counties have the same policy, and the law is thus being selectively applied. This Court addressed an identical challenge to Moore County's policy of indicting habitual felons in *Parks*. We held that the Moore County District Attorney properly exercised his discretion in deciding to prosecute all eligible offenders for habitual felon status, and that this policy did not violate the equal protection clause. *Parks*, 146 N.C. App. at 573, 553 S.E.2d at 697; *see also State v. Brown*, 146 N.C. App. 590, 591-92, 553 S.E.2d 428, 429 (2001) (likewise rejecting equal protection challenge to Moore County policy); *State v. Wilson*, 139 N.C. App. 544, 550-51, 533 S.E.2d 865, 870, *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000).

Fourth, defendant argues that the Moore County prosecutor's failure to exercise his discretion in deciding whether to indict defendant as an habitual felon constituted a violation of the principle of separation of powers. This challenge to Moore County's policy of indicting all eligible habitual felons was at issue in *Wilson*. We rejected the argument, holding that "[o]ur courts have held the procedures set forth in the Habitual Felon Act comport with a criminal defendant's federal and state constitutional guarantees." *Wilson*, 139 N.C. App. at 550, 533 S.E.2d at 870; *see also Brown*, 146 N.C. App. at 591-92, 553 S.E.2d at 429 (rejecting separation of powers challenge to Moore County policy of indicting all eligible offenders for habitual felon status).

Finally, defendant argues that the Habitual Felon Act is ambiguous as to when one becomes an habitual felon. This Court has held that no such ambiguity exists. *See Brown*, 146 N.C. App. at 592-93, 553 S.E.2d at 429-30. These arguments are overruled. Defendant's trial and sentencing were free of error.

No error.

Judges WALKER and BRYANT concur.

WILLIAM KEITH BURCHETTE, EMPLOYEE, PLAINTIFF-APPELLEE v. EAST COAST MILLWORK DISTRIBUTORS, INCORPORATED, EMPLOYER, ZENITH INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLANTS

No. COA00-1535

(Filed 16 April 2002)

1. Workers' Compensation— temporary total disability benefits—maximum medical improvement

The Industrial Commission did not err in a workers' compensation case by awarding temporary total disability benefits under N.C.G.S. § 97-29 to plaintiff employee after specifically finding that plaintiff had reached maximum medical improvement, because: (1) the Court of Appeals has previously held that it is not error as a matter of law to award temporary total disability payments after an employee has reached maximum medical improvement; and (2) even though there was a finding of maxi-

mum medical improvement, plaintiff is still entitled to a continuing presumption of disability which defendants have yet to overcome.

2. Workers' Compensation— disability—burden of proof—employee capable of returning to employment

The Industrial Commission did not err in a workers' compensation case by placing the burden of proof on defendants to show that plaintiff employee was capable of returning to employment, because: (1) defendants are unable to rebut the presumption of continuing disability with a finding of maximum medical improvement; and (2) there is competent evidence in the record to support the Commission's findings of fact that the jobs presented to plaintiff were not suitable given plaintiff's restrictions.

3. Workers' Compensation— ten percent penalty—past due compensation

The Industrial Commission did not err in a workers' compensation case by assessing a ten percent penalty under N.C.G.S. § 97-18(g) on all compensation that was past due, because: (1) although defendants filed an appropriate Form 28T in response to plaintiff's return to work on 26 April 1996, defendants were aware that plaintiff's trial return to work was unsuccessful; (2) when plaintiff made a subsequent trial return to work on 2 May 1996, defendants failed to file a subsequent and separate Form 28T in response to this subsequent return to work; (3) there is no language in the General Statutes or in the Industrial Commission Rules which mandates that the employee file a form with the Industrial Commission in order to have the employee's benefits reinstated after an unsuccessful trial return to work; and (4) once defendants had knowledge that plaintiff's trial return to work was unsuccessful, they were required to reinstate compensation pursuant to the Form 21 approved 6 April 1995, and defendants' remedy if they felt plaintiff's refusal to work was unjustified was to file a Form 24 under N.C.G.S. § 97-18.1(c).

4. Workers' Compensation— approval of treating physician—abuse of discretion standard

The Industrial Commission did not err in a workers' compensation case by striking the testimony of one doctor and designating another doctor as plaintiff's treating physician, because: (1) as long as there is any competent evidence to support the possibility of undue influence upon the treating physician, the

Commission's findings on this basis are conclusive on appeal; and (2) the approval or disapproval of a treating physician is within the discretion of the Industrial Commission, and defendants have presented no argument amounting to abuse of discretion.

5. Workers' Compensation— failure to render opinion within 180 days—no prejudice

Although defendants contend the Industrial Commission erred in a workers' compensation case by failing to render an opinion within 180 days after the close of the record as required by N.C.G.S. § 97-84, defendants have failed to show how this delay prejudiced them in any manner.

Appeal by defendants from opinion and award entered 16 August 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 November 2001.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellee.

Morris York Williams Surles & Barringer, LLP, by G. Lee Martin, for defendant-appellants.

McGEE, Judge.

Defendants appeal from the award of workers' compensation benefits to plaintiff William Keith Burchette. Plaintiff sustained an injury arising in and out of his employment with defendant East Coast Millwork Distributors, Incorporated, on 11 May 1994. A pallet of glass fell on the foot of another employee, and plaintiff lifted the pallet high enough for the employee to free himself. In doing so, plaintiff sustained a low back injury. Defendants accepted the claim as compensable pursuant to a Form 21 agreement dated 21 June 1994 and approved by the Industrial Commission 6 April 1995.

Plaintiff initially received treatment at Jonesville Family Medical Center and was diagnosed with acute low back pain. From 17 May 1994 until 18 July 1995, plaintiff attempted to return to work with defendant at least five times at various light duty jobs created for or modified for plaintiff. Each of these attempts was unsuccessful. During this period plaintiff also received various medical care procedures, including steroid injections and physical therapy.

Plaintiff began treatment with Dr. Louis Pikula (Dr. Pikula) on 17 January 1996. Dr. Pikula recommended a back therapy program and plaintiff went to The Rehab Center in Charlotte on 18 March 1996.

Plaintiff was discharged from the program on 17 April 1996. Dr. Pikula released plaintiff to return to work pursuant to guidelines established at the rehabilitation program, which were not to lift over twenty pounds and to alternate sitting, standing, and walking. He was also to avoid sustained bending and twisting. Plaintiff made a sixth attempt to return to work on 25 April 1996. The next day plaintiff called his employer and said he would be unable to work due to severe back pain. Knowing the return to work was unsuccessful, defendants nonetheless filed a Form 28T to terminate benefits with the Industrial Commission on 30 April 1996.

Plaintiff made a subsequent seventh attempt to return to work on 2 May 1996 but was unable to continue working on 13 May 1996, again due to severe lower back pain and leg pain. Dr. Pikula informed plaintiff there was nothing more he could do for plaintiff; therefore, plaintiff began to see his family physician, Dr. Christopher Campbell (Dr. Campbell).

Plaintiff attempted an eighth trial return to work on 17 December 1996; however, plaintiff was unable to continue working on 19 December 1996. Defendants submitted a Form 33, dated 11 November 1997, requesting a hearing with the Industrial Commission which sought a determination of plaintiff's disability. Plaintiff filed a Form 33R Response on 7 July 1998 contending plaintiff was entitled to continuing total disability payments. This case was heard before a deputy commissioner on 30 September 1998, and the deputy commissioner entered an opinion and award in plaintiff's favor on 1 March 1999. Defendants appealed to the Full Industrial Commission. In an opinion and award filed 16 August 2000, the Industrial Commission affirmed the deputy commissioner's opinion and award. Defendants appeal to this Court.

I.

[1] Defendants first argue the Industrial Commission erred in awarding temporary total disability benefits to plaintiff after specifically finding that plaintiff had reached maximum medical improvement. However, defendants do not cite any case law or authority which supports this proposition. We rely on our Court's decision in *Russos v. Wheaton Indus.*, 145 N.C. App. 164, 551 S.E.2d 456 (2001), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 135 (2002), which held it is not error as a matter of law to award temporary total disability payments after an employee has reached maximum medical improvement. Once " 'a Form 21 agreement is entered into by the parties and

approved by the Commission, a presumption of disability attaches in favor of the employee.' " *Russos*, 145 N.C. App. at 167, 551 S.E.2d at 458. (quoting *Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997)); *see also Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 562 S.E.2d 434 (2002). A finding of maximum medical improvement is insufficient to overcome this presumption.

> A finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury and does not satisfy the defendant's burden. . . .
>
> After a finding of maximum medical improvement, the burden remains with the employer to produce sufficient evidence to rebut the continuing presumption of disability; the burden does not shift to the employee.

Brown v. S & N Communications, Inc. 124 N.C. App. 320, 330-31, 477 S.E.2d 197, 203 (1996). In the case before us, a Form 21 agreement was approved on 6 April 1995, and plaintiff was awarded total disability benefits under N.C. Gen. Stat. § 97-29. Even though there was a finding of maximum medical improvement, at this point plaintiff is still entitled to a continuing presumption of disability, which defendants have yet to overcome. We overrule this assignment of error.

II.

[2] Defendants next argue the Industrial Commission erred in placing the burden of proof on defendants to show that plaintiff was capable of returning to employment. Defendants contend that they rebutted plaintiff's presumption of continuing disability both by presenting evidence of a finding of maximum medical improvement and also by offering suitable employment to plaintiff. As discussed above, defendants are unable to rebut this presumption of continuing disability with a finding of maximum medical improvement. In order to rebut the ongoing presumption of disability by offering suitable employment, an employer must present evidence that (1) "suitable jobs are available for the employee;" (2) "that the employee is capable of getting said job taking into account the employee's physical . . . limitations;" and (3) "that the job would enable the employee to earn some wages." *Brown*, 124 N.C. App. at 330, 477 S.E.2d at 202-03.

However, the Industrial Commission found the jobs presented to plaintiff were not suitable given plaintiff's restrictions.

47. In the period since 16 May 1994 plaintiff has made at least eight different good faith, trial return to work efforts at very light duty jobs made available to him by defendant-employer. In each instance the job was not suitable to plaintiff's capacities and his effort was unsuccessful due to increased lower back pain and increased right leg pain and weakness from the prolonged sitting or standing required by the job. These light duty jobs were also modified to fit plaintiff's restrictions as to not be available in the competitive job market. Plaintiff is unable to sit, stand or walk for longer than about 3 hours at a time on a sustained work basis of 5 days a week. He requires frequent periods of complete recumbency to help keep his pain level from becoming severe.

48. The various employment opportunities offered to plaintiff by defendant-employer in the period after his 11 May 1994 back injury were not suitable to plaintiff's capacities and plaintiff's refusal to accept or continue performing any of these positions was justified.

Defendants essentially contest these findings of facts by their assignment of error. "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)).

In the case before us, there is competent evidence to support the Industrial Commission's findings of fact. After a careful review of the record, we find there is evidence that plaintiff made at least eight different attempts to return to work. Each time plaintiff was unable to continue to work at the job because of a combination of the requirements of the job and his physical limitations of no heavy lifting and an inability to sit or stand for long periods of time. We overrule this assignment of error.

III.

[3] Defendants next argue the Industrial Commission erred in assessing a ten percent penalty on all compensation that was past due pur-

suant to N.C. Gen. Stat. § 97-18(g). Defendants contend they followed the appropriate rules set out by the Industrial Commission and filed all the required forms.

N.C. Gen. Stat. § 97-18.1 (1999) states

> (a) Payments of compensation pursuant to an award of the Commission shall continue until the terms of the award have been fully satisfied.
>
> (b) An employer may terminate payment of compensation for total disability being paid pursuant to G.S. 97-29 when the employee has returned to work for the same or a different employer, subject to the provisions of G.S. 97-32.1[.] . . . The employer shall promptly notify the Commission and the employee, on a form prescribed by the Commission, of the termination of compensation and the availability of trial return to work and additional compensation due the employee for any partial disability.

In the case before us, defendants filed an appropriate Form 28T in response to plaintiff's returning to work on 26 April 1996. However, defendants were aware this trial return to work was unsuccessful. Furthermore, when plaintiff made a subsequent trial return to work on 2 May 1996, defendants failed to file a subsequent and separate Form 28T in response to this subsequent return to work. Defendants contend the employee's failure to file a Form 28U following the defendants' filing of a Form 28T relieves the employer of any responsibility to resume payment of disability compensation. We disagree, as defendants' argument fails both based on the face of the General Statutes and the Workers' Compensation Rules of the North Carolina Industrial Commission (IC Rules).

N.C.G.S. § 97-18.1(b) creates an exception to the general rule found in N.C.G.S. § 97-18.1(c) requiring a hearing by the Industrial Commission in order to terminate benefits. N.C.G.S. § 97-18.1(b), in conjunction with N.C.G.S. § 97-32.1, encourages an employee to return to work by allowing the employee to attempt a trial return to work. Under N.C.G.S. § 97-18.1(b), an employer may terminate benefits when the employee has returned to work, if the employer immediately provides notice to the employee and the Industrial Commission of the termination of compensation and the availability of a trial return to work. The employer provides this notice by filing a Form 28T. *See* IC Rule 404A(1) (2000). However, if the trial return to

work is unsuccessful, "the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article." N.C. Gen. Stat. § 97-32.1 (1999).

There is no language in the General Statutes or in the IC Rules which mandates that the employee file a form with the Industrial Commission, Form 28U or otherwise, in order to have the employee's benefits reinstated. IC Rule 404A(2) previously stated the employee "shall" file a Form 28U. However, Rule 404A(2) was amended in 2000 to state that if "during the trial return to work period, the employee must stop working due to the injury for which compensation had been paid, the employee should complete and file with the Industrial Commission, a Form 28U." IC Rule 404A(2) (2000). This amendment was retroactive to 1995. *See* IC Rule 404A(8) (2000). The revised IC Rule 404A(2) is now not in conflict with N.C.G.S. § 97-32.1, which has always maintained that an employee's benefits, following an unsuccessful trial return to work, cannot be "unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article." Instead, after a failed trial return to work, N.C.G.S. § 97-32.1 directs the employer that the compensation shall not be terminated without following the provisions of the General Statutes. This language directs the employer back to N.C.G.S. § 97-18.1(c), which sets forth the procedures for all termination requests other than the exceptions listed in N.C.G.S. § 97-18(b).

Therefore, in the case before us, once defendants had knowledge that plaintiff's trial return to work was unsuccessful, they were required to reinstate compensation pursuant to the Form 21 approved 6 April 1995. At the time the trial return to work was unsuccessful, the defendants did not qualify for the exception listed in N.C.G.S. § 97-18.1(b). Defendants' remedy at that point, if they felt plaintiff's refusal to work was unjustified, was to file a Form 24 pursuant to N.C.G.S. § 97-18.1(c). As a result of defendants' failure to follow these procedures, defendants are subject to the ten percent penalty pursuant to N.C.G.S. § 97-18(g).

Furthermore, when plaintiff returned to work on 2 May 1996, defendants were again required by IC Rule 404A(1), in compliance with N.C.G.S. § 97-18.1(b), to file a subsequent Form 28T following plaintiff's subsequent return to work. A primary purpose of a Form 28T, "Notice of Termination of Compensation," is to give notice to the Industrial Commission of the termination; but more importantly, it is

a notice to the employee of that employee's current status and rights available to that employee. In the case before us, following the 2 May 1996 trial return to work, defendants never filed a Form 28T; therefore, plaintiff did not receive the employer's notice of plaintiff's benefits status or any direction as to what plaintiff should do if the trial return to work proved unsuccessful. As a result of defendants' failure to follow both the General Statutes and the IC Rules, we hold defendants are subject to the ten percent penalty imposed by the Industrial Commission. We overrule this assignment of error.

IV.

[4] Defendants next argue the Industrial Commission erred in striking the testimony of Dr. Pikula and in designating Dr. Campbell as plaintiff's treating physician. Defendants contend there is no competent evidence to support the Industrial Commission's findings of fact relating to these issues.

The Industrial Commission found that Dr. Pikula and Nurse Wyatt, plaintiff's rehabilitation specialist who was hired by defendants, had *ex parte* communications concerning plaintiff's case. There is competent evidence in the record to support this finding of fact. Correspondence between Dr. Pikula and Nurse Wyatt summarizing plaintiff's visits with Dr. Pikula indicated there were telephone conversations between Dr. Pikula and Nurse Wyatt in which the two "discussed the case." Furthermore, Dr. Pikula received a note which contradicted what plaintiff had told him about the amount of time plaintiff took for a break. While a conversation outside the plaintiff's presence, standing alone, does not require disregarding that physician's opinion, the weight given to his testimony is for the Industrial Commission to decide. "As long as there [is] any competent evidence to support the possibility of undue influence upon [the treating physician], the Commission's findings on this basis are conclusive on appeal." *Jenkins v. Public Service Co. of N.C.*, 134 N.C. App. 405, 417, 518 S.E.2d 6, 13 (1999) (Wynn, J. dissenting). Upon review, our Supreme Court adopted Judge Wynn's dissent. *Jenkins v. Public Service Co. of N.C.*, 351 N.C. 341, 524 S.E.2d 805 (2000).

The approval or disapproval of a treating physician is "within the discretion of the [Industrial] Commission and the [Industrial] Commission's determination may only be reversed upon a finding of 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) (citation omitted). The evidence in

the record supports the Industrial Commission's decision, and defendants have presented no argument amounting to abuse of discretion. We overrule this assignment of error.

V.

[5] Defendants next argue the Industrial Commission erred in not rendering an opinion within 180 days after the close of the record, pursuant to N.C. Gen. Stat. § 97-84 (1999). However, defendants have failed to show how this delay prejudiced them in any manner. We dismiss this assignment of error.

We affirm the opinion and award of the Industrial Commission.

Affirmed.

Judges HUNTER and BRYANT concur.

ROBERTO CASTILLO TRUJILLO AND WILLIAM LEWIS KING, ADMINISTRATOR OF THE ESTATE OF PEDRO BELTRAN BORBONIO, PLAINTIFFS V. NORTH CAROLINA GRANGE MUTUAL INSURANCE CO. AND HALIFAX MUTUAL INSURANCE CO., DEFENDANTS

No. COA00-1204

(Filed 16 April 2002)

Insurance— farm machine—not covered

The trial court erred by granting summary judgment for plaintiffs in a declaratory judgment action to determine whether defendant insurance companies provide coverage for a farmworker injured by a cotton picker where three brothers shared the operation of their farms and there were factual issues as to whether the brothers were partners and as to who employed the person operating the machine, but there was no genuine issue of material fact that the machine was not a vehicle to which the policy applied.

Appeal by defendant North Carolina Grange Mutual Insurance Company from order entered 9 June 2000 by Judge Frank R. Brown in Wilson County Superior Court. Heard in the Court of Appeals 23 August 2001.

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by W. Earl Taylor, Jr., and Andrew J. Whitley, for plaintiff-appellees.

Gabriel Berry & Weston, L.L.P., by Robert A. Wells; and Richmond G. Bernhardt, Jr., for defendant-appellant North Carolina Grange Mutual Insurance Company.

MARTIN, Judge.

Plaintiffs brought this action seeking a declaratory judgment to determine whether defendant insurance companies provide coverage for personal injuries sustained by Roberto Castillo Trujillo and the death of Pedro Beltran Borbonio. In a separate action, a jury found that Trujillo was injured, and Borbonio was killed, on 13 October 1996 as a result of the negligent operation of a cotton picker machine by Donald Ray Vick. The same jury also determined that Robert Harrell, Russell Harrell, and Melvin Harrell, d/b/a Harrell Farms were not negligent. Plaintiffs were awarded judgment against Vick for damages for Trujillo's injuries and Borbonio's death.

In their complaint for declaratory judgment, plaintiffs alleged that at the time of the accident, Vick "was an employee of Melvin O. Harrell and Russell Harrell, and Robert Harrell d/b/a Harrell Farms," and that Vick was acting "in the course and scope of his employment with Melvin O. Harrell, Russell Harrell, and Robert Harrell d/b/a/ Harrell Farms." Plaintiffs alleged that Melvin O. Harrell was insured under a policy issued by Halifax Mutual Insurance Company (Halifax), and that Russell Harrell was insured under a policy issued by defendant North Carolina Grange Mutual Insurance Company (defendant NCGMIC). Plaintiffs alleged that Vick was an insured under both of the policies.

Plaintiffs submitted to a voluntary dismissal with prejudice as to Halifax. Defendant NCGMIC filed an answer admitting that it insured Russell Harrell under a policy of insurance which was in effect on the date of the accident, but denying that Donald Ray Vick was insured by the policy or that the policy provided any coverage for his negligent acts or omissions. After the completion of discovery, the trial court granted plaintiffs' motion for summary judgment. Defendant NCGMIC appeals.

Defendant NCGMIC assigns error to the trial court's grant of summary judgment for plaintiffs, arguing that Donald Ray Vick is not an insured under the insurance policy issued by defendant to Russell

Harrell and Sheila Harrell. For the reasons which follow, we agree with defendant; therefore, we reverse the order granting summary judgment in favor of plaintiffs and remand this case to the trial court for entry of summary judgment in favor of defendant NCGMIC.

Summary judgment is appropriate when the materials before the court reveal there is no genuine controversy concerning any factual issue which is material to the outcome of the action so that resolution of the action involves only questions of law. *First Federal Savings & Loan Ass'n. v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972). The burden is on the party moving for summary judgment to show the absence of any genuine issue of fact and his entitlement to judgment as a matter of law. *Id.* In ruling on the motion, the court is not authorized to resolve any issue of fact, only to determine whether there exist any genuine issues of fact material to the outcome of the case. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). When appropriate, summary judgment may be rendered against the moving party. N.C. Gen. Stat. § 1A-1, Rule 56(c).

It is well settled that "an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986) (citations omitted). In those circumstances where "the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law for the court." *W.S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 421-22, 360 S.E.2d 814, 816 (1987) (citation omitted). If an insurance policy is not ambiguous, "then the court must enforce the policy as written and may not remake the policy under the guise of interpreting an ambiguous provision." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 492, 467 S.E.2d 34, 40 (1996) (citing *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)). Further,

> a contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language.

Grant v. Emmco Ins. Co., 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978) (citations omitted).

In this case, it is undisputed that defendant NCGMIC issued its policy of insurance to its named insureds, Russell Harrell and Sheila Harrell, and that the policy was in effect on the date of the accident in which Pedro Borbonio was killed and Roberto Trujillo was injured. The policy, a "Farmowners Policy—Broad Form" provided, in "Section II—Liability Coverage," coverage to an "insured" for liability for damages because of bodily injury or death "to which this coverage applies." The policy defined "insured" as the named insureds, Russell Harrell and Sheila Harrell and, as relevant to this case, an "insured" under the policy was also defined "with respect to any vehicle to which this policy applies, any person while engaged in your employment . . . ." The two issues, then, upon which this case turns are (1) whether Donald Ray Vick was, in the operation of the cotton picker, engaged in the employment of Russell Harrell so as to be an "insured" within the coverage of the NCGMIC policy, and (2) whether the cotton picker which he was operating at the time of the accident was a vehicle "to which [the NCGMIC] policy applies." We hold that a genuine issue of fact exists as to the first issue, precluding summary judgment in favor of plaintiffs, but that there is no issue of fact that the cotton picker operated by Vick was not a vehicle to which the NCGMIC policy applied. Thus, Vick cannot be an "insured" under the NCGMIC policy issued to Russell Harrell and NCGMIC is entitled to judgment as a matter of law.

The materials before the trial court for its consideration in ruling on the motion for summary judgment consisted of the pleadings, depositions, and trial transcript in the underlying tort action, as well as the pleadings and discovery in the present action. In the underlying action, plaintiffs alleged that Donald Ray Vick was an employee of "Russell H. Harrell, Robert T. Harrell and Melvin O. Harrell, d/b/a Harrell Farms, a partnership . . . ," that the cotton picker machine was owned by either Robert Harrell or Russell Harrell, and that the accident occurred while Borbonio, Trujillo and Vick were working on a farm owned by Melvin Harrell. In his answer, Vick admitted that he "was employed and paid by Harrell Farms with a check drawn on the Harrell Farms payroll account . . . ." He admitted upon information and belief that the cotton picker was owned by Robert Harrell and that the farm where the accident occurred was owned by Melvin Harrell. Russell Harrell similarly admitted that Vick was employed by Russell Harrell and Robert Harrell, d/b/a Harrell Farms, a partnership, and that the cotton picker was "owned by either Russell H. Harrell or Robert T. Harrell."

In his deposition taken in the underlying action, Vick testified that his employer and supervisor was Russell Harrell. At the trial of the underlying action, however, Vick testified that he was employed by Harrell Farms and that he was paid by Harrell Farms checks. Robert Harrell testified in the underlying action that Harrell Farms consisted of himself; his brother, Russell Harrell; and their father, Melvin Harrell. All three owned their own farms and equipment and set up a common account to share the labor pool. Russell Harrell testified that Vick was employed by Harrell Farms.

There is evidence from which a jury could, but would not be compelled to, find that Russell Harrell, Robert Harrell, and Melvin Harrell were in fact engaged in business as partners. "A partnership is a combination of two or more persons, their property, labor, or skill in a common business or venture under an agreement to share profits or losses and where each party to the agreement stands as an agent to the other and the business." *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 110, 362 S.E.2d 807, 810 (1987) (citations omitted). The existence of a partnership does not require an express written or oral agreement; its existence may be inferred by the conduct of the parties and requires examination of the circumstances. *Wilder v. Hobson*, 101 N.C. App. 199, 398 S.E.2d 625 (1990); *see* N.C. Gen. Stat. § 59-37.

Not only is the existence of the partnership an issue material to the resolution of this action, the allegations, admissions, and testimony also disclose a factual dispute as to Donald Ray Vick's employer. There is considerable evidence that Vick was employed by the partnership, if such a partnership is found to have existed at the time of the accident; there is also evidence that Vick was an employee of Russell Harrell.

Plaintiffs argue that the issue of who employed Vick is not material because all partners are jointly and severally liable for the acts and obligations of the partnership. However, there is no partnership obligation at issue here; the jury in the underlying action found no liability on the part of the individual Harrells or Harrell Farms. The only issue is whether NCGMIC provides coverage for Vick as an "insured" under Russell Harrell's policy. Vick can only be an "insured" under the policy if he is employed by Russell Harrell. " 'A partnership as employer constitutes an entirely different employer than would exist if one of the partners is the individual employer. . . . A partnership is a distinct entity from the individual members constituting it.' " *Oklahoma Farm Bureau Mut. Ins. Co. v. Mouse*, 268 P.2d 886, 889 (1953) (quoting *Anderson v. Dukes*, 143 P.2d 800, 801 (1943)). Thus,

there is a genuine issue of fact as to whether Vick was engaged as an employee of NCGMIC's named insured, Russell Harrell, at the time of the accident giving rise to this action.

As noted above, even if Vick had been an employee of Russell Harrell, in order to come within the coverage of the policy as an "insured" he would have to have been operating a vehicle to which the policy applied. Under the language of the policy, " 'insured' also means: . . . b. with respect to any vehicle to which this policy applies, any person while engaged in your employment. . . ."

The policy declarations listed the mobile agricultural equipment to which the coverage applied, including a 1996 John Deere model 9965 cotton picker. NCGMIC argues, however, that the evidence is uncontroverted that at the time of the accident, Vick was not operating the cotton picker owned by Russell Harrell and listed in the policy. Instead, the evidence shows Vick was operating a model 9960 cotton picker owned by Robert Harrell. Therefore, defendant NCGMIC argues, regardless of by whom Vick was employed, there can be no coverage for Vick's operation of a vehicle to which the NCGMIC policy does not apply and defendant is entitled to summary judgment in its favor as a matter of law.

Plaintiffs counter that the policy issued by NCGMIC to Russell Harrell contained a Custom Farming endorsement, by which the liability coverage was extended "to include farm tractors, trailers, implements, . . ., or vehicles used while under contract to others for a charge in connection with any farming operation." They argue the endorsement extends coverage to Vick, as an employee of Russell Harrell, under the policy. We disagree.

The plain language of the Custom Farming endorsement requires that equipment be used "under contract to others for a charge" in order for coverage to be extended under the endorsement. There is no evidence from which a jury could find that, on the date of the accident, Russell Harrell was using Robert Harrell's cotton picker under contract with Melvin Harrell for a charge. Though the cotton picker was operating in a field owned by Melvin Harrell on the date of the accident, there was no evidence of any arrangement between Melvin Harrell and Russell Harrell whereby Russell Harrell was charging a fee for harvesting the cotton. Russell Harrell testified that each of the men had their own farms, "but we work together on harvesting all our farms." The labor cost for harvesting the field was paid through the Harrell Farms account. Melvin Harrell was to receive the profits

realized from the field after payment of the expenses. Thus, there is no evidence from which a jury could find the Custom Farming endorsement extends the coverage of NCGMIC's policy to Donald Ray Vick in this case.

There is no genuine issue of material fact that the cotton picker operated by Vick was not a vehicle to which the NCGMIC policy applied. Therefore, Vick cannot be an "insured" under the NCGMIC policy issued to Russell Harrell, regardless of whether he was Russell Harrell's employee, and NCGMIC is entitled to judgment as a matter of law. Summary judgment in favor of plaintiffs is reversed and this case is remanded to the trial court for entry of summary judgment in favor of defendant NCGMIC.

Reversed and remanded.

Judges McCULLOUGH and BIGGS concur.

CAP CARE GROUP, INC. AND PWPP PARTNERS v. C. WAYNE McDONALD, INDIVIDUALLY, AND C&M INVESTMENTS OF HIGH POINT, INC.

No. COA01-170

(Filed 16 April 2002)

1. Partnerships; Contracts— breach of oral agreement to enter into partnership—directed verdict—judgment notwithstanding the verdict

The trial court did not err by denying defendants' motions for directed verdict and judgment notwithstanding the verdict on the issue of breach of an oral agreement to enter into a partnership to purchase property because there is substantial evidence that plaintiffs and defendants entered into an agreement to form a partnership, including that: (1) an officer of defendant corporation testified she knew defendants had a deal with plaintiffs and that plaintiff corporations' president had agreed to fund half of the earnest money to get the property; (2) the individual defendant testified that his account would have been overdrawn had he not deposited plaintiffs' checks and that the $20,000 earnest

money was part of the purchase price of the property; (3) there was substantial evidence that the parties had reached an agreement to jointly purchase and develop the property; (4) defendants never informed plaintiffs that they were not acting as partners until after the purchase of the property; (5) the offer to form a partnership is not contested since defendants accepted the consideration of $10,000 from plaintiffs for the property and defendants precisely carried out the joint plan of the parties until after the purchase of the property; and (6) there was a meeting of the minds even though how the property would be managed was not clear since a failure to agree on some of the issues does not invalidate the underlying agreement.

2. Partnerships— jury instructions—time limits—validity of agreement to agree—evidence of partnership

The trial court did not err in an action for breach of an oral agreement to enter into a partnership to purchase property by failing to instruct the jury on time limits regarding acceptance, the validity of an agreement to agree, and what may be considered evidence of a partnership, because the substance of defendants' requested instructions was embodied in the instructions given.

3. Evidence— expert testimony—damages

The trial court did not abuse its discretion in an action for breach of an oral agreement to enter into a partnership to purchase property by admitting the testimony of plaintiffs' expert regarding plaintiffs' damages, because: (1) there is evidence that defendants knew of the expert's identity for over a month before trial and that defendants did not depose him; and (2) the individual defendant himself provided the basis of the expert's calculations.

4. Real Property— lis pendens—constructive trust

The trial court did not err in an action for breach of an oral agreement to enter into a partnership to purchase property by failing to cancel plaintiffs' lis pendens imposing a constructive trust on the pertinent property and failing to disburse to defendant corporation the bond plaintiffs posted, because: (1) plaintiffs showed that their money was used as part of the payment to purchase the property; and (2) plaintiffs' allegations for a trust were adequate.

5. Judgments— date interest accrues—breach of contract

The trial court did not err in an action for breach of an oral agreement to enter into a partnership to purchase property by failing to amend the judgment to reflect interest beginning on the judgment date, because: (1) N.C.G.S. § 24-5(a) provides that in an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach; and (2) the individual defendant informed plaintiffs that he did not intend to act as a partner on 30 April 1997, which is the date the trial court properly relied on to establish the initial date on which interest began to accrue.

Appeal by defendants from judgments entered 6 May 1998, 31 December 1998, and 5 April 2000 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 19 February 2002.

Hendrick Law Firm by T. Paul Hendrick & Matthew H. Bryant for plaintiffs-appellees.

Law Offices of J. Calvin Cunningham by R. Flint Crump & J. Calvin Cunningham for defendants-appellants.

THOMAS, Judge.

Defendants, C. Wayne McDonald and C&M Investments of High Point, Inc., appeal from a judgment finding them in breach of an oral partnership contract to purchase real estate.

Ordered to pay plaintiffs, Cap Care Group, Inc. and PWPP Partners, $477,511.00 as a result of the breach, defendants argue five assignments of error. Among their contentions is that the parties had merely entered into an unenforceable agreement to form a partnership. For the reasons discussed herein, we find no error.

Cap Care and PWPP are engaged in the business of buying and developing commercial real estate and then either leasing or selling it. Ronnel S. Parker, Sr., is president of both entities. C&M is engaged in the same type of business as plaintiffs. McDonald owns and controls C&M.

Plaintiffs' factual allegations include the following: Cap Care made several attempts to buy a 27.6 acre commercial site in High Point, North Carolina, which also contained a large building. The

owner of the property had defaulted on a loan, so the holder of the deed of trust, NationsBank, was in charge of the sale. Plaintiffs' first two offers to purchase the property were rejected. The third, for $1,300,000, was accepted by NationsBank. Due to the results of an environmental study, however, plaintiffs cancelled the contract despite being still interested in eventually purchasing the property.

Dwain Skeen, a real estate agent who had earlier advised plaintiffs regarding the property, suggested that a joint venture with McDonald might be beneficial. Plaintiffs had become concerned NationsBank would view any more of their offers with skepticism.

Skeen, McDonald, Parker, and another officer of Cap Care, Daniel Greene, met at Cap Care's offices in November 1996. During that meeting, McDonald was informed of the history of plaintiffs' offers. He was also given copies of environmental and title reports and a re-roofing estimate. The parties discussed entering into a partnership to jointly purchase, renovate, and manage the property with McDonald agreeing it was a viable investment. In fact, McDonald noted that he could perform the renovation at a lower cost than Cap Care had initially estimated.

Cap Care and McDonald then allegedly agreed: (1) to be equal partners in the purchase and development of the property; (2) to be equally responsible for costs; and (3) that McDonald would offer $700,000 to the seller on behalf of the partnership. Prior to that time, McDonald had never made an offer on the property.

Following the meeting, McDonald made an initial offer of $700,000. It was rejected. NationsBank's broker contacted Skeen in January 1997 and offered to sell the property for $1,000,000. While the proposal was being considered, PWPP wrote two checks totaling $10,000 to McDonald as an earnest money deposit on the property. This was one-half of the required $20,000 earnest money deposit.

On or about 12 February 1997, McDonald signed the sales contract, which was executed on 14 February 1997. He deposited PWPP's checks in his account and applied them to the $20,000 earnest money.

McDonald, Greene and Skeen met later in February to discuss the details of the purchase and development of the property. Greene reduced the discussions to a letter, which included that McDonald and Cap Care would jointly own the property as partners, Cap Care

would work with Skeen to procure tenants, McDonald would be the general contractor for any environmental remediation, and Cap Care and McDonald would each finance 50% of the costs. McDonald never signed the letter.

Defendants closed on the property on 10 March 1997. McDonald borrowed $1,000,000 from Branch Banking and Trust Company to finance the sale. He did not inform Cap Care of the closing date, or that the deed was only in the name of C&M, McDonald's company.

Plaintiffs subsequently demanded that defendants contribute the property to the partnership. Defendants refused and sent a letter to plaintiffs' attorney stating that they did not wish to continue to work with plaintiffs.

A complaint was filed by plaintiffs on 9 December 1997, alleging that defendants: (1) formed a partnership to purchase property located in Guilford County; (2) misappropriated partnership assets; (3) breached an express partnership contract; (4) breached an implied partnership contract; (5) participated in unfair and deceptive trade practices; and (6) wrongfully converted the partnership's contract rights to purchase the property to their own uses and control. Plaintiffs requested a judicial dissolution, for the property to be held in a constructive trust, and damages.

At trial, defendants moved for a directed verdict at the close of plaintiffs' evidence and at the close of all the evidence. The motions were denied. The jury found that: (1) plaintiffs had sustained damages in the amount of $477,511 for breach of contract; (2) defendants owed plaintiffs $10,336 for the acquisition and use of plaintiffs' $10,000 to fund the purchase of the property; and (3) defendants were not liable to plaintiffs for punitive damages. The trial court ordered plaintiffs to recover from defendants $477,511 plus 8% interest, filing fees, service fees, plaintiffs' deposition expenses and plaintiffs' expert witness fees. Defendants appeal.

[1] By their first assignment of error, defendants argue the trial court should have granted their motions for directed verdict and judgment notwithstanding the verdict on the issue of breach of an agreement to enter into a partnership. We disagree.

A directed verdict is proper when there is no evidence of an essential element of plaintiff's claim. *McMurray v. Surety Federal Savings & Loan Assoc.*, 82 N.C. App. 729, 348 S.E.2d 162 (1986), *cert. denied*, 318 N.C. 695, 351 S.E.2d 748 (1987). Judgment

notwithstanding the verdict is properly granted if all the evidence supporting plaintiffs' claim, taken as true and considered in the light most favorable to plaintiffs, was not sufficient as a matter of law to support a verdict for the plaintiffs. *Hargett v. Gastonia Air Service*, 23 N.C. App. 636, 638, 209 S.E.2d 518, 519 (1974), cert. denied 286 N.C. 414, 211 S.E.2d 217 (1975). In the instant case, there is substantial evidence that plaintiffs and defendants entered into an agreement to form a partnership.

A partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. § 59-36 (1999). A partnership can be formed orally or implied by the parties' conduct. *Peed v. Peed*, 72 N.C. App. 549, 325 S.E.2d 275, *rev. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985).

McDonald's wife, Wendy McDonald, who is also an officer of C&M, testified that she knew McDonald had a deal with plaintiffs and that Parker had agreed to fund half of the earnest money to get the property. McDonald himself testified that his account would have been overdrawn had he not deposited Parker's checks and that the $20,000 earnest money was part of the purchase price of the property. There was substantial evidence that the parties had reached an agreement to jointly purchase and develop the property. Further, defendants never informed plaintiffs that they were not acting as partners until after the purchase of the property.

An enforceable agreement requires an offer, acceptance and consideration. *Copy Products, Inc. v. Randolph*, 62 N.C. App. 553, 555, 303 S.E.2d 87, 88 (1983).

Here, the offer to form a partnership is not contested. Defendants argue they never accepted the offer. However, defendants did accept the consideration of $10,000 from plaintiffs to pay for the property. They also precisely carried out the joint plan of the parties until *after* the purchase of the property. There was never any indication during that process that the parties were not operating in unison, as partners. The general law of partnership applies to a partnership formed for the purpose of dealing in land. *Leftwich v. Franks*, 198 N.C. 289, 151 S.E. 637 (1930). An acceptance by conduct is a valid acceptance. *Durant v. Powell*, 215 N.C. 628, 2 S.E.2d 884 (1939).

Defendants contend there was no meeting of the minds because how the property would be managed was not clear. However, it is well-established in North Carolina that a failure to agree on some

issues does not invalidate the underlying agreement. *See Pee Dee Oil Co. v. Quality Oil Co., Inc.*, 80 N.C. App. 219, 341 S.E.2d 113, *disc. rev. denied*, 317 N.C. 706, 347 S.E.2d 438 (1986); *Satterfield v. Pappas*, 67 N.C. App. 28, 312 S.E.2d 511, *disc. rev. denied*, 311 N.C. 403, 319 S.E.2d 274 (1984).

We therefore hold that there was a valid agreement among the parties to form a partnership to purchase the property and that defendants breached that agreement. The trial court did not err in refusing to grant defendants' motions for directed verdict and judgment notwithstanding the verdict.

[2] By their second assignment of error, defendants argue the trial court should have instructed the jury on: (a) time limits regarding acceptance; (b) the validity of an agreement to agree; and (c) what may be considered evidence of a partnership. We disagree.

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). In the instant case, the trial court instructed the jury on (1) mutual assent; (2) sufficiency of consideration; (3) offer and acceptance; (4) manner of acceptance; (5) contract between parties; and (6) the standard of reasonableness in determining the meaning of writings, words, and conduct of the parties. These instructions were correct and there was ample specific evidence to show mutual assent through conduct, an offer and acceptance, and consideration. The substance of defendants' requested instructions, in fact, was embodied in those given. The trial court did not err.

[3] By their third assignment of error, defendants argue the trial court should not have admitted the testimony of plaintiffs' expert witness, Dwain Bryant, regarding plaintiffs' damages. We disagree.

The trial court has unbridled discretion in allowing expert testimony and will only be overturned for an abuse of discretion. *State v. Parks*, 96 N.C. App. 589, 386 S.E.2d 748 (1989). The test for abuse of discretion is whether a decision is manifestly unsupported by reason, or is so arbitrary that it could not have been the result of a reasoned decision. *Harrison v. Tobacco Transport, Inc.*, 139 N.C. App. 561, 533 S.E.2d 871, *rev. denied*, 353 N.C. 263, 546 S.E.2d 96 (2000).

In the instant case, there is evidence that defendants knew of Bryant's identity for over a month before trial and that defendants did

not depose him. Further, McDonald himself provided the basis of Bryant's calculations. Defendants failed to carry their burden to show an abuse of discretion. We reject this argument.

[4] By their fourth assignment of error, defendants argue the trial court should have cancelled plaintiffs' *lis pendens* against the property at issue and disbursed to C&M the bond plaintiffs posted. We disagree.

Lis pendens binds a purchaser or encumbrancer of property to the results of a lawsuit that may affect the title to the property. *Black's Law Dictionary* 932 (6th ed. 1990). The *lis pendens* notifies prospective purchasers and encumbrancers that any interest acquired by them is subject to a pending lawsuit. *Id. See also* N.C. Gen. Stat. § 1-116(a)(1) (1999).

In the instant case, plaintiffs filed *lis pendens* to impose a constructive trust on the property. *See Cutter v. Cutter Realty Co.*, 265 N.C. 664, 144 S.E.2d 882 (1965). This Court has held that *lis pendens* is appropriate where a plaintiff: (1) can trace his funds into the property; and (2) alleges either an express or implied trust. *Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 166 S.E.2d 849 (1969). Here, plaintiffs showed that their money was used as part of the payment to purchase the property and their allegations for a trust were adequate. The trial court, therefore, did not err in maintaining notice of *lis pendens* on the property in question.

[5] By their final assignment of error, defendants argue the trial court should have amended the judgment to reflect interest beginning on the judgment date. We disagree.

Pre-judgment interest is awarded under N.C. Gen. Stat. § 24-5, which provides, in pertinent part, that "[i]n an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach." N.C. Gen. Stat. § 24-5(a) (2001). Once breach is established, plaintiffs are entitled to interest from the date of the breach as a matter of law. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 431, 349 S.E.2d 552, 558 (1986).

In the instant case, McDonald informed plaintiffs that he did not intend to act as a partner on 30 April 1997. The trial court properly relied on this evidence for establishing the initial date on which interest began accruing. Again, the trial court did not err.

NO ERROR.

Judges GREENE and McGEE concur.

BOSTIC PACKAGING, INC. AND SHELBY INSURANCE CO., PLAINTIFFS v. CITY OF MONROE (A MUNICIPAL CORPORATION), DEFENDANT

No. COA01-39

(Filed 16 April 2002)

1. Immunity— city sewer system—proprietary function

Defendant-city was not immune from tort liability in the operation and maintenance of its sewer system where plaintiffs alleged specifically that defendant set rates and charged fees for the maintenance of sewer lines and the reasoning of *Pulliam v. City of Greensboro*, 103 N.C. App. 748, was applicable.

2. Cities and Towns— negligence—operation of sewer system—issues of fact

The trial court erred by granting summary judgment for defendant-city in an action resulting from a sewage backup and overflow in plaintiff's business where there were genuine issues as to the cause of the sewage backup, as to whether defendant was negligent in its operation of its sewage system, and as to whether plaintiff was contributorily negligent in not installing a backwater valve pursuant to the building ordinances.

Appeal by plaintiffs from order entered 30 October 2000 by Judge Mark E. Klass in Union County Superior Court. Heard in the Court of Appeals 7 November 2001.

Crews & Klein, P.C., by Paul I. Klein and Katherine Freeman, for plaintiff appellants.

Cranfill, Sumner & Hartzog, L.L.P., by Anthony T. Lathrop and Jaye E. Bingham, for defendant appellee.

TIMMONS-GOODSON, Judge.

Plaintiffs appeal from the order of the trial court granting summary judgment in favor of defendant. For the reasons stated herein, we reverse the order of the trial court.

On 10 May 1999, Bostic Packaging, Inc. ("Bostic") filed a complaint against the City of Monroe ("defendant") in Union County Superior Court. The complaint alleged that Bostic operated a packaging material manufacturing facility located on Stitt Street in the City of Monroe, and that defendant operated and maintained the sewer lines that serviced Bostic's facility. According to the complaint, on or around 30 July 1997, defendant "negligently and carelessly failed to properly maintain and repair the sewer lines," causing sewage to back up and overflow into Bostic's facility. Shelby Insurance Company was later added as a necessary party to the lawsuit and joined Bostic as a party plaintiff (collectively, "plaintiffs"). In support of their complaint, plaintiffs presented the affidavit of engineer Carlton Burton, who indicated that defendant was negligent in the plan, design, and construction of the culverts, storm drains, and sewer lines serving Bostic's facility on Stitt Street.

Defendant filed an answer asserting, *inter alia*, the defense of governmental immunity. Alternatively, defendant asserted that plaintiffs were contributorily negligent in that they "[f]ailed to have backwater drains installed as required under the North Carolina State Plumbing Code." On 15 September 2000, defendant filed a motion for summary judgment, which the trial court granted. Plaintiffs appeal.

Plaintiffs assign error to the trial court's order granting summary judgment in favor of defendant. Plaintiffs contend that the trial court erred when it concluded that the doctrine of governmental immunity applied to defendant's operation and maintenance of its sewer system. Plaintiffs further argue that they presented adequate evidence of defendant's negligence to withstand the motion for summary judgment, and that the trial court erred in concluding that plaintiffs were contributorily negligent as a matter of law. For the reasons stated herein, we reverse the order of the trial court.

I. Governmental Immunity

[1] As a general rule, the doctrine of governmental immunity shields a municipality from liability for torts committed by its agencies and organizations. *See Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461, *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). Application of the doctrine depends upon whether the activity out of which the tort arises is properly characterized as "governmental" or "proprietary" in

nature. *Schmidt v. Breeden*, 134 N.C. App. 248, 252, 517 S.E.2d 171, 174 (1999). Specifically, "[t]he doctrine applies when the entity is being sued for the performance of a governmental function . . . . [b]ut it does not apply when the entity is performing a ministerial or proprietary function." *Herring*, 137 N.C. App. at 683, 529 S.E.2d at 461 (citation omitted). Application of the governmental versus proprietary distinction to given factual situations has resulted in "splits of authority and confusion as to what functions are governmental and what functions are proprietary." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 528, 186 S.E.2d 897, 907 (1972).

Our Supreme Court has articulated the following test for determining whether an activity falls within the governmental or proprietary function of a municipality:

> When a municipality is acting "in behalf of the State" in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers. In either event it must be for a public purpose or public use.
>
> So then, generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and "private" when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security or general welfare of the residents of the municipality.

Britt v. Wilmington, 236 N.C. 446, 450-51, 73 S.E.2d 289, 293 (1952). When applying the foregoing test, our courts have focused upon the "commercial aspect of the definition." *Hickman v. Fuqua*, 108 N.C. App. 80, 83, 422 S.E.2d 449, 451 (1992), *disc. review denied*, 333 N.C. 462, 427 S.E.2d 621 (1993). Although a "profit motive" is not dispositive in determining whether an activity is governmental or proprietary in nature, *see Schmidt*, 134 N.C. App. at 253, 517 S.E.2d at 175, "[c]harging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary." *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

Plaintiffs maintain that defendant does not enjoy governmental immunity because the operation and maintenance of a sewer system is a proprietary function. Prior holdings of this Court reveal an apparent conflict in determining whether the operation and maintenance of a sewer system is a governmental or proprietary function.

In *Roach v. City of Lenoir*, 44 N.C. App. 608, 261 S.E.2d 299 (1980), residents of Lenoir brought suit against the city seeking to recover for property damage allegedly caused by the city's negligence in the maintenance and operation of its sewer system. The trial court granted summary judgment in favor of the defendant. On appeal, this Court held that the defendant was entitled to governmental immunity, but reversed the trial court on the issue of whether the defendant had waived such immunity. The Court stated that the "establishment and construction of a sewer system by a municipality are governmental functions entitling it to immunity from negligence." *Id.* at 610, 261 S.E.2d at 300-01. The *Roach* Court based its reasoning on *Metz v. Asheville*, 150 N.C. 748, 64 S.E. 881 (1909), where our Supreme Court stated that, "[t]he theory upon which municipalities are exempted from liability in cases like this is, that in establishing a free sewerage system for the public benefit it is exercising its police powers for the public good and is discharging a governmental function." *Metz*, 150 N.C. at 750, 64 S.E. at 882. The *Roach* Court therefore concluded that "the City of Lenoir, while performing a governmental function in the maintenance of a sewer system within its municipal jurisdiction, may not be held liable for any damage arising out of the governmental activity unless it expressly waives its immunity." *Roach*, 44 N.C. App. at 610, 261 S.E.2d at 301.

In a more recent decision, however, this Court held that a municipality is "not immune from tort liability in the operation of its sewer system." *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 754, 407 S.E.2d 567, 570, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991). In *Pulliam*, the plaintiffs were homeowners who brought suit against the city of Greensboro for its allegedly negligent maintenance, operation and repair of the sewer lines serving plaintiffs' residence. The sewer lines at issue were "subject to [the] defendant's rates and charges." *Id.* at 749, 407 S.E.2d at 567. The plaintiffs alleged that they suffered considerable damage when raw sewage backed up and overflowed into their residence. The defendant moved for summary judgment on the grounds of governmental immunity and contributory negligence, which motion the trial court granted.

In reversing the trial court, this Court noted that the legislature had "extensively revised and rewr[itten] the statutory law relating to cities and towns in North Carolina[,]" adopting a new article entitled "Public Enterprises." *Id.* at 752, 407 S.E.2d at 569 (quoting N.C. Gen. Stat. § 160A-311 (1987)). The statutory revisions allowed municipalities to fix and enforce rates for sewer systems and authorized the granting of franchises for the operation of public enterprises. The Court recognized that "an interesting pattern of public enterprise activity has emerged[,]" resulting in "an accepted practice in North Carolina for cities and towns to compete with private enterprise by the ownership and operation of these public enterprises recognized by the General Assembly." *Id.* at 753, 407 S.E.2d at 569. Because "our courts have clearly stated that in setting rates for public enterprise services, municipalities act in a proprietary role[,]" the *Pulliam* Court determined that the operation of the defendant's sewer system, for which it charged rates, was a proprietary function. *Id.* at 753, 407 S.E.2d at 569-70. Further noting the "modern tendency to restrict the application of governmental immunity[,]" the Court concluded that the defendant was not protected by governmental immunity and was therefore "answerable to these plaintiffs for any negligent act which may have caused them injury and damage." *Id.* at 754, 407 S.E.2d at 570.

In reviewing *Roach* and *Pulliam*, we are persuaded in the instant case that the reasoning in *Pulliam* is applicable to the present defendant's operation and maintenance of its sewer system. Like the plaintiffs in *Pulliam*, plaintiffs here specifically alleged in their complaint that "Defendant set rates and charge[d] Plaintiff fees for the maintenance of said sewer lines." There is no mention in *Roach* of any payment for the services provided by the defendant in that case. Moreover, in determining that the operation of a sewer system is a governmental function, the *Roach* Court specifically relied upon the *Metz* decision, which only addressed the establishment of "a free sewerage system for the public benefit." *Metz*, 150 N.C. at 750, 64 S.E. at 882. Accordingly, we hold that defendant is not immune from tort liability in the operation and maintenance of its sewer system, and the trial court therefore erred in granting summary judgment to defendant on the basis of governmental immunity.

II. Negligence

[2] In their next two assignments of error, plaintiffs contend that their forecast of evidence presented genuine issues of material fact precluding summary judgment. We agree.

Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999); *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). A summary judgment movant bears the burden of showing either that (1) an essential element of the plaintiff's claim is nonexistent; (2) the plaintiff cannot produce evidence to support an essential element of its claim; or that (3) the plaintiff cannot surmount an affirmative defense raised in bar of its claim. *See Lyles v. City of Charlotte*, 120 N.C. App. 96, 99, 461 S.E.2d 347, 350 (1995), *reversed on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996). In ruling on a motion for summary judgment, the evidence is viewed in the light most favorable to the non-movant.

In a negligence claim, summary judgment is proper where the plaintiff's forecast of evidence is insufficient to support an essential element of negligence. *See Patterson v. Pierce*, 115 N.C. App. 142, 143, 443 S.E.2d 770, 771, *disc. review denied*, 337 N.C. 803, 449 S.E.2d 749 (1994). To make out a *prima facie* case of negligence, a plaintiff must show that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury. *See Estate of Jiggetts v. City of Gastonia*, 128 N.C. App. 410, 412, 497 S.E.2d 287, 289 (1998). Summary judgment is a drastic measure, and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case. *See Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979). "Like negligence, contributory negligence is rarely appropriate for summary judgment." *Ballenger v. Crowell*, 38 N.C. App. 50, 55, 247 S.E.2d 287, 291 (1978).

Viewing the evidence in the light most favorable to the non-movant, the evidence in the instant case highlights a genuine dispute as to the cause of the sewage backup and whether defendant was negligent in the operation and maintenance of the sewer system. Further, although defendant asserts that plaintiffs were contributorily negligent in their failure to install a backwater valve pursuant to North Carolina Building Code ordinances, the applicability of these ordinances does not absolve defendant of liability, but rather raises issues of (1) whether the facility in fact maintained a backwater valve; (2)

whether plaintiffs fall within the purview of the ordinances; and (3) whether the backwater valve would have prevented the damage or injury sustained. *See Pulliam,* 103 N.C. App. at 756, 407 S.E.2d at 571 (holding that the failure of plaintiffs to install a backflow valve "merely highlights [the] issue [of contributory negligence]; it does not settle it beyond question"). As genuine issues of material fact exist concerning defendant's negligence and plaintiffs' contributory negligence, the trial court erred in granting summary judgment to defendants.

For the reasons stated herein, we hold that the trial court erred in granting summary judgment in favor of defendants.

Reversed.

Judges HUDSON and JOHN concur.

THOMAS J. GRAHAM AND WIFE, MARY FRANCES GRAHAM, PLAINTIFFS v. CHARLES MARTIN AND WIFE, EVELYN MARTIN, DEFENDANTS

No. COA01-541

(Filed 16 April 2002)

1. Unjust Enrichment— oral contract to sell land—improvements

There was sufficient evidence for the court to find in a nonjury trial arising from an oral contract to sell land that defendants would be unjustly enriched by plaintiffs' ejection from the land where plaintiffs paid $17,626 toward the land and mobile home, installed a well and septic system, landscaped the property and erected outbuildings, and underpinned and permanently attached the double-wide mobile home to the property.

2. Unjust Enrichment— remedy—constructive trust

The trial court erred by imposing a constructive trust as a remedy for unjust enrichment in an action arising from an oral contract to sell land. While a constructive trust can be the proper remedy to prevent unjust enrichment, absent more it cannot be used to bypass the Statute of Frauds. Here, there was no fraud or improper conduct associated with defendants' acquisition of the property; they merely refused to sell it pursuant to an unenforce-

able contract. Defendants are liable for the reasonable value of the goods and services plaintiffs rendered to them.

3. Trials— consolidation—required for ruling in parallel case

The trial court erred by declaring moot a summary ejection action which was not before it in an action to enforce an oral contract to sell land. If a trial court wishes to rule in a parallel case, it must first consolidate the cases pursuant to Rule 42.

Appeal by defendants from judgment entered 18 December 2000 by Judge Lillian B. Jordan in Moore County District Court. Heard in the Court of Appeals 13 February 2002.

Thigpen & Jenkins, by Arthur A. Donadio, for plaintiff-appellees.

Gill & Tobias, LLP, by Douglas R. Gill, for defendant-appellants.

HUNTER, Judge.

Charles Martin and wife, Evelyn Martin ("defendants") appeal from a judgment imposing a constructive trust and ordering defendants to execute a deed to Thomas J. Graham and wife, Mary Frances Graham ("plaintiffs") for the 10.51 acres of land upon which plaintiffs live and which is currently titled in the names of defendants. This transfer is to take place upon payment by plaintiffs to defendants of the sum of $28,474.00. For the reasons stated herein we reverse the trial court's ruling and remand the case for a retrial on the issue of damages for unjust enrichment.

Defendants entered into an oral agreement to sell a parcel of land to plaintiffs in July, 1993. At defendants' request, plaintiffs had the parcel surveyed where it was determined to consist of 10.51 acres. While the parties agree that the price was to be $500.00 per acre, there is disagreement over the interest rate that was to be charged and there was no discussion of the length of time over which the payments were to be made. In addition, defendants purchased a mobile home for $34,550.00 and had the title placed in the names of plaintiffs pursuant to an oral agreement to repay defendants. There was no discussion of the applicable interest rate or other payment terms for the mobile home.

Plaintiff Mary Graham worked for defendant Charles Martin for eight years, starting in 1992. She was fired after filing the lawsuit in question. Rather than require plaintiffs to make regular monthly pay-

ments, Mr. Martin kept Ms. Graham's paychecks as payment for the land and the mobile home.

Plaintiffs repeatedly requested that the oral agreement for the land be put into writing, but defendants kept delaying. In 1998, plaintiffs refused to continue to make payments until the agreement was put into writing. To date, plaintiffs have paid a total of $17,626.00 towards the land and mobile home. In addition to making payments, plaintiffs improved the tract by installing a well, septic system, landscaping, erecting outbuildings and underpinnings, and permanently attaching the mobile home to the property based upon defendants' promise that they would convey the land to them. There is disagreement over who paid for all of these improvements, and how much was paid.

In May 1998, plaintiffs' attorney drafted a letter to defendants requesting that they provide a warranty deed to plaintiffs in exchange for a deed of trust. Mr. Martin noted on the letter that "when the appropriate time comes for papers to be drawn up my lawyer will take care of the matter." On 11 August 1999, plaintiffs filed this action against defendants, attempting to have the oral agreement for the purchase of the land enforced, and title transferred to them. On 7 February 2000, defendants filed a summary ejectment proceeding against plaintiffs.

The case was tried without a jury on 27 November 2000. The trial court found that the oral agreement for the purchase of the land was not enforceable because it was in violation of the Statute of Frauds. However, the trial court also found that due to the improvements to the land and other monies paid by plaintiffs, defendants would be unjustly enriched if defendants were allowed to simply put the plaintiffs off the land.

The trial court ruled that the plaintiffs are to have a constructive trust in the 10.51 acres of land and that the defendants are to execute a deed to the plaintiffs for that land upon payment by plaintiffs of $28,474.00, which was the remaining balance, plus interest, owed for the land and mobile home. Finally, the trial court declared the summary ejectment proceeding moot and ordered any funds held by the Clerk of Superior Court of Moore County returned to plaintiffs. Defendants appeal.

Defendants bring forth six assignments of error on appeal: (1) the trial court's finding that Ms. Graham's salary was kept as payment for

the land and mobile home; (2) the trial court's finding that plaintiffs improved the property based on defendant's promise that the land would be theirs; (3) the trial court's finding that defendants would be unjustly enriched if they were able to simply put plaintiffs off the land; (4) the trial court's imposition of a constructive trust on the land in question; (5) the trial court's order that defendants must execute a deed to plaintiffs upon payment by plaintiffs of $28,474.00; and (6) the trial court's order declaring the summary ejectment proceeding moot.

Defendants do not argue assignments of error (1) and (2) in their brief, therefore these assignments of error are deemed abandoned. *See* N.C.R. App. P. 28(a).

I.

[1] Defendants first argue that the trial court could not properly conclude that defendants would be unjustly enriched if they were simply allowed to put the plaintiffs off the land. Defendants base their argument on the lack of a specific finding as to the difference between the value of what plaintiffs have provided defendants and the value defendants have provided plaintiffs. Defendants point out the conflicting testimony about who actually paid for the improvements, and the lack of a determination of the cost of the improvements. The trial court found that the plaintiffs had improved the acreage "considerably" and that defendants would be unjustly enriched as a result if plaintiffs were simply put off of the land.

When a trial is held without a jury, the trial court's findings of fact are equivalent to a verdict by a jury and are conclusive on appeal unless there is no evidence to support them. *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). This is true even though the evidence may also sustain findings to the contrary. *Id.*

In this case, there was sufficient evidence for the trial court to find that defendants would be unjustly enriched as a result of plaintiffs ejection from the land. The trial court found that the plaintiffs have already paid defendants $17,626.00 for the land and mobile home, and that "[t]he plaintiffs have improved the acreage considerably by installing a well and septic system, landscaping, erecting out buildings [sic], and underpinning and permanently attaching the double wide mobile home to the property." However, for the reasons stated in II below, the trial court's remedy was improper. As this assignment of error only relates to the finding of unjust enrichment, and not the remedy, this assignment of error is overruled.

II.

[2] Defendants next argue that the remedy imposed by the trial court, a constructive trust and ordering the transfer of title upon payment of $28,474.00, is not appropriate. We agree.

Plaintiffs presented two exhibits to the trial court as evidence of a written contract sufficient to satisfy the Statute of Frauds. At the hearing on defendants' N.C.R. Civ. P. 12(b)(6) Motion to Dismiss plaintiffs' claims, the trial court concluded that these exhibits were not sufficient and "[a]ny alleged agreement to convey the property to the Plaintiffs is unenforceable and void under the Statute of Frauds." The trial court allowed the cause of action to proceed on the other claims. After the trial, the trial court again found:

> Although the parties have an agreement for the plaintiffs to purchase the 10.51 acres of land, said agreement is not enforceable since it is not in writing and to enforce it would be in violation of the Statute of Frauds.

However, even though the trial court acknowledges that enforcement would be in violation of the Statute of Frauds, a constructive trust was imposed requiring defendants to convey the property upon plaintiffs' payment of the remaining monies due under the oral agreement, calculated at $28,474.00. In justifying this remedy, the trial court found:

> Due to all the monies paid and improvements made by the plaintiffs, the defendants would be unjustly enriched if they were allowed to simply put the plaintiffs off the land.

While a constructive trust can be the proper remedy to prevent unjust enrichment, absent more it cannot be used to bypass the Statute of Frauds. *See Roper v. Edwards*, 323 N.C. 461, 373 S.E.2d 423 (1988); *Walker v. Walker*, 231 N.C. 54, 55 S.E.2d 801 (1949).

> Generally a constructive trust is
>
> ". . . imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder *acquired* through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. . . ."

Roper, 323 N.C. at 464, 373 S.E.2d at 424-25 (emphasis added) (citation omitted). In the current case, there is no allegation of impropri-

ety in defendants' acquisition of the parcel they are refusing to sell. We can find no reported cases in North Carolina, and plaintiffs concede that they believe there to be none, in which a constructive trust has been imposed absent some fraudulent or improper *acquisition* of property.

Even if we were to allow a constructive trust absent improper acquisition of property, our Supreme Court's decision in *Walker* makes it clear that a constructive trust cannot be based upon an unenforceable oral agreement. *See Walker*, 231 N.C. at 56, 55 S.E.2d at 802. In *Walker*, the defendant and his father had an oral agreement for the defendant to transfer title of land back to the father for $300.00. The defendant was to destroy the unrecorded deed executed previously transferring the land from his father to the defendant. The father paid the money and retook possession of the land. However, upon the father's death, the defendant refused to complete the transaction and recorded the deed for registration. *Id.* at 56, 55 S.E.2d at 802. In an action by the heirs to have the transaction completed by a constructive trust, the Supreme Court held:

> In disavowing the contract and refusing to abide by its terms, defendant was exercising a legal right and his exercise of a legal right in a lawful manner cannot be made the basis of a charge of fraud such as would impress a trust upon his title to the property.
>
> Even if we accept plaintiffs' version of the transaction, defendant's promissory representations created no right in equity and cannot serve to vest in plaintiffs any interest in the land in the form of any type of trust known to equity jurisprudence. Certainly they are insufficient to constitute a conveyance recognized in law. Real estate is not conveyed in that manner.

Id. Here, the contract was unenforceable under the Statute of Frauds and defendants were merely exercising their legal right in disavowing the contract.

Our Supreme Court in *Roper* did recognize that there can be an equitable duty to convey property even if there is no legal duty to convey the property. *Roper*, 323 N.C. at 465-66, 373 S.E.2d at 425-26. However, *Roper* is distinguishable. In *Roper*, the plaintiff's grandmother had a dispute with the defendants over entitlement to 136 acres of land. Pursuant to a settlement agreement, plaintiff's grandmother conveyed the 136 acres of land to defendants in fee simple absolute, with the exception of one acre which was not to be sold or

encumbered by the defendants prior to the grandmother's death and was to be conveyed as the grandmother specified in her will. The plaintiff's grandmother directed the one acre to be conveyed to plaintiff. After the grandmother died, the defendants refused to convey the one acre to plaintiff. *Id.* at 462-63, 373 S.E.2d at 423-24. Our Supreme Court noted that the defendants had no legal duty to convey the land because it represented a prohibited restraint on alienation. *Id.* at 464, 373 S.E.2d at 424. However, the Court recognized that there was an equitable duty to convey because the defendants *acquired* the land pursuant to a settlement agreement and that it would be inequitable for the defendants to continue to retain the land against the claim of the beneficiary of the constructive trust. *Id.*

The key in *Roper* was the manner in which the defendants *acquired* the property subject to the constructive trust. Again, there is no allegation of impropriety in defendants' acquisition of the property in question; they merely refused to sell it pursuant to an unenforceable oral agreement.

The facts of *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965), are similar to those in this case as well. In *Fulp*, the defendant had orally promised to convey a one-half interest in land to plaintiff in exchange for money. The Court ruled that the contract was unenforceable under the Statute of Frauds and further that plaintiff had no equitable title to the land necessary for a constructive trust because plaintiff's money was not used to acquire title to the land. *Id.* at 23, 140 S.E.2d at 711. However, when defendant refused to fulfill the contract, he became liable to plaintiff for the monies received under it. *Id.*

In this case, a constructive trust is improper because defendants had no legal duty to convey the 10.51 acres to plaintiffs and there was no fraud or other improper conduct associated with defendants' acquisition of the 10.51 acres. If defendants would be unjustly enriched by plaintiffs' eviction due to payments and improvements made under the oral agreement, defendants are liable to plaintiffs for that unjust enrichment. This case is remanded for the trial court to make appropriate findings on the issue of unjust enrichment and conclusions as to what amount plaintiffs are entitled to recover, that is, the reasonable value of the goods and services plaintiffs rendered to defendants. *See Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (measure of damages for unjust enrichment is the reasonable value of goods and services rendered), *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540 (1988).

III.

[3] Defendants' final argument is that the trial court had no authority to declare the separate summary ejection proceeding moot. Whether the separate action would have been moot or not, the trial court has no authority to render a decision in a case not before it. Both plaintiffs and defendants concede that this separate action could have been consolidated with the current case under N.C.R. Civ. P. 42; however, that was not done. If a trial court wishes to rule in a parallel case it must first consolidate the cases following the provisions of Rule 42. *See* N.C.R. Civ. P. 42(a). This assignment of error is sustained and the order declaring the separate action moot is reversed.

Reversed and remanded.

Judges WALKER and BRYANT concur.

STATE OF NORTH CAROLINA v. KENNETH EDWARD JORDAN

No. COA01-545

(Filed 16 April 2002)

Criminal Law— prosecutor's argument outside record—failure to grant mistrial—lack of intervention following objections

The trial court abused its discretion in an action where defendant was found guilty of voluntary manslaughter by failing to grant defendant's motion for a mistrial under N.C.G.S. § 15A-1061 based on the prosecutor's improper and inflammatory jury argument concerning a witness's pretrial statements that were never admitted into evidence and the prosecutor's comparison of defense counsel to Joseph McCarthy, because: (1) an attorney may not make arguments on the basis of matters outside the record, N.C.G.S. § 15A-1230(a), and the prosecutor in this case traveled outside the record in asking the jury to consider the excluded transcripts containing the witness's pretrial statements; (2) the prosecutor belabored his prejudicial comments for several paragraphs of his closing argument, and the prosecutor's voluminous comments appear to have been impermissibly calculated to mislead or prejudice the jury given the lack of evidence on record to support the McCarthy analogy; and (3) although defendant

twice objected and the trial court twice instructed the prosecutor to move on, the trial court failed to instruct the jury to disregard the prosecutor's comments.

Appeal by defendant from judgment entered 22 May 2000 by Judge Loto G. Caviness in Watauga County Superior Court. Heard in the Court of Appeals 14 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Beth S. Posner, and Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

MARTIN, Judge.

Defendant, Kenneth Edward Jordan, was indicted for first degree murder. He entered a plea of not guilty. A jury returned a verdict finding him guilty of voluntary manslaughter. Defendant appeals from the judgment entered on the verdict.

The evidence at trial tended to show that the victim, Christopher Scott Pendley, died from a shotgun wound to the neck in the early morning hours of 14 January 1999. The shooting took place in the home of defendant following an argument between defendant and Pendley, who had been friends since the eighth grade. At the time of the shooting, Pendley was temporarily residing with defendant and defendant's wife.

The State's evidence tended to show that on the night of 13 January 1999, defendant, his wife, Pendley, and their mutual friend, Monique Harman, were socializing at defendant's mobile home. Defendant and Pendley had been drinking beer and consuming prescription Xanax since early in the afternoon. The four shared two marijuana cigarettes and ingested more Xanax, and defendant and Pendley also continued to drink beer. Sometime after 11 p.m., defendant, his wife, and Harman retired to the back bedroom of the mobile home where they engaged in a three person sexual encounter. Pendley did not participate. Following the sexual activity, defendant's wife left the bedroom. Harman testified that soon after, defendant returned to the living room and that she followed several seconds behind him. Harman testified that defendant's wife and Pendley were lying on the living room floor under a blanket. Defendant accused Pendley of "sleeping with" defendant's wife,

which Pendley denied, and an argument broke out between the two men. Defendant and his wife left the living room and defendant's wife pushed him against the wall. They returned to the living room and defendant then went into another bedroom, and Pendley followed him into the hall. Harman testified that she saw defendant come out of the bedroom and turn away to talk to defendant's wife. She then heard a gunshot and when she turned to look, Pendley was lying on the floor. Defendant said that Pendley "would not be talking s—t to him anymore" and told Harman to go home and not to tell anyone what had happened.

Defendant testified that after his wife left the bedroom he fell asleep. He woke up alone, and returned to the living room where he found Harman sitting on the couch, and Pendley and defendant's wife on the floor under a blanket. When defendant spoke, his wife and Pendley jumped up; his wife had no clothing on and Pendley was pulling on his sweat shorts. Pendley immediately denied engaging in any sexual activity with defendant's wife. Defendant and his wife argued and defendant ordered Pendley to leave. Pendley refused; the two men exchanged angry words and defendant testified that Pendley threatened him. Defendant testified that he then retreated to the back bedroom to gather his clothes and, as he was returning to the living room, Pendley stepped out of a side bedroom with a shotgun in his hand. When defendant attempted to maneuver past him, Pendley struck defendant on the side of the head. The two men began to wrestle and defendant testified that as he was trying to pry the gun away from Pendley, the gun went off, fatally wounding Pendley. Defendant claimed self-defense and accident.

Defendant assigns error to the trial court's failure to grant his motion for a mistrial, made after an allegedly improper and inflammatory jury argument by the prosecutor. The assignment of error arises upon the following occurrences during trial. During her cross-examination, Harman testified that she gave as many as ten statements to investigating officers during their investigation of Pendley's death. Defendant's counsel sought to impeach her direct testimony by examining her using excerpts from some of her pre-trial statements. The State did not attempt, on re-direct, to rehabilitate her testimony by examining her about prior consistent statements, but sought to introduce Harman's prior statements to the investigating detective during the officer's testimony. Upon defendant's objections, and after a voir dire, the trial court ruled that the statements were admissible to the extent they corroborated Harman's testimony, but

that the statements could not be published to the jury. Subsequent to the court's ruling, the prosecutor either referenced the transcripts in their entirety or attempted to enter them into evidence on approximately nine occasions during the State's case and four occasions during defendant's case. On each occasion, defendant's objection was sustained.

During his jury argument, the prosecutor made the following argument:

> What Senator Joe then started doing was taking a brief case into the Senate hearing room and he would lay that briefcase up on the table and he would say, "Now, folks here in the Senate Chamber, I have proof positive here in this brief case that such and such a person is a communist and a member of the American Communist Party." He would say, "Now, these papers that I have in here, I can't let you look at them, they're secret, but I will tell you that they say this and they say this and they say that." The press would say, "Senator Joe, let us see the papers." "No, no, I can't let you look at them but this is what they say."
>
> It was determined after the fall and disgrace of Senator Joe McCarthy that normally all he had in that brief case was a salami sandwich that his wife made him for his lunch. But through Senator Joe's statements for a good while the communist scare of the 50's came about and hundreds and thousands of innocent lives and reputations were ruined. [Defense Counsel] have presented their case. As [they] argued to you, I couldn't help but think of Senator Joe. They tell you that within these statements that Monique Harman made is proof positive that she's lying. Within these statements they say are statements that show they cannot be true. Within these statements they say are things that actually corroborate what their client says. Within these statements they say is proof positive that our client is not guilty. They stand here before you and say now in these statements it says this, and in these statements it says this, and in these statements it says this and this. Like Senator Joe did they ever give you a copy of them?
>
> Mr. Speed: Objection.
>
> Mr. Wilson: If it says—
>
> The Court: Move on.

Mr. Wilson: If it says what they say it says, wouldn't they stand up here handing each and every one of you a copy saying here, read this, read this, read this—

Mr. Speed: Objection.

The Court: Move on.

Defendant's motion for a mistrial based on the argument was denied. Defendant contends the prosecutor's arguing outside the record in this manner created "substantial and irreparable prejudice." The argument has merit.

"Prosecutors are granted wide latitude in the scope of their argument." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). They are allowed to argue the law and the facts *in evidence* and present all reasonable inferences to be drawn from them. *State v. Craig*, 308 N.C. 446, 454, 302 S.E.2d 740, 745, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983) (emphasis added) (citations omitted). But the law is clear that during a closing argument to the jury an "attorney may not . . . make arguments on the basis of matters outside the record . . . ." N.C. Gen. Stat. § 15A-1230(a) (1999). Likewise, our courts have consistently refused to tolerate "remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury." *State v. Smith*, 352 N.C. 531, 560, 532 S.E.2d 773, 791-92 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001); *State v. Sanderson*, 336 N.C. 1, 15-16, 442 S.E.2d 33, 42 (1994); *State v. Wilson*, 335 N.C. 220, 224-25, 436 S.E.2d 831, 834 (1993); *State v. Anderson*, 322 N.C. 22, 37, 366 S.E.2d 459, 468 (1988).

G.S. § 15A-1061 provides that "the judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." The decision whether to grant a motion for mistrial falls within the discretion of the trial judge. *State v. Boyd*, 321 N.C. 574, 579, 364 S.E.2d 118, 120 (1988). For the decision to be reversed on appeal, the reviewing court must find that the trial court abused its discretion. *Id.* Abuse of discretion occurs when a trial court's ruling was manifestly unsupported by reason and thus could not have been the result of a reasoned decision. *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

In this case, the transcripts of Harman's pre-trial statements were never admitted into evidence and thus never became part of the record. The prosecutor therefore clearly traveled "outside the record" in asking the jury to consider the excluded transcripts when reaching its verdict. In so doing, he violated G.S. § 15A-1230(a). We analyze the prejudicial nature of this misconduct to assess whether the trial court abused its discretion in failing to declare a mistrial.

In *State v. Allen*, 353 N.C. 504, 508, 546 S.E.2d 372, 374 (2001), our Supreme Court granted a new trial when during closing argument, the prosecutor told the jury they had been allowed to hear a certain piece of the State's evidence "because the Court found [the evidence was] trustworthy and reliable . . . . If there had been anything wrong with that evidence, you would not have heard that." On appeal, the Supreme Court found that the prosecutor's statement "travel[ed] outside the record" by alluding to the trial judge's findings and opinions made during a hearing held outside the jury's presence. The Court held that the jurors' knowledge of the judge's opinion unduly biased them against the defendant, entitling him to a new trial. *Id.* at 508-09, 546 S.E.2d at 374-75.

Similarly, in *State v. Roach*, 248 N.C. 63, 65-66, 102 S.E.2d 413, 414 (1958), our Supreme Court granted a new trial when, during closing argument, the prosecutor told the jury, "I tell you I could get a number of people, at least one hundred, to come in here and testify to [the defendant's] bad character." The Court held that the "one hundred" witnesses were clearly outside the record and that the prejudice created was not cured by the trial court's instruction to the jury to disregard the prosecutor's statement. *Id.*

In this case, the prosecutor used evidence outside the record to make a statement equally, if not more grossly, prejudicial to defendant than those made in *Allen* and *Roach*. Comparing defendant's counsel to Joseph McCarthy thoroughly undermined his defense by casting unsupported doubt on counsel's credibility and erroneously painting defendant's defense as purely obstructionist. Further, unlike *Allen* and *Roach* where the prejudicial comment comprised one or two sentences, the prosecutor in this case belabored his prejudicial comments for several paragraphs of his closing argument. Given the lack of evidence on record to support the McCarthy analogy, the prosecutor's voluminous comments appear to have been impermissibly "calculated to mislead or prejudice the jury." *Smith*, 352 N.C. at 560, 532 S.E.2d at 791-92; *Sanderson*, 336 N.C. at 15-16, 442 S.E.2d at 42

(1994); *Wilson*, 335 N.C. at 224-25, 436 S.E.2d at 834; *Anderson*, 322 N.C. at 37, 366 S.E.2d at 468.

Finally, where a defendant objects to an improper remark made by the prosecutor during closing argument, the trial court may cure the impropriety by immediately instructing the jury to disregard the offensive statement. *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982). In this case, defendant twice objected and the trial court twice instructed the prosecutor to "move on." At no time, however, did the trial court instruct the jury to disregard the prosecutor's comments.

Reversal of a denial of a motion for mistrial requires a showing that the trial court abused its discretion in failing to recognize the "substantial and irreparable prejudice" resulting from some occurrence during trial. Given the egregious nature of the beyond-the-record argument and the trial court's lack of intervention following defendant's appropriate objections, we hold that the prosecutor's misconduct "resulted in substantial and irreparable prejudice" to defendant's case. Therefore, we must hold that the trial court's failure to grant the motion for mistrial was an abuse of discretion, and that defendant is entitled to a new trial. We find it unnecessary to reach defendant's remaining allegations of error as they may not recur at defendant's new trial.

New Trial.

Judges HUDSON and THOMAS concur.

RONALD H. METTS AND REGGIE METTS, PLAINTIFFS v. TIMMY TURNER AND LINDA TURNER, DEFENDANTS

No. COA01-840

(Filed 16 April 2002)

Easements— implied by prior use—summary judgment

The trial court did not err by granting partial summary judgment in favor of plaintiffs and by denying defendants' motion for summary judgment in an action where the trial court awarded plaintiffs a sixty-foot easement implied by prior use and access across defendants' land, and ordered defendants to open and

repair the roadway for the use and benefit of plaintiffs, because: (1) the issue of the physical location of the easement is not material for an easement by implied prior use; (2) plaintiffs have shown that the easement is reasonably necessary to the beneficial enjoyment of the land and that the parties intended the use to continue after severance; and (3) the roadway was plainly visible and appeared on the tax map.

Appeal by defendants from order entered 29 November 1995 by Judge Russell J. Lanier, Jr. and order entered 13 March 2001 by Judge Carl L. Tilghman in Jones County Superior Court. Heard in the Court of Appeals 28 March 2002.

Hunter Bircher, L.L.P. by John C. Bircher, III, for plaintiffs-appellees.

Henderson, Baxter, Taylor & Gatchel, P.A. by David S. Henderson, for defendants-appellants.

TYSON, Judge.

I. Facts

Ronald H. Metts and Reggie Metts (collectively "plaintiffs") filed this action in district court on 6 May 1994, alleging that the adjoining parcel of land owned by Timmy Turner and Linda Turner (collectively "defendants") is subject to an easement for their benefit. Plaintiffs complained that defendants had interfered with their use of the easement and had threatened harm if they used the easement. Plaintiffs sought a temporary restraining order, a preliminary injunction, $10,000.00 in damages for the denial of their use of the easement, and demanded that defendants repair damage to the easement.

Defendants filed an answer admitting ownership of the described land, denying that the land was subject to an easement, and counterclaimed for damages in excess of $10,000.00 for multiple trespasses, destruction of gates and fences, and threats by plaintiffs. Defendants also sought injunctive relief restraining plaintiffs from continuing acts of intimidation and harassment, as well as trespass, damage, and waste to their property.

The action was transferred to superior court by order entered 23 March 1995 due to the amount in controversy. Both parties moved for summary judgment which was heard on 9 October 1995. In an order entered 29 November 1995, the trial court granted partial summary

judgment in favor of plaintiffs, awarding them a sixty-foot easement and access across defendants' land and ordering defendants to open and repair the roadway for the use and benefit of plaintiffs. Defendants appealed. In a prior unpublished opinion of this Court, filed 17 December 1996, we dismissed defendants' appeal as interlocutory. On 19 February 2001, the remaining issues of plaintiffs' damages and defendants' counterclaim for damages were tried. The trial court entered an order denying both parties damages on 13 March 2001. Defendants appeal.

II. Issue

The sole issue raised on appeal is whether the trial court erred in entering partial summary judgment for plaintiffs and denying summary judgment for defendants.

III. Standard of Review

Rule 56 of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2000); *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 473, 251 S.E.2d 419, 423-24 (1979). Where the forecast of evidence available demonstrates that a party will not be able to make out at least a prima facie case at trial, no genuine issue of material fact exists and summary judgment is appropriate. *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 858 (1988). On appeal, this Court must view the record in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Aetna Casualty & Surety Co. v. Welch*, 92 N.C. App. 211, 213, 373 S.E.2d 887, 888 (1988).

Defendants argue that the trial court erred in finding facts and making conclusions of law on a motion for summary judgment. Facts required to support summary judgment must be established by the pleadings, depositions, answers to interrogatories, admissions, or affidavits. *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 202, 468 S.E.2d 846, 849-50 (1996). Findings of fact and conclusions of law are not required in a summary judgment order. *Bland v. Branch Banking & Trust Co.*, 143 N.C. App. 282, 285, 547 S.E.2d 62, 64 (2001). Findings of fact "do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judg-

ment." *Mosley v. National Finance Co., Inc.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147 (1978) (citation omitted).

Defendants contend that the trial court erred in finding facts as to a disputed material issue: the physical location of the easement on the ground. This issue would be material to an express easement; however, the trial court did not find the existence of an express easement, but found an easement implied by prior use. Furthermore, given the nature of this case, the inclusion of the undisputed material facts and the trial court's conclusions thereon provides helpful guidance for this Court in reviewing the judgment.

IV. Existence of Easement

Defendants argue that the trial court erred in entering judgment entitling plaintiffs to the described sixty-foot easement. The trial court, in its 29 November 1995 order, found in pertinent part:

> 5. That on or about May 1, 1959, Lindsey V. Maness was deeded 300 acres of land and said deed is recorded in Deed Book 132, at Page 12 of the Jones County Registry.
>
> 6. That on or about March 10, 1976, Lindsey V. Maness deeded to his wife, Nancy Louise Griffin Maness, 350 feet of land located on the north and south of Highway 41 and reserved a 60 foot easement . . . . This parcel of land is a portion of the land described in Deed Book 132, Page 12.
>
> . . . .
>
> 10. That Plaintiff, Ronald Metts, owns a 7/14th interest in the land . . . having received his interest from Wanda Maness Jones in Deed Book 223, Page 318. This parcel of land is a portion of the land described in Deed Book 132, Page 12.
>
> 11. That Plaintiff, Reggie Metts, owns a 1/14th interest in the land . . . having received his interest from Nancy Griffin Maness in Deed Book 223, Page 574. This parcel of land is a portion of [the] land described in Deed Book 132, Page 12.
>
> . . . .
>
> 14. That Defendants own a 2/14th interest in the land recorded in Deed Book 170, Page 180 and is a portion of the land described in Deed Book 132, Page 12.

15. The Defendants also bought from Wanda Maness Jones three (3) lots which were a portion of the 350 foot piece of land described in Deed Book 170, Page 179. These three (3) lots are recorded in Deed Book 213, Page 6 and are also a portion of the land described in Deed Book 132, Page 12.

16. The Plaintiff's and Defendant's are tenants in common in the land recorded in Deed Book 170, at Page 180.

. . . .

18. The Plaintiffs filed affidavits . . . [which] state that the road which runs from Highway 41 to the land which Plaintiffs own an 8/14th interest has been used for farming, mining, and personal use by Lindsey Maness and his grantees for the past 50 years . . . and that this roadway is the only roadway they have used in the past 50 years.

19. A roadway does exist and runs across Defendants land . . . from Highway 41 to the land which Plaintiffs own a 8/14 interest as evidenced by the affidavits filed by the Plaintiffs and from a review of the Jones County tax map . . . .

. . . .

22. The roadway which crosses Defendants land is recorded in Deed Book 213, at Page 6, and is located where the gate fence and the ditch tile are located. Said roadway is also plainly visible on the Jones County tax map . . . . Said roadway was used for ingress and egress of the farm until barred by defendants' actions . . . .

The trial court concluded that:

4. An implied easement by prior use in the road across Defendants' land described in Deed Book 213, Page 6 from Highway 41 to the land in which Plaintiffs own a 8/14th interest, as shown on the Jones County tax map, exists in favor of the Plaintiffs, since prior to severance, the use, which gave way to said easement, had been so long continued, observed and manifest as to show that it was meant to be a permanent one and that the easement was and is necessary to the Plaintiffs' beneficial enjoyment of the lands . . . .

Defendants contend that the facts do not support an express easement, an implied easement from prior use, or an implied ease-

ment by necessity. We agree that the easement described in the parties' deeds is not an express easement. The "description" does not furnish any means by which the location of the proposed easement may be ascertained. *See Adams v. Severt*, 40 N.C. App. 247, 249, 252 S.E.2d 276, 278 (1979) (in order to create an easement by deed or reservation in a deed, the description must be "sufficiently certain to permit the identification and location of the easement with reasonable certainty").

Even though an easement is not expressly granted in a conveyance, our courts will find the existence of an easement by implication under certain circumstances. "[A]n 'easement from prior use' may be implied 'to protect the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer.' " *Knott v. Washington Housing Authority*, 70 N.C. App. 95, 98, 318 S.E.2d 861, 863 (1984) (quoting P. Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary,"* 58 N.C. L. Rev. 223, 224 (1980)). We conclude that competent evidence exists in the record to support the trial court's finding and conclusion that plaintiffs obtained an easement implied by prior use.

To establish an easement implied by prior use, plaintiffs must prove that: (1) there was a common ownership of the dominant and servient parcels of land and a subsequent transfer separated that ownership, (2) before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was "apparent, continuous and permanent," and (3) the claimed easement is "necessary" to the use and enjoyment of plaintiffs' land. *Id.*

In the present case, the first link in the chain of title is a deed to Lindsey V. Maness for 345½ acres dated 1 May 1959. The next conveyance in the chain is a deed from Lindsey V. Maness to his wife, Nancy Louise Griffin Maness, dated 10 March 1976. This deed conveyed 350 feet of land, located on the North and South of Highway 41, and also reserved a sixty-foot right of way on both the North and South sides of Highway 41 for the purpose of ingress and egress to the remaining property. Plaintiffs also offered affidavits that the sixty-foot right of way from Highway 41 was used by Lindsey Maness, his assigns or lessees, his predecessors-in-title, and their assigns or lessees as a general means of ingress and egress for personal use, for use with a mining operation, and use for farming purposes for over fifty years.

Defendants contend that plaintiffs failed to show reasonable necessity and erroneously argue that the subject property has access to State Road 1143. The element of necessity, with an implied easement by prior use, does not require a showing of absolute necessity. *Id.* "It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the road in the same manner and to the same extent which his grantor had used it, because such use was reasonably necessary to the 'fair' . . , 'full,' . . . 'convenient and comfortable,' . . . enjoyment of his property." *Smith v. Moore*, 254 N.C. 186, 190, 118 S.E.2d 436, 438-39 (1961) (citations omitted). The affidavits submitted by plaintiffs established that the alternative access to State Road 1143 has never been used. The trial court's finding and conclusion that plaintiffs have shown that the easement is reasonably necessary to the beneficial enjoyment of the land and more importantly, that the parties intended the use to continue after severance, is supported by substantial competent evidence.

Defendants also contend that there cannot be an implied easement in favor of plaintiffs because there was no attempt to locate the easement on the ground. The trial court found that the roadway was plainly visible and appeared on the tax map. The witnesses testified to the roadway's existence and use by affidavit. It is apparent that the roadway may be readily located on the parties' land. *See Cash v. Craver*, 62 N.C. App. 257, 258-61, 302 S.E.2d 819, 820-22 (1983) (citing *Thompson v. Umberger*, 221 N.C. 178, 19 S.E.2d 484 (1942)).

V. Conclusion

We hold that the trial court properly found an implied easement by prior use in favor of plaintiffs. We affirm the grant of partial summary judgment in favor of plaintiffs and the denial of defendants' motion for summary judgment.

Affirmed.

Judges MARTIN and THOMAS concur.

AUGER v. AUGER

[149 N.C. App. 851 (2002)]

LESLIE S. AUGUR, PLAINTIFF v. RICHARD G. AUGUR, DEFENDANT

No. COA01-220

(Filed 16 April 2002)

Declaratory Judgment— subject matter jurisdiction—actual controversy

The trial court erred by dismissing defendant's counterclaim for a declaratory judgment that the Domestic Violence Act is unconstitutional as being moot after the trial court dismissed plaintiff's complaint seeking a domestic violence protective order, and the case is remanded to the trial court to consider and rule upon defendant's requested declaratory judgment because: (1) the trial court has subject matter jurisdiction to render a declaratory judgment when there is an actual controversy both at the time of the pleading and at the time of hearing; and (2) an actual controversy existed between plaintiff and defendant at the time defendant filed his answer and counterclaim for a declaratory judgment on 1 November 1999 and at the time of the return hearing on 13 December 1999.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 11 December 2000 by Judge Gary S. Cash in Buncombe County District Court. Heard in the Court of Appeals 8 January 2002.

Pisgah Legal Services, by Anne Bamberger, for plaintiff-appellee.

Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for defendant-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Emery E. Milliken, for the State of North Carolina, amicus curiae.

TYSON, Judge.

Richard G. Augur ("defendant") appeals from judgment dismissing plaintiff's complaint for a domestic violence protective order and denying defendant's counterclaim for a declaratory judgment that the Domestic Violence Act is unconstitutional. We affirm the trial court's judgment in part and reverse and remand in part.

I. Facts

Defendant and Leslie S. Augur ("plaintiff") were married in 1981 and divorced in 1996. Three children were born of the marriage.

Plaintiff sought a domestic violence protective order ("DVPO") on 26 October 1999 claiming that defendant abused her the day before at a soccer game and that defendant had been physically and sexually abusive to her in the past. The court entered plaintiff's *ex parte* DVPO on 28 October 1999. At the return hearing on 1 November 1999, defendant served plaintiff with an answer and counterclaim for a declaratory judgment. Defendant also moved for and received a continuance to prepare for the hearing. The DVPO remained in effect. The trial court eliminated the provision in the DVPO that prohibited defendant from possessing and purchasing a firearm with plaintiff's consent.

On 13 December 1999, the trial court held a hearing on the merits. The trial court found that plaintiff had failed to prove that defendant committed any acts of domestic violence and dismissed plaintiff's complaint. The trial court retained defendant's counterclaim under advisement. The North Carolina Attorney General was given due notice as required by the Declaratory Judgment Act. N.C. Gen. Stat. § 1-260 (1931).

On 7 August 2000, the trial court entered an order dismissing defendant's counterclaim finding that the issue was moot after the court dismissed plaintiff's complaint on 13 December 1999.

Defendant filed a Rule 60 motion for relief from judgment or order on 29 August 2000. On 6 September 2000, defendant timely filed notice of appeal to our Court. On 25 October 2000, the trial court set aside the 7 August 2000 order to give the North Carolina Attorney General an opportunity to be heard. The trial court entered a new and final judgment on 11 December 2000. Defendant appealed on 8 January 2001.

II. Issues

Defendant assigns as error the trial court's (1) holding that the issues raised in defendant's counterclaim are moot, (2) denying defendant's counterclaim that the Domestic Violence Act is unconstitutional, and (3) refusing to consider defendant's declaratory judgment counterclaim even if it was moot.

Defendant in his brief asks us to consider the constitutionality of the Domestic Violence Act as contained in Chapter 50B of the North Carolina General Statutes. The trial court did not address the merits of his request for a declaratory judgment. "Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a requirement." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986) (citing *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)). In ruling on the requisite timing of the controversy, our Supreme Court held that in order for a court to have subject matter jurisdiction to render a declaratory judgment, there must be "an actual controversy . . . both at the time of the filing of the pleading and at the time of hearing." *Sharpe*, 317 N.C. at 585, 347 S.E.2d at 30 (citing *Harrison*, 311 N.C. at 234-35, 316 S.E.2d at 62) (emphasis supplied).

At the time defendant filed his answer and counterclaim for a declaratory judgment on 1 November 1999, and at the time of the return hearing on 13 December 1999, an actual controversy existed between plaintiff and defendant. Plaintiff and defendant were divorced in 1996 after lengthy and rancorous divorce proceedings. Sometime in 1997, plaintiff filed a domestic violence complaint and obtained an *ex parte* order against defendant. Plaintiff dismissed the case before a hearing was held.

On 26 October 1999, plaintiff filed for a DVPO. She appeared *ex parte* and *pro se* on 28 October 1999 and obtained the DVPO, which found that: (1) defendant had committed acts of domestic violence against plaintiff, and (2) the *ex parte* DVPO was necessary to protect plaintiff; the DVPO ordered that defendant: (1) shall not interfere with, assault, threaten, abuse, follow, or harass plaintiff, (2) shall stay away from plaintiff's residence and work, (3) shall have no contact with plaintiff, and (4) is prohibited from possessing and purchasing a firearm. Plaintiff and defendant appeared at the return hearing on 1 November 1999. Defendant served plaintiff at the return hearing with his answer, counterclaim for a declaratory judgment, request to lift the firearm restriction, and a request for a continuance, arguing that he could not mount a proper defense on 3 days notice. Plaintiff consented to the continuance and the lifting of the firearm restriction. At the return hearing on 13 December 1999, the trial court found that defendant did not commit an act of domestic violence against plaintiff, dismissed plaintiff's complaint, and took defendant's counterclaim under advisement.

Article 26 "is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered." N.C. Gen. Stat. § 1-264 (1931). "[C]laims for injunctive and declaratory relief regarding 'any statute' or 'any claim of constitutional right' are the particular province of the superior courts." *Simeon v. Hardin*, 339 N.C. 358, 368, 451 S.E.2d 858, 865 (1994) (citing N.C. Gen. Stat. § 7A-245 (1989)). We hold that an actual controversy existed between plaintiff and defendant at the time defendant filed his answer and counterclaim for a declaratory judgment on 1 November 1999, and at the time of the return hearing on 13 December 1999, in order to determine the constitutionality of the Domestic Violence Act. "[A] counterclaim is in the nature of an independent proceeding and is not automatically determined by a ruling in the principal claim . . . ." *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) (citing N.C. Gen. Stat. § 1A-1, Rule 13 (1967)). Defendant is entitled under the Declaratory Judgment Act to a determination of the constitutionality of the Domestic Violence Act.

We re-affirm this Court's general rule that we will not decide constitutional issues in the first instance when the trial court has not ruled upon them. *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856 (2001) ("Constitutional questions that are not raised and passed upon in the trial court will not ordinarily be considered on appeal.") (citing *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 436-37 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed.2d 797 (2001); *accord Nobles*, 350 N.C. at 495, 515 S.E.2d at 893)).

We affirm that portion of the trial court's judgment dismissing plaintiff's complaint. We reverse the trial court's order dismissing defendant's counterclaim and remand to the trial court to consider and rule upon defendant's requested declaratory judgment.

Affirmed in part, reversed and remanded in part.

Judge HUNTER concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

As I believe the trial court did not have subject matter jurisdiction under the Declaratory Judgment Act, I dissent.

A trial court only has subject matter jurisdiction under the Declaratory Judgment Act if "an actual controversy . . . exist[s] at the time the pleadings [are] filed and at the time of [the] hearing." *Hammock v. Bencini*, 98 N.C. App. 510, 512, 391 S.E.2d 210, 211 (1990). In addition, although a trial court has the power to determine the validity of a statute, it can do so only "when some specific provision(s) thereof is challenged by a person who is directly and adversely affected" by the statute. *Greensboro v. Wall*, 247 N.C. 516, 519-20, 101 S.E.2d 413, 416 (1958). Thus, the "validity or invalidity of a statute, in whole or in part, is to be determined in respect of its adverse impact upon personal or property rights in a specific factual situation." *Id.* at 520, 101 S.E.2d at 416. Consequently, an individual can challenge a statute only when he can show that "the enforcement of all or any of its provisions will result in an invasion or denial of [his] specific personal or property rights under the Constitution." *Id.* at 522, 101 S.E.2d at 418.

In this case, an actual controversy existed between plaintiff and defendant at the time defendant filed his counterclaim seeking a declaratory judgment to determine the constitutionality of the Domestic Violence Act. After the trial court dismissed plaintiff's complaint on 13 December 1999, however, the issue raised in defendant's counterclaim was necessarily terminated, as he was no longer adversely affected by the Domestic Violence Act. Accordingly, the trial court was without subject matter jurisdiction to entertain a claim under the Declaratory Judgment Act concerning the constitutionality of the Domestic Violence Act. I, therefore, would affirm the trial court in denying defendant's counterclaim for a declaratory judgment.

MICHAEL WILLIAMS, PLAINTIFF v. REECE SMITH, D/B/A REECE'S BODY SHOP, DEFENDANT

No. COA01-749

(Filed 16 April 2002)

Negligence— premises liability—security

The trial court did not err by granting summary judgment for defendant in a negligence action arising from the theft of plaintiff's tools from defendant's body shop where plaintiff contended that security was inadequate but the actual cause of the loss was

criminal activity by a third party, there was only one confirmed prior break-in on the premises, and this was not enough to negate the sufficiency of the security methods employed by defendant.

Appeal by plaintiff from order entered 18 March 2001 by Judge Dennis J. Winner in Transylvania County Superior Court. Heard in the Court of Appeals 13 March 2002.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for plaintiff.

Ball, Barden & Bell, P.A., by Ervin L. Ball, Jr., for defendant.

BRYANT, Judge.

On 6 December 1999, plaintiff-employee Michael Williams filed a complaint against defendant-employer Reece Smith d/b/a Reece's Body Shop alleging that defendant was negligent in that defendant failed to maintain adequate security in connection with the theft of plaintiff's tools occurring at defendant's body shop. As a condition of plaintiff's employment, he was to supply his own work tools. Both plaintiff and defendant stated that it was common practice for employees that work in automotive body shops to supply their own tools. The size and weight of plaintiff's tool chest made it impractical to load and unload the chest each time he left the work site for the day, therefore plaintiff would leave his chest, containing his tools, at the body shop. The chest had a lock on it, although plaintiff stated that he would leave the chest unlocked because nothing had been previously impermissibly removed from the chest.

In November 1998, a theft occurred at the body shop and approximately $43,000 worth of plaintiff's tools and several of defendant's tools were stolen. Earlier that same year, someone broke into the body shop lot and stole several batteries. Defendant did not report this incident to the police, but he did notify plaintiff of the theft. In addition, plaintiff claims that concerning a separate incident, a deputy from the Henderson County Sheriff's Department told plaintiff that someone might have been attempting to break into the body shop building, however, plaintiff could not confirm whether an actual crime was committed. Plaintiff alleges that these prior incidents of criminal activity occurring on the body shop premises put defendant on notice of the potential for future acts of theft to occur on the premises.

The body shop is secured by a gate that plaintiff claims is in a dilapidated condition. In addition, there is a floodlight located on the premises; however, the parties dispute whether the floodlight was functioning at the time the theft occurred. Plaintiff argues that the dilapidated gate and malfunctioning floodlight are insufficient methods of securing the premises, especially in light of the prior theft incidents.

On 31 January 2001, defendant filed a motion for summary judgment. A hearing on defendant's motion was heard at the 15 March 2001 session of Transylvania County Superior Court with the Honorable Dennis J. Winner presiding. By order filed on 18 March 2001, defendant's motion was granted. Plaintiff gave notice of appeal on 30 March 2001.

On appeal, plaintiff argues that the trial court erred in shifting the burden to plaintiff to make a forecast of evidence on which he might recover based on defendant having presented *prima facie* evidence that the theft was the result of criminal activity by a third party. In addition, plaintiff argues that the trial court erred in stating that in order for plaintiff to avoid summary judgment, he must show that significant criminal activity occurred at defendant's place of business. We disagree.

The granting of summary judgment is proper if the pleadings, discovery, admissions, affidavits and deposition testimony, if any, show that there does not exist a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C. R. Civ. P. 56. If the moving party has established the lack of a genuine issue of material fact, then the burden shifts to the non-moving party to present his own forecast of evidence to show that a genuine issue of material fact does exist. *See Cockerham v. Ward*, 44 N.C. App. 615, 618, 262 S.E.2d 651, 654 (1980).

In the case at bar, evidence was presented that the actual cause of plaintiff's loss was the result of criminal activity by a third party. Therefore, in reviewing the granting of defendant's motion for summary judgment, this Court must ascertain what duty, if any, was owed by defendant to plaintiff to protect plaintiff's property from theft due to the criminal activity of a third party. In addition, if a duty is found to exist, then we must determine whether a breach of that duty occurred and whether defendant's actions were the proximate cause of plaintiff's injury. *See Young v. Fun Services-Carolina, Inc.*, 122

N.C. App. 157, 159, 468 S.E.2d 260, 262 (1996) ("The essential elements of negligence are: Duty, breach of duty, proximate cause, and damages. . . . Proximate cause is defined as 'a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred.' " (citations omitted)).

In his brief, plaintiff fails to specifically address what duty, if any, is owed by an employer to his employee to protect the employee's property that is stored at the employer's place of business. Although defendant conceded that under certain circumstances, an employer may be held liable for the theft of his employee's property, defendant does not cite to any authority for this proposition. Moreover, this Court has conducted its own search for North Carolina legal authority addressing the duty owed by an employer to his employee in this context and has found none. Therefore, it appears this issue should be addressed under the ordinary rules of negligence as we find there is no increased duty on the part of defendant in this case.

In a negligence action, there can be no liability if there is no duty owed by the defendant to the plaintiff. *See Prince v. Wright*, 141 N.C. App. 262, 266, 541 S.E.2d 191, 195 (2000). Duty may be imposed if one party undertakes to render services to another and the surrounding circumstances are such that the first party should recognize the necessity to exercise ordinary care to protect the other party or the other party's property; and failure to do such will cause the danger of injury to the other party or the other party's property. *See Davidson and Jones, Inc., v. County of New Hanover*, 41 N.C. App. 661, 666, 255 S.E.2d 580, 584 (1979) ("The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence."). To establish actionable negligence, it must be shown that the harm complained of was a foreseeable consequence of defendant's alleged negligent act. *See Luther v. Asheville Contracting Co.*, 268 N.C. 636, 642, 151 S.E.2d 649, 653 (1966) ("Foreseeability of injury to another is an essential element of actionable negligence."); *Moore v. Moore*, 268 N.C. 110, 112, 150 S.E.2d 75, 77 (1966) ("To permit recovery for an injury, the jury must find the defendant was guilty of one or more of the negligent acts alleged and that the injurious result was reasonably foreseeable."); *Dunn v. Bomberger*, 213 N.C. 172, 177, 195 S.E. 364, 368 (1938) ("[T]o establish actionable negligence the plaintiff must

show that the defendant, in the exercise of ordinary care, could foresee that some injury would result from [defendant's] alleged negligent act.").

In the case at bar, defendant was aware that plaintiff would store his tools at defendant's body shop when plaintiff would leave work each day. It does not appear that defendant opposed this action. Rather, it appears that defendant acquiesced to plaintiff storing his tools there. Plaintiff argues that defendant did not exercise reasonable care to secure plaintiff's tools from theft. This failure to exercise reasonable care, plaintiff argues, is flagrant in light of the fact that prior incidents of theft had occurred on the premises. According to plaintiff, defendant's failure to provide adequate security was the proximate cause of foreseeable injury to plaintiff. Therefore, plaintiff argues that the trial court improperly granted summary judgment in favor of defendant. We disagree.

The evidence reveals that the perimeter of the premises is secured by a gate, which is secured after hours by a heavy chain and padlock—however, the condition of the gate is in question. As to the body shop building itself, there is a garage door which is secured by a latch that pushes into a bar. There is a metal door with a glass window that can be locked from the inside. In addition, there is a floodlight on the premises—however, the parties dispute whether the floodlight was functioning on the date of the theft. Based on the findings in *Connelly v. Family Inns of Am., Inc.*, 141 N.C. App. 583, 540 S.E.2d 38 (2000), the trial court determined that the plaintiff failed to present evidence of significant criminal activity on the premises to show that the security methods assured by defendant were inadequate. Plaintiff disagrees.

In *Connelly*, the Court addressed the duty owed by a motel to its guests to protect the guests against the criminal activities of third parties. The *Connelly* Court stated that the foreseeability of the complained of acts can be gleaned from evidence of prior crimes including, "the location where the prior crimes occurred, . . . the type of prior crimes committed, . . . and the amount of prior criminal activity. . . ." *Connelly*, 141 N.C. App. at 588, 540 S.E.2d at 41 (citations omitted). Ultimately, the *Connelly* Court found that

> "[t]he evidence in this case . . . indicates that in the five years preceding the armed robbery in this case, one hundred instances of criminal activity bearing on the issue of forseeability occurred [within an area not too remote from the premises]. This number

> of crimes was sufficient to raise a triable issue of fact as to the foreseeability of the attack upon plaintiffs."

Connelly, 141 N.C. App. at 589, 540 S.E.2d at 42. In addition, the *Connelly* Court found that the motel was on sufficient notice of the prior incidents to present a triable issue of foreseeability.

Plaintiff argues that the trial court erred in relying on *Connelly* as that case did not involve a negligence action brought by an employee against an employer. Rather plaintiff offers *Kottlowski v. Bridgestone/Firestone, Inc.*, 670 N.E.2d 78 (Ind. Ct. App. 1996), as persuasive authority.

In *Kottlowski*, employees of an automotive service shop brought a negligence action against the shop owner after the employees' tools were stolen from the shop premises. The *Kottlowski* court, in reviewing a grant of summary judgment in favor of the shop owner, found that a genuine issue of material fact existed concerning whether an after hours break-in resulting in the theft of the employees tools and tool boxes, was a foreseeable result of the shop owner's alleged negligent act of failing to maintain adequate security. In reaching its conclusion, the *Kottlowski* court considered evidence of several criminal acts that had occurred on the premises during the four years preceding the latest break-in.

Even in considering *Kottlowski* as persuasive authority, this Court concludes that the trial court did not err in requiring plaintiff to present evidence of significant criminal activity to overcome defendant's forecast of evidence in support of its motion for summary judgment. In *Kottlowski*, although the court did not detail the exact number of, the type of, or location of the criminal activities that occurred, it is clear that there occurred several incidents of criminal activity, and not just one isolated incident as occurred in the instant case.

In the instant case, there was only one confirmed incident of a break-in occurring on the body shop premises. Standing alone, this prior incident is insufficient to negate the sufficiency of the security methods currently employed by defendant. Therefore, for the reasons stated herein, we hold that the trial court did not err in granting summary judgment in favor of the defendant.

AFFIRMED.

Judges WALKER and HUNTER concur.

BERTIE PINKEY-FURR HOLLOMAN AND DAVID R. HOLLOMAN, PLAINTIFFS V. JESSIE H. HARRELSON, EXECUTOR OF THE ESTATE OF RUTH B. SYKES, JESSIE H. HARRELSON, INDIVIDUALLY, AND WIFE, DOROTHY J. HARRELSON, DOROTHY BURNSIDE, MAGNOLIA O. HILTON, MICHAEL A. STEVENS AND WIFE, MARGARET MASTIN STEVENS, BRANCH BANKING AND TRUST, DEFENDANTS

No. COA01-481

(Filed 16 April 2002)

Estates— claim against estate for personal services—sufficiency of evidence

The trial court did not err by granting defendants' motions to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) in plaintiffs' action against decedent's estate seeking a sum in excess of $10,000 for personal services allegedly rendered to decedent based on the fact that the notice of claim filed by plaintiffs did not comply with N.C.G.S. § 28A-19-1(a), because: (1) plaintiffs failed to state the amount or item claimed, and a claim for a sum in excess of $10,000 is not definite enough to satisfy the statute; (2) plaintiffs failed to state the basis for their claim with particularity since they did not specify the dates upon which their alleged services were rendered, the specific service performed, or the charge for such service; and (3) plaintiffs did not seek to correct their insufficient notice of claim, and a claim which is not presented to the personal representative by the date specified in the general notice to creditors is forever barred against the estate, the personal representative, the collector, their heirs, and the devisees of the decedent, N.C.G.S. § 28A-19-3.

Appeal by plaintiffs from orders entered 6 February 2001, 13 February 2001, and 16 February 2001 by Judge W. Douglas Albright in Randolph County Superior Court. Heard in the Court of Appeals 14 February 2002.

Ottway Burton, P.A., by Ottway Burton, for plaintiff-appellants.

Frederick M. Dodge, II, for defendant-appellees Jesse H. Harrelson, Executor, Jesse H. Harrelson, individually, and wife, Dorothy J. Harrelson.

O'Briant, Bunch & Robins, by W. Edward Bunch, for defendant-appellee Dorothy Burnside.

Lori J. Williams for defendant-appellee Magnolia O. Hilton.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Randall A. Underwood and Jennifer T. Harrod, for defendant-appellees, Michael A. Stevens, Margaret Mastin Stevens and Branch Banking and Trust.

MARTIN, Judge.

Plaintiffs filed this action seeking judgment against defendants for a sum in excess of $10,000 for personal services allegedly rendered to Ruth B. Sykes, who is deceased. All defendants filed answers to the complaint and motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for plaintiffs' failure to state a claim upon which relief may be granted. Defendants' motions to dismiss were granted by the trial court and plaintiffs appeal.

The decedent, Ruth B. Sykes, a citizen and resident of Randolph County, died testate on 21 June 1999. On 24 June 1999, defendant, Jesse H. Harrelson, was appointed executor of decedent's estate. Defendants (Jesse H. Harrelson, Dorothy Burnside, and Magnolia O. Hilton) were named as heirs in decedent's will.

In his capacity as executor, Jesse Harrelson improperly placed a notice to claimants in the *High Point Enterprise*, a newspaper of general circulation in Guilford County. The notice indicated that all claims against the estate of Ruth B. Sykes were required to be filed by 30 September 1999. Since decedent had been a resident of Randolph County at the time of her death, the executor correctly readvertised a notice to creditors in *The Courier-Tribune*, a newspaper of general circulation in Randolph County. This second notice required that claims against decedent's estate be filed by 1 January 2000.

Though plaintiffs alleged that they presented a notice of claim to the executor, on 25 September 1999, their notice of claim was not filed with the Clerk of Superior Court of Randolph County until 29 December 1999. Plaintiffs' notice of claim does not state any specific amount alleged to be due, but simply demands "the sum in excess of $10,000." Plaintiffs' claim against decedent's estate purports to be for personal services performed by plaintiffs for decedent during the three and a half years prior to her death.

On 19 January 2000, Jesse Harrelson, as executor, rejected plaintiffs' notice of claim. Harrelson gave the following reasons for rejecting the notice of claim: the claims did not have basis in fact; the

claims sought an unreasonable amount for the services described; the claims failed to describe with particularity the dates services were provided, the amount of service expended, and the charges for the services; the claims did not detail the basis by which the deceased agreed to pay for such services; and decedent's estate did not have sufficient assets to pay the claims.

Decedent owned real property, described as Lots 42 and 43 of Manor Ridge in Randolph County, at the time of her death. A deed from Jesse Harrelson, individually and in his capacity as executor of the estate, his wife, Dorothy J. Harrelson, and the other heirs, Dorothy Burnside and Magnolia O. Hilton, to defendants, Michael A. Stevens and his wife, Margaret Mastin Stevens, for this property was signed on 1 and 4 October 1999 and recorded in the Office of the Register of Deeds of Randolph County. The grantees, Mr. and Mrs. Stevens, executed a deed of trust in favor of Branch Banking and Trust Company to secure repayment of a loan in the amount of $27,000.

After their claim was rejected by the executor, plaintiffs filed a complaint on 8 May 2000 seeking damages in excess of $10,000 against the named defendants for services allegedly provided by plaintiffs to Ruth B. Sykes. Plaintiffs did not allege that they performed these services pursuant to an agreement or contract with decedent; instead, they alleged that they performed these services with the expectation of payment therefor. Plaintiffs alleged that, after they presented Mrs. Sykes' executor with the notice of claim, he, with full knowledge of the scope and extent of plaintiffs' claim, distributed all of decedent's personal property to himself and his wife, Dorothy Harrelson, and to defendants Magnolia Hilton and Dorothy Burnside. Plaintiffs alleged that such personal property should have been sold and that the proceeds of such sale would have been sufficient to pay their claim.

Plaintiffs also allege that on 8 October 1999, Jesse Harrelson, Dorothy Harrelson, Dorothy Burnside, and Magnolia Hilton, with full knowledge of the scope and extent of plaintiffs' claim, sold the real property owned by decedent to defendants Michael and Margaret Stevens and divided the proceeds of the sale among decedent's heirs. Plaintiffs allege that the proceeds from this sale were sufficient to satisfy plaintiffs' pending claim. In addition to damages, plaintiffs sought to set aside the deed to the Stevens, and for the deed of trust to be stricken from the record book in the Randolph County Register of Deeds Office.

The sole issue on appeal is whether the trial court erred in granting defendants' motions to dismiss plaintiffs' complaint under N.C.R. Civ. P. 12(b)(6). Our standard of review of an order allowing a motion to dismiss is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint "unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

To present a proper claim against a decedent's estate, a claimant must comply with the provisions of G.S. § 28A-19-1(a), which require that a written statement of the claim be hand delivered or mailed to the personal representative or to the clerk of court. G.S. § 28A-19-1(a) specifically requires that

> [a] claim against a decedent's estate must be in writing *and state the amount or item claimed, or other relief sought, the basis for the claim*, and the name and address of the claimant. . . . (emphasis added)

The notice of claim filed by plaintiffs in the instant case did not comply with the statute. First, plaintiffs failed to "state the amount or item claimed." Plaintiffs notice of claim, stating only a claim for a sum "in excess of $10,000.00," is not definite enough to satisfy the statute. Additionally, plaintiffs failed to state the basis for their claim with particularity. Plaintiffs claimed that they were entitled to payment for the following personal services:

> domestic duties in and about the dwelling of the deceased as well as numerouse [sic] other services relating to the running of a household and caring for personal individual healthcare services. That these services also relate to general errand runnings [sic] for shopping and providing transportation to and from facilities that provide personal services, medicines and food.

Plaintiffs did not specify the dates upon which such services were rendered, the specific service expended, or the charge for such service. Plaintiffs only stated that they were demanding payment for services rendered from 1 January 1996 through 22 June 1999.

Therefore, plaintiffs did not present a proper notice of claim under G.S. § 28A-19-1(a).

A claim which is not presented to the personal representative pursuant to G.S. § 28A-19-1 by the date specified in the general notice to creditors is forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent. N.C. Gen. Stat. § 28A-19-3(a) (1999). Plaintiffs in the present case did not seek to correct their insufficient notice of claim against Ms. Sykes' estate to comply with G.S. § 28-19-1 at any time prior to 1 January 2000. Therefore, their claim is barred and the trial court correctly granted defendants' motions to dismiss.

Affirmed.

Judges HUDSON and CAMPBELL concur.

PHILLIP JOHNSON v. UNITED PARCEL SERVICE AND LIBERTY MUTUAL INSURANCE COMPANY

No. COA01-319

(Filed 16 April 2002)

Workers' Compensation— attorney fees—reasonable grounds to defend disability claim

Defendants did not have reasonable grounds to defend plaintiff's workers' compensation claim, and the Industrial Commission erred by failing to tax plaintiff's attorney fees as costs under N.C.G.S. § 97-88.1, where plaintiff met his burden of establishing disability with a Form 21 agreement, which created the presumption of a continued disability; plaintiff never signed an agreement electing partial disability compensation, although he unsuccessfully attempted to return to work in another job; and a letter from defendants to plaintiff's counsel cancelling a hearing appeared to settle the issue and restore the presumption of ongoing total disability. Nothing thereafter occurred to put the presumption in question and defendants did not have reasonable grounds to defend the claim.

Appeal by plaintiff from judgment entered 20 October 2000 by Commissioner Bernadine S. Ballance in the North Carolina Industrial Commission. Heard in the Court of Appeals 30 January 2002.

Mast, Schulz, Mast, Mills & Stem, PA, by Charles D. Mast for plaintiff-appellant.

Cranfill, Sumner & Hartzog, LLP, by P. Collins Barwick, III and Jaye E. Bingham for defendants-appellants.

THOMAS, Judge.

Plaintiff, Phillip Johnson, appeals from an opinion and award by the North Carolina Industrial Commission (Commission) regarding the taxing of attorney fees in a workers' compensation claim. For the reasons discussed herein, we reverse.

The parties stipulated to the following facts: Plaintiff was working for defendant, the United Parcel Service (UPS), when he sustained a compensable back injury on 11 June 1991. The parties entered into a Form 21 agreement, by which defendants, UPS and Liberty Mutual Insurance Company (Liberty) agreed: (1) plaintiff was disabled; and (2) to pay him the maximum rate of $406.00 per week and continuing for "necessary weeks."

In July 1994, Liberty informed plaintiff of an offer of a full-time job with Combined Contract Services paying $4.25 per hour as an airport screener. Liberty sent plaintiff's counsel a letter stating that plaintiff had until 18 July 1994 to accept or decline the position. Plaintiff then filed a Form 33 request for hearing. On 18 July 1994, defendants filed a Form 24 application to stop payment of compensation. On the same day, plaintiff notified defendants that he accepted the job as an airport security screener under protest. There was no employment position available for plaintiff with UPS.

Plaintiff only worked from 8 August 1994 to 16 October 1994 and defendants continued to pay temporary total disability benefits. Then, with a hearing scheduled for December, defendants wrote plaintiff's counsel a letter on 10 November 1995 stating in part:

> As you know, your client is continuing to receive temporary total disability benefits, and I do not believe that there are any issues currently in dispute which would require the necessity of the hearing. As long as we keep paying temporary total disability, it

would not seem wise use of the Industrial Commission's time to hold a hearing in this matter.

Plaintiff received the temporary total disability payments until 30 May 1997, when defendants discontinued them alleging the 300-week maximum for benefits under N.C. Gen. Stat. § 97-30 had passed. Defendants explained that the only way plaintiff could receive additional benefits was if his condition worsened during the two-year statute of limitations period after the 300-week lapse.

Plaintiff has not worked since October 1994. Evidence showed that plaintiff has received $40,009.44 in medical compensation and $125,454 in disability compensation, of which $58,464 was temporary partial disability. Defendants have paid plaintiff no weekly benefits since 30 May 1997.

Defendants filed a Form 24 application to terminate plaintiff's partial disability benefits, which was initially approved. However, the Commission subsequently found that the Form 24 application was improvidently approved and based upon a misunderstanding of the facts. It set the approval aside. Because plaintiff had not elected to receive *partial* disability benefits, defendants were ordered to pay plaintiff pursuant to N.C. Gen. Stat. § 97-29 for *total* disability benefits, retroactive to 16 October 1994 and continuing through the present.

In its opinion and award, the Commission found that:

> Defendants have not produced any evidence that plaintiff has been able to return to suitable employment at the same or similar wages as he was earning prior to his injury. Nor have defendants offered any evidence that plaintiff is capable of earning wages at any kind of employment beyond the return to work effort which he made from August to October 1994 in a part time, modified job. The wages earned by plaintiff in his attempt to return to modified work are not indicative of his wage earning capacity in the competitive job market. All plaintiff's treating physicians were of the opinion that plaintiff should attempt to return to work, and that his work attempt was unsuccessful. Plaintiff's current treating physicians are of the opinion that plaintiff is not presently capable of working in any kind of job, nor has he been since October 1994 when he stopped working the security job.

The Commission, however, then found defendants "had reasonable grounds to defend this claim." It ordered attorney fees to be paid only from the accrued award, and not pursuant to N.C. Gen. Stat. § 97-88.1.

By plaintiff's sole assignment of error, he argues the Commission erred in: (1) finding that defendants had reasonable grounds to defend his claim; and (2) failing to tax plaintiff's attorney fees as costs. We agree.

"Whether a defendant had reasonable ground[s] to bring a hearing is a matter reviewed by this Court *de novo*." *Ruggery v. N.C. Dept. of Corrections*, 135 N.C. App. 270, 273, 520 S.E.2d 77, 80-81 (1999) (citing *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 50, 464 S.E.2d 481, 484 (1995), *disc. rev. denied*, 343 N.C. 516, 472 S.E.2d 26 (1996)). A defendant has reasonable grounds to defend a claim where the defense is based in "reason rather than in stubborn, unfounded litigiousness." *Sparks v. Mountain Breeze Restaurant and Fish House, Inc.*, 55 N.C. App. 663, 665, 286 S.E.2d 575, 576 (1982).

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

The burden to establish the existence and extent of a disability lies with the employee. *Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 545 S.E.2d 485 (2001). In the instant case, plaintiff carried his burden by signing the Form 21 agreement with defendants. An approved Form 21 creates the presumption of an employee's continued disability. *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 476 S.E.2d 434 (1996), *disc. rev. denied*, 345 N.C. 343, 483 S.E.2d 169 (1997). Once the presumption attaches, the employer then has the burden of establishing that the employee is employable. *Id.*

Plaintiff accepted a position as an airport security screener, but testified that he did so under protest. Then, claiming he suffered excruciating pain, frequently fell down, and had serious difficulties driving, he quit after approximately two months.

Prior to the 10 November 1995 letter, defendants corresponded with plaintiff and referred to his benefits as "partial." Plaintiff, however, never signed a Form 26 agreement to elect compensa-

tion for partial disability. The 10 November 1995 letter and hearing cancellation appeared to settle the issue and restore the presumption of ongoing total disability. *See Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 181 S.E.2d 588 (1971). Nothing thereafter occurred to put the presumption in question. Defendants did not have reasonable grounds to defend plaintiff's claim and, therefore, we reverse the Commission.

REVERSED.

Judges WYNN and HUDSON concur.

REESE ANN JONES, PLAINTIFF v. MICHAEL WAINWRIGHT AND BRUCE VEDDER WAINWRIGHT, DEFENDANTS

No. COA01-747

(Filed 16 April 2002)

1. Arbitration and Mediation— appeal fee—deposited to General Fund

The trial court erred by taxing a $75 arbitration appeal fee award as costs to defendants where the arbitrator's award was $1,879 and the jury award $256. N.C.G.S. § 6-20 permits the trial court to award costs in its discretion unless otherwise provided by law; Rule 5(b) of the arbitration rules is explicit in its requirement that the $75 fee be deposited into the State's General Fund if the trial did not improve plaintiff's position.

2. Arbitration and Mediation— attorney fees—factors to be considered

The trial court did not abuse its discretion in its award of $3,045.00 in attorney fees to plaintiff after a trial which followed arbitration where the court made findings that reflected its consideration of the factors in *Washington v. Horton*, 132 N.C. App. 347, in determining whether to award attorney fees and made appropriate findings regarding the amount of the fees.

Appeal by defendants from an order entered 22 March 2001 by Judge Alice C. Stubbs in Wake County District Court. Heard in the Court of Appeals 13 March 2002.

E. Gregory Stott for plaintiff-appellee.

Broughton, Wilkins, Sugg, Hall & Thompson, P.L.L.C., by Jonathan E. Hall, for defendant-appellants.

HUNTER, Judge.

Michael Wainwright and Bruce Vedder Wainwright ("defendants") appeal an order awarding Reese Ann Jones ("plaintiff") attorney's fees and costs following entry of a jury verdict in favor of plaintiff. We affirm in part and reverse and remand in part.

This case stems from a June 1997 automobile collision wherein defendant Michael Wainwright rear-ended plaintiff's vehicle and then fled the scene. Plaintiff filed a complaint on 14 October 1997 seeking damages for Michael Wainwright's negligence, as well as attorney's fees. The matter was submitted to court-ordered arbitration, and in June 1998, the arbitrator ruled in favor of plaintiff in the amount of $1,879.00. Defendants then filed an Offer of Judgment on 21 July 1998 for the amount determined by the arbitrator. Plaintiff declined the offer and requested a trial *de novo* in district court.

Following a trial on the matter, a jury returned a verdict in favor of plaintiff in the amount of $256.00. The trial court entered judgment thereon on 30 July 1999. By a separate order dated 26 July 1999, the trial court taxed costs of $55.00 against defendants, and ordered them to pay plaintiff $3,045.00 in attorney's fees. Defendants appealed the order of costs and attorney's fees to this Court. In an unpublished opinion, this Court vacated the order, concluding the order failed to reflect that the trial court had considered all of the factors required under this Court's decision in *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999), and that the order reflected that attorney's fees were awarded as a matter of law, not in the court's discretion as required. *See Jones v. Wainwright*, 139 N.C. App. 450, 537 S.E.2d 272 (2000) (unpublished opinion). We remanded the matter to the trial court with instructions for further review and findings consistent with *Washington*.

Upon remand, the trial court entered an order on 22 March 2001 containing additional findings and again concluding that plaintiff was entitled to attorney's fees in the amount of $3,045.00. The trial court taxed the same $55.00 costs to defendants, but also added as costs a $75.00 arbitration appeal fee. From this order, defendants appeal.

Defendants make two arguments on appeal: (1) the trial court erred in taxing as costs the $75.00 arbitration appeal fee; and (2) the trial court abused its discretion in awarding plaintiff $3,045.00 in attorney's fees. We agree with defendants as to their first argument, and accordingly reverse the trial court's decision to tax the $75.00 appeal fee to defendants. However, we affirm the trial court's order in all other respects, including the taxing of costs of $55.00 to defendants, and awarding of attorney's fees to plaintiff in the amount of $3,045.00.

[1] Regarding the $75.00 arbitration appeal fee, Rule 5(b) of the Rules for Court-Ordered Arbitration provides:

> **(b) Filing Fee.** A party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held by the court until the case is terminated and returned to the demanding party only if there has been a trial in which, in the trial judge's opinion, the position of the demanding party has been improved over the arbitrator's award. Otherwise, the filing fee shall be deposited into the State's General Fund.

R. Ct.-Ordered Arbitration in N.C. 5(b), 2002 N.C. R. Ct. 234.

Thus, the rules of arbitration provide specifically for the disposition of the $75.00 appeal fee upon conclusion of the trial. We acknowledge that N.C. Gen. Stat. § 6-20 (1999) permits the trial court to award costs in its discretion; however, it may do so "unless otherwise provided by law." N.C. Gen. Stat. § 6-20. We believe Rule 5(b) of the arbitration rules is explicit in its requirements for disposition of the $75.00 fee and thus falls within the "unless otherwise provided by law" limitation on the court's discretion to award costs. The trial court was required to dispose of the $75.00 fee in the manner set forth in Rule 5(b), which requires a determination of whether the trial improved plaintiff's position over the arbitrator's award of $1,879.00, and if not, the $75.00 must be deposited into the State's General Fund. It is clear from the record that plaintiff's position was not improved by trial. The jury only awarded plaintiff $256.00, whereas the arbitrator's award was $1,879.00. The $75.00 must be deposited into the State's General Fund. We therefore reverse the trial court's order only to the extent it taxed the $75.00 as costs to defendants.

[2] Defendants next argue that the trial court erred in awarding plaintiff attorney's fees. They contend the trial court failed to properly consider the *Washington* factors as required by our prior opinion, and

that the trial court abused its discretion in awarding $3,045.00 in fees. We disagree.

"The allowance of attorney fees is in the discretion of the presiding judge, and may be reversed only for abuse of discretion." *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334. In *Washington*, this Court set forth six factors that the trial court must consider in determining whether to award attorney's fees: (1) settlement offers made prior to the institution of the action; (2) offers of judgment, and whether the judgment finally obtained was more favorable than those offers; (3) whether the defendant unjustly exercised superior bargaining power; (4) the context in which the dispute arose in cases of an unwarranted refusal by an insurance company; (5) the timing of settlement offers; and (6) the amounts of the settlement offers as compared to the jury verdict. *Id.* at 351, 513 S.E.2d at 334-35.

The record in this case reflects that the trial court complied with our prior mandate by making findings that reflect its consideration of all applicable *Washington* factors, and by stating that the award of fees was made in its discretion. The trial court's findings with respect to these factors are supported by the evidence.

Moreover, with respect to the amount of fees, the trial court made appropriate findings on the specific tasks performed by plaintiff's attorney; the amount of time actually devoted to such tasks, as well as the amount of time reasonably devoted to such tasks; and whether the rate charged for such tasks was customary for the profession. The trial court awarded fees only for the amount of time it determined was reasonably spent in prosecuting the claim, which was less than what plaintiff's attorney had billed, and at the rate it determined to be customary for the profession. Defendants have failed to show that the trial court abused its discretion in awarding attorney's fees.

The order on appeal is affirmed in all respects, with the exception of that portion taxing the $75.00 arbitration appeal fee to defendants. The $75.00 must be deposited into the State's General Fund in accordance with Rule 5(b) of the Rules for Court-Ordered Arbitration.

Affirmed in part; reversed and remanded in part.

Judges WALKER and BRYANT concur.

BRENDA HARVEY, EMPLOYEE, PLAINTIFF v. CEDAR CREEK BP, EMPLOYER, AND CASUALTY RECIPROCAL EXCHANGE, CARRIER, DEFENDANTS

No. COA01-25

(Filed 16 April 2002)

Workers' Compensation— involuntary dismissal for failure to prosecute—dismissal with prejudice—abuse of discretion

The full Industrial Commission did not err by vacating an order by the deputy commissioner dismissing plaintiff's workers' compensation claim and a subsequent order by the executive secretary allowing defendants' motion to strike plaintiff's request for a hearing based on an abuse of discretion by the deputy commissioner, because: (1) the involuntary dismissal of plaintiff's claim entered by the deputy commissioner upon plaintiff's failure to prosecute, which does not mention whether it was entered with or without prejudice, must be construed as having been entered with prejudice; and (2) the dismissal with prejudice terminated plaintiff's exclusive remedy when other lesser sanctions were appropriate and available.

Appeal by defendants from order filed 17 August 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 December 2001.

Maxwell & Melvin, by Stephen R. Melvin, for plaintiff-appellee.

Young Moore and Henderson, P.A., by Joe E. Austin, Jr., and Tina Lloyd Hlabse, for defendant-appellants.

GREENE, Judge.

Cedar Creek BP and Casualty Reciprocal Exchange (collectively, Defendants) appeal an order filed 17 August 2000 by the Full Commission of the North Carolina Industrial Commission (the Commission) vacating: (a) an order by the deputy commissioner dismissing a workers' compensation claim by Brenda Harvey (Plaintiff) and (b) a subsequent order by the executive secretary allowing Defendants' motion to strike Plaintiff's request for a hearing.

On 19 May 1995, Plaintiff, an employee of Cedar Creek BP, filed a workers' compensation claim, alleging she had injured her foot when she fell at work. Plaintiff submitted a Form 33 dated 13 October 1998 requesting her claim be assigned for hearing before a deputy com-

missioner. A hearing was scheduled for 15 November 1999; however, neither Plaintiff nor her attorney appeared before the deputy commissioner on that date. When Defendants moved for a dismissal of Plaintiff's workers' compensation claim with prejudice, the deputy commissioner entered an order filed 22 November 1999 dismissing Plaintiff's claim without stating whether he was doing so with or without prejudice.

In a second Form 33 dated 19 January 2000, Plaintiff again requested her claim be assigned for a hearing. Defendants responded by filing a motion dated 3 March 2000 requesting Plaintiff's Form 33 be stricken. In an order filed 27 March 2000, the executive secretary granted Defendants' motion, noting the deputy commissioner had dismissed Plaintiff's claim with prejudice. On 3 April 2000, Plaintiff appealed this order to the Commission. In an order filed 17 August 2000, the Commission vacated both the deputy commissioner's dismissal of Plaintiff's claim and the executive secretary's order striking Plaintiff's request for a hearing on the grounds that: (1) no statutory authority for the dismissal of Plaintiff's claim existed at the time of the hearing on 15 November 1999; and (2) in the alternative, "the dismissal of [P]laintiff's claim terminated [her] exclusive remedy when other lesser sanctions were appropriate and available" and therefore constituted an abuse of discretion.

The dispositive issue is whether the deputy commissioner's dismissal of Plaintiff's claim was with or without prejudice.

We first note that even prior to the enactment of Workers' Compensation Rule 613(1)(c),[1] the Industrial Commission, which includes the deputy commissioner, had the inherent authority to dismiss a claim with or without prejudice for failure to prosecute. "[T]he Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act." *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 138, 337 S.E.2d 477, 483 (1985); N.C.G.S. § 97-83 (1999). One of the powers inherent in the courts and thus also in the Industrial Commission is the "power of the court to dismiss a case for want of prosecution." *Swygert v. Swygert*, 46 N.C. App. 173, 178, 264 S.E.2d 902, 905, *appeal dismissed*, 270 S.E.2d 116 (1980). Accordingly, the Commission, in falsely believing the

1. Rule 613(1)(c) was enacted in June 2000 and provides: "Upon proper notice and an opportunity to be heard, any claim may be dismissed with or without prejudice by the Industrial Commission on its own motion or by motion of any party for failure to prosecute or to comply with these Rules or any Order of the Commission." Workers' Comp. R. N.C. Indus. Comm'n 613(1)(c), 2002 Ann. R. N.C. 770.

Industrial Commission lacked such authority, erred in setting aside on this basis the orders by the deputy commissioner and the executive secretary.

With respect to an involuntary dismissal, N.C. Gen. Stat. § 1A-1, Rule 41(b) states: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, . . . operates as an adjudication upon the merits." N.C.G.S. § 1A-1, Rule 41(b) (1999). In other words, an involuntary dismissal which fails to state that it is without prejudice will be construed as being with prejudice. While "[t]he Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act," they may provide guidance in the absence of an applicable rule under the Workers' Compensation Act. *See Hogan*, 315 N.C. at 137, 337 S.E.2d at 483 (determining the Industrial Commission has the inherent power, analogous to N.C. Gen. Stat. § 1A-1, Rule 60(b)(6), to grant relief from judgment). The Workers' Compensation Act provides no direction for the proper interpretation of an involuntary dismissal that is silent on whether the dismissal is with or without prejudice. Thus, this Court may look to N.C. Gen. Stat. § 1A-1, Rule 41(b) for guidance.

Accordingly, the involuntary dismissal of Plaintiff's claim entered by the deputy commissioner upon Plaintiff's failure to prosecute, which does not mention whether it was entered with or without prejudice, must be construed as having been entered with prejudice. Because the dismissal with prejudice "terminated [P]laintiff's exclusive remedy when other lesser sanctions were appropriate and available," we agree with the Commission's alternative conclusion that the deputy commissioner's order dismissing Plaintiff's claim and the executive secretary's order allowing Defendants' motion to strike Plaintiff's request for a hearing should be vacated based on an abuse of discretion by the deputy commissioner[2] and Plaintiff's claim should be reset for hearing. *See Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 17, 510 S.E.2d 388, 393 (in reviewing a dismissal for abuse of discretion, the exclusivity of the plaintiff's remedy and the appropriateness of alternative sanctions must be considered), *disc. review denied*, 350 N.C. 834, 538 S.E.2d 197 (1999). Accordingly, we affirm the Commission.

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2. The Commission has the inherent power, analogous to N.C. Gen. Stat. § 1A-1, Rule 60(b)(6), to strike an order based on an abuse of discretion. *See Hogan*, 315 N.C. at 137, 337 S.E.2d at 483.

Affirmed.

Judges McCULLOUGH and CAMPBELL concur.

MARY JOHNSON, PLAINTIFF v. LOUIS ADOLF AND, MARY ADOLF, DEFENDANTS

No. COA01-536

(Filed 16 April 2002)

Child Support, Custody, and Visitation— custody—changed circumstances—impact on child—determination required

An order decreeing that the maternal grandmother and the parents of a child share joint legal custody was remanded where plaintiff, the grandmother, had had sole custody, the trial court found that there had been a substantial change in circumstances but never determined that the changes impacted the child positively or negatively, and the court never assessed whether it is in the best interest of the child that the prior order be modified.

Appeal by plaintiff from orders dated 6 October 2000 and 18 October 2000 by Judge Elaine M. O'Neal in Durham County District Court. Heard in the Court of Appeals 12 March 2002.

Stubbs, Cole, Breedlove, Prentis & Biggs, P.L.L.C., by Barri H. Payne, for plaintiff-appellant.

Browne, Flebotte, Wilson & Horne, P.L.L.C., by Candy Pahl, Daniel R. Flebotte, and Ann Marie Vosburg, for defendant-appellees.

GREENE, Judge.

Mary Johnson (Plaintiff) appeals orders dated 6 October 2000 and 18 October 2000 modifying Plaintiff's sole custody of the minor child Mary Catherine Adolf (Katie) to joint legal custody with the biological parents, Louis Adolf (the Father) and Mary Adolf (the Mother) (collectively, Defendants).

Katie was born 10 April 1992 and is the maternal granddaughter of Plaintiff. In March 1996, a court order was entered granting joint

custody of Katie to Plaintiff and Defendants. During the fall of 1996, the Mother, who had care of Katie during the day, was hospitalized twice with delusional and irrational thought patterns for which her doctor increased her medications. Around this time, Katie and her brother were found several times playing in the streets and a report was filed with the Carrollton County Department of Social Services in Kentucky. On several occasions in 1997, Katie arrived at her half-day preschool program without a lunch and improperly clothed. After these occurrences, Plaintiff moved the trial court on 7 February 1997 to modify the March 1996 custody order. In August 1997, the trial court awarded sole custody of Katie to Plaintiff, finding the Defendants unfit to have custody because of the Mother's periods of delusional behavior, Defendants' nomadic lifestyle in that they had moved six times since Katie's birth, and the Father's failure to demonstrate the necessary insights into his wife's condition that would allow Katie to be safe in the home.

On 19 May 1999, Defendants filed a motion to modify the August 1997 custody order. In an order filed 18 October 2000 *nunc pro tunc* for 9 June 2000, the trial court found as fact that "there had been a substantial change in circumstances since 1997."

The trial court concluded as a matter of law that:

> 2. The proper standard for deciding whether a modification of custody is justified is whether there has been a substantial change in circumstances affecting the welfare of the child. If there has been a substantial change in circumstances, then the [trial] court must consider whether a change in custody would be in the best interest of the child. Bivens v. Cottle [,] 120 N.C. App. 467, 462 S.E.2d 829 (1995).
>
> 3. There have been changes in circumstances since August[] 1997.
>
> 4. It is not, however, in [Katie's] best interest to move her custody from North Carolina to Iowa at this time.

The trial court further stated it was not entering a permanent order, but it would give Defendants thirty days to consider whether they would be willing or able to move to Durham, North Carolina.

At a 24 July 2000 hearing, the Father informed the trial court that he had a job offer from a firm in Greenville, North Carolina, and had made steps toward moving back to North Carolina. In an order dated

6 October 2000, issuing from the 24 July 2000 hearing, the trial court decreed that Plaintiff and Defendants would share joint legal custody of Katie, with physical custody remaining with Plaintiff until further order from the trial court.

The dispositive issue is whether conclusions exist showing that there has been a substantial change of circumstances affecting the welfare of the child and that it is in the best interest of the child to place joint legal custody with Plaintiff and Defendants.

In a custody modification action, even one involving a parent, the existing child custody order cannot be modified except upon a showing by the party seeking a modification that there has been a substantial change in circumstances affecting the welfare of the child and if so, that a change in custody is in the best interest of the child. *Bivens v. Cottle*, 120 N.C. App. 467, 469, 462 S.E.2d 829, 831 (1995), *appeal dismissed*, 346 N.C. 270, 485 S.E.2d 296 (1997). The trial court must first determine whether the movant has met her burden of making these showings. *Id.* Because these determinations involve an exercise of judgment and an application of legal principles, they are appropriately classified as conclusions of law. *See In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999).

In this case, the trial court stated there "had been a substantial change in circumstances" since entry of the August 1997 custody order.[1] The trial court never determined, however, that the changes impacted the child, either positively or negatively. *See Pulliam v. Smith*, 348 N.C. 616, 620, 501 S.E.2d 898, 900 (1998). Furthermore, assuming the changes impacted the child, the trial court never assessed (in its orders) whether it is in the best interest of the child that the August 1997 child custody order be modified. For these reasons, the orders of the trial court must be reversed and remanded. On remand, because it has been some eighteen months since the entry of the orders modifying custody, the trial court must take new evidence and enter a new order in response to Defendants' 19 May 1999 motion for change of custody.

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1. Although this statement is included in the trial court's 18 October 2000 order as a finding of fact, and thus inappropriately labeled, this Court will treat it as a conclusion of law. *See In re Will of Church*, 121 N.C. App. 506, 508 n.1, 466 S.E.2d 297, 298 n.1 (1996). Also, there is language included in the conclusion of law section of the order stating that "[t]here have been changes in circumstances since August[] 1997." This language, however, is not adequate to modify a custody order, as the change must be substantial. *Bivens*, 120 N.C. App. at 469, 462 S.E.2d at 831.

Reversed and remanded.[2]

Judges McGEE and CAMPBELL concur.

STATE OF NORTH CAROLINA v. DENNIS LEE WINGATE

No. COA01-393

(Filed 16 April 2002)

Probation and Parole— work release—fines, fees, and costs

The trial court in a probation revocation was permitted to recommend that defendant pay costs and attorney fees as a condition if work release was granted, was not permitted to recommend a fine as a condition of work release, and was permitted to recommend a community service fee as a condition of work release provided the fee had been incurred by the State and constituted damages instead of additional punishment. The proceeding was remanded for the trial court to determine whether the fee was a cost actually incurred by the State.

On writ of certiorari to review judgment dated 11 October 2000 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Emery E. Milliken, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

GREENE, Judge.

Dennis Lee Wingate (Defendant), by writ of certiorari, appeals a judgment dated 11 October 2000 revoking his probation and entering an active sentence on his 19 January 2000 guilty plea to perjury.

On 19 January 2000, Defendant pled guilty to perjury and was sentenced to a minimum term of 21 months and a maximum term of 26 months. The trial court suspended Defendant's sentence and placed

2. Because we are reversing the trial court's orders, it is unnecessary for us to address the other assignments of error raised by Plaintiff in her brief to this Court.

him on supervised probation for 36 months. Pursuant to the trial court's judgment suspending sentence, Defendant was required to: keep scheduled appointments with a probation officer; commit no criminal offense; remain within his county of residence unless granted written permission to leave by his probation officer; complete fifty hours of community service; be in his place of residence between the hours of 6 p.m. and 6 a.m.; not use, possess, or control any illegal drug or controlled substance; and participate in any counseling, treatment, or education program as directed by the probation officer. In addition, the trial court imposed monetary conditions on Defendant's suspended sentence and ordered him to pay a total amount of $2,231.00, including: $231.00 in costs; a $1,500.00 fine due to Cabarrus County; a $100.00 community service fee; and $400.00 in attorney's fees.

On 28 July 2000, Catherine Andre (Andre), Defendant's probation officer, filed a violation report alleging Defendant had: violated the monetary conditions of his probation; failed to keep scheduled appointments; failed to participate in an evaluation, counseling, treatment or education program as directed by Andre; tested positive for cocaine use on four different occasions; violated his curfew on four occasions; left his county of residence without Andre's permission; and been held in a jail in Chesterfield, South Carolina, on 19 July 2000 for driving while license revoked and providing fictitious information.

On 11 October 2000, the trial court held a probation violation hearing and Defendant admitted the violations but argued "drug addiction . . . kept him from meeting his obligations." The trial court found the violations contained in the report had been admitted and were willful. Thereafter, the trial court revoked Defendant's probation and activated his sentence. Both in court and in its written order, the trial court recommended that "as a condition of work release if granted[, Defendant] pay monies owed in [the 19 January 2000] judg[]ment suspending sentence."

The dispositive issue is whether the trial court erred in recommending that if work release were granted, Defendant pay monies owed under the judgment suspending sentence.

Initially we note Defendant failed to object to the trial court's recommendation that if work release were granted, Defendant pay the amounts ordered under the 19 January 2000 judgment and therefore

has not preserved the issue for appellate review. N.C.R. App. P. 10(b)(1). Nevertheless, in order to prevent manifest injustice to Defendant, we address Defendant's argument pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. *See* N.C.R. App. P. 2 (Rules of Appellate Procedure may be suspended to "prevent manifest injustice to a party").

When an active sentence is imposed, a trial court is permitted to recommend to the Secretary of the Department of Correction that restitution or reparation be imposed as a condition of attaining work-release privileges. N.C.G.S. § 148-33.2(c) (1999). The Secretary of the Department of Correction is "not required to follow the trial court's recommendation." *State v. Lambert*, 40 N.C. App. 418, 420, 252 S.E.2d 855, 857 (1979). "Even though [the trial court's] recommendations . . . are not binding," the trial court is not permitted to make unsupported recommendations. *State v. Daye*, 78 N.C. App. 753, 757, 338 S.E.2d 557, 560, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986). Thus, the trial court's recommendation should "be in accordance with the applicable provisions of G.S. 15A-1343(d) and Article 81C of Chapter 15A of the General Statutes." N.C.G.S. § 148-33.2(c). Within statutory limitations, the trial court's recommendation "for restitution or restoration to the aggrieved party as a condition of attaining work-release privileges" should fulfill the purpose of "rehabilitation and not additional penalty or punishment, and the sum ordered or recommended must be reasonably related to the damages incurred." *State v. Killian*, 37 N.C. App. 234, 238, 245 S.E.2d 812, 815 (1978). Our courts have held that a trial court is permitted to recommend as a condition to work release: "restitution to a party injured by criminal activity," *Lambert*, 40 N.C. App. at 420-21, 252 S.E.2d at 857; restitution for attorney's fees, *State v. Alexander*, 47 N.C. App. 502, 502-03, 267 S.E.2d 396, 396 (1980); the imposition of costs, *see id.*; and the costs of the defendant's keep, *see Killian*, 37 N.C. App. at 239, 245 S.E.2d at 816. The trial court, however, is prohibited from recommending the imposition of a fine because "a fine is not 'restitution or reparation' within the meaning of [N.C. Gen. Stat. § 148-33.2(c)]." *Alexander*, 47 N.C. App. at 503, 267 S.E.2d at 396.

In this case, the judgment suspending sentence imposed as monetary conditions: $231.00 in costs; a $1,500.00 fine due to Cabarrus County; a $100.00 community service fee; and $400.00 in attorney's fees. Upon revocation of Defendant's probation and activation of his sentence, the trial court was permitted to recommend Defendant pay, as a condition to work release if granted, the $231.00 in costs and the

$400.00 in attorney's fees. Provided the community service fee had been incurred by the State and constituted damages as a result of Defendant's commission of the crime, instead of an additional penalty or punishment, the trial court was permitted to recommend Defendant pay community service fees as a condition to work release.[1] The trial court, however, was not permitted to recommend the imposition of a $1,500.00 fine as a condition to work release. Accordingly, we modify the trial court's judgment by striking that portion recommending the payment of a $1,500.00 fine, *see Alexander*, 47 N.C. App. at 503, 267 S.E.2d at 396, and remand for the trial court to determine if the community service fee was a cost actually incurred by the State.

Modified and remanded.

Judges McGEE and CAMPBELL concur.

YOLANDRA BEST AND ROY HUDSON, PETITIONERS v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, JOHN UMSTEAD HOSPITAL, RESPONDENT

No. COA01-118

(Filed 7 May 2002)

1. Administrative Law— scope of review—State personnel just cause dismissal case

The trial court exercised the appropriate scope of review in a State personnel just cause dismissal case and the State Personnel Commission properly required petitioner state employees to prove the absence of substantial evidence of reasonable cause for their termination.

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1. Defendant argues in his brief to this court that the "[c]ommunity [s]ervice fee is a normal operating expense of local or State government and as such cannot be considered 'restitution.'" We disagree. Because the community service expenses for Defendant would not have been incurred absent the commission of a crime by Defendant, it is not a normal operating expense of government. *See Alexander*, 47 N.C. App. at 503, 267 S.E.2d at 396-97 (affirming the recommendation of the imposition of costs as a condition to work release).

2. Public Officers and Employees— judicial review of agency decision—state employees' failure to submit to drug testing—reasonable cause

The trial court did not err by reversing the State Personnel Commission's (SPC) decision to dismiss petitioner state employees from their jobs for alleged reasonable cause based on their refusal to submit to a blood test for drugs in violation of the Department of Health and Human Services Directive 47, because the employer hospital did not have reasonable cause to request a drug test of petitioners based on the facts that: (1) although a coworker suspected a straw containing white residue that she saw in the chart room was used by petitioners for drug use, the coworker observed no erratic behavior by petitioners and she did not believe that either petitioner appeared to be under the influence of any substances; (2) searches revealed no substances on either petitioner, but did reveal a straw on one of the petitioners, which the coworker indicated was not the straw she saw earlier in the chart room; (3) other information relied upon by SPC, such as the suggestion that one petitioner instigated a telephone call to draw the coworker out of the chart room, was not discovered until later; (4) the coworker could not identify the power residue on the straw that she saw and she was not able to articulate any other basis for her suspicion; and (5) no other coworker had similar suspicions, and the strip searches of petitioners revealed nothing improper or illegal.

3. Constitutional Law— Fourth Amendment—unreasonable searches—drug testing of state employees

The Department of Health and Human Services had no basis to terminate petitioner state employees from employment for refusing to comply with the Department's request for petitioners to submit to drug testing, because: (1)the Department had no reasonable cause to request drug tests of petitioners; and (2) a person may not be discharged for refusing to waive a right which the Constitution guarantees to him, including the Fourth Amendment Right to be free from unreasonable searches.

4. Administrative Law— whole record test-findings of fact—reasonable cause—drug testing of state employees

The whole record test reveals that the evidence did not support the State Personnel Commission's findings of fact that John Umstead Hospital had reasonable cause to request that petitioner

state employees submit to drug testing, because: (1) a coworker's testimony reveals the absence of any specific objective and articulable facts and reasonable inferences drawn to show reasonable cause under Department of Health and Human Services Directive 47 or the Fourth Amendment of the United States Constitution; and (2) petitioners carried their burden of proving that their employer did not have reasonable cause to request that petitioners should submit to drug testing.

Judge TYSON dissenting.

Appeal by respondent from an order entered 24 October 2000 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 28 November 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for respondent-appellant.

Grafstein & Walczyk, P.L.L.C., by Lisa Grafstein and Konrad Schoen, for petitioner-appellees.

HUDSON, Judge.

Respondent, the Department of Health and Human Resources ("the Department"), appeals an Order entered 24 October 2000 by Judge Abraham Penn Jones in the superior court which reversed and remanded the decision of the State Personnel Commission ("SPC"). For the reasons discussed herein, we affirm the superior court's order.

We begin with a brief summary of the pertinent facts. Petitioners Yolandra Best ("Ms. Best") and Roy Hudson ("Mr. Hudson") were employed by respondent-appellant Department of Health and Human Services at John Umstead Hospital ("JUH") beginning 4 March 1987 and 15 October 1992, respectively. Both worked as Health Care Technicians at JUH until they were discharged from their jobs on 19 February 1997. On Saturday, 15 February 1997, petitioners were on the job at JUH.

Ms. Amanda Blanks, a Rehabilitation Therapy Coordinator at JUH, was also at work that day, even though it was her scheduled day off. She initiated the chain of events which has culminated in these proceedings.

According to Ms. Blanks, on 15 February 1997, at around 9:30 a.m., she went through the nurses' workstation to the "chart room."

As she entered the chart room, she "ran into or saw Mr. Hudson initially, and Mr. Coles, who was also the healthcare tech on the ward, sitting at the counter." Ms. Blanks testified that "a few minutes later I saw Yolandra Best come out [of the chart room]." In the chart room, Ms. Blanks noticed on the counter "a set of keys, pack of cigarettes, and a straw about three to four inches long," with a "white residue in one end of it." Shortly thereafter, Ms. Blanks left the chart room to take a telephone call at the nurses' station. While she was "in the process of getting off the phone," Mr. Hudson "walked back into the nurse's station," asked where his keys were, stepped in to the chart room, and immediately exited the chart room with "a set of keys and the pack of cigarettes that had been laying on the counter." When Ms. Blanks re-entered the chart room, she noticed "that the keys, the cigarettes, and the straw that [she] had seen earlier were all missing." She "look[ed] around" for these items, but could not find them. On direct-examination Ms. Blanks testified that she did not see anyone else enter the chart room during that time, however, on cross-examination she admitted that she was not facing the chart room during the entire telephone conversation and may not have seen everyone in the area. Based on these observations, Ms. Blanks reported to her supervisor, Ms. Jo Schuchardt, that she suspected Mr. Hudson and Ms. Best of using the straw with illegal drugs.

Later that morning, Ms. Schuchardt informed Ms. Blanks that Dr. Patricia Christian (director of JUH), Mr. Sandy Brock (director of human resources at JUH), and Officer Pendleton (Butner Public Safety) were on their way to JUH. Officer Pendleton arrived first; when he did, Ms. Blanks related to him what she had seen and what she suspected. She gave Mr. Brock the same report when he arrived. Officer Pendleton waited for Ms. Best and Mr. Hudson, who had gone to lunch. When they returned, Officer Pendleton identified himself to them and asked Mr. Hudson to empty his pockets and show him the contents. Mr. Hudson complied; upon seeing a yellow straw from Mr. Hudson's front right pocket, Officer Pendleton "seized [the straw]. I picked it up. I looked at it, observed a white powdery substance inside the straw, and I seized it." Officer Pendleton and Ms. Blanks both testified that the straw seized had a bend in it and was not the one Ms. Blanks saw in the chart room. Officer Pendleton submitted the straw from Mr. Hudson's pocket to the SBI lab for analysis, which later revealed no controlled substance on the straw.

Officer Pendleton testified that he "frisked [Mr. Hudson] around his waist band and pulled his pant legs up and looked around the cuff

of his shoes, and that was it . . . ." Mr. Hudson, however, testified that as part of the search Officer Pendleton's "hands were down right far into my underclothes. He was going into my genital area. . . . Then he checked my socks and my shoes. . . . Then he told me to stand at the front of the truck facing the building, and he was going to search my truck. He asked me to unlock my truck." Mr. Hudson complied with all of these requests. At the conclusion of the search, Officer Pendleton told Mr. Hudson, "[t]hey're going to ask you to take a drug screen."

While Officer Pendleton was searching Mr. Hudson and his truck, Ms. Blanks and Ms. Schuchardt conducted a strip search of Ms. Best in a ladies' restroom. Ms. Best removed all of her outer garments while standing in the open portion of the restroom in front of Ms. Blanks and Ms. Schuchardt. Ms. Best testified in response to direct examination:

Q. How did they search you?

A. She told me to take off my sweater. I did.

THE COURT: Who told you to take it off? Who told you to take off your sweater?

A. Jo asked me to take off my sweater, and I did. Then she asked me to undo my blouse; I did. She asked me to undo my bra; I did.

Q. As you undid each article of clothing what did you do with them?

A. I opened them up. My blouse was buttoned in the front, and I opened it up and picked up the back part of the blouse. I did the same thing with my bra and opened it up and took to the back.

Q. And then what?

A. I had to pull down my pants and my pantyhose.

Ms. Best was visibly upset and crying during and after the search, in which no drugs or paraphernalia were found. Neither Ms. Blanks, Ms. Schuchardt, Mr. Brock, nor Officer Pendleton saw any evidence of abnormal or erratic behavior, nor did any of them see any indication that either petitioner was impaired. Mr. Hudson also described what sort of activities usually took place in the chart room and how straws were normally found in the chart room:

Q: Tell us—we've heard a lot about the chart room. Can you describe, briefly, the dimensions of it and generally what it's used for?

A: Yes. It's a room that's probably about 5 by 9 or so. It has charts in there. It has equipment that's used for drawing blood. It has some manuals in there for that. I know that because they generally pertain to me because I (inaudible) that board. It has patients' charts, patient belongings, and food items and staff belongings. It's normally an all-purpose.

Q: People keep their stuff in there? Their food in there?

A: At times, yes.

Q: Did anybody ever mix medications in there?

A: Yes, it has been used for that.

Q: Okay. Did you all ever use straws to mix medications?

A: Yes. I did not, but I have others do so, yes.

After completing both searches, Mr. Brock, Ms. Blanks, and Ms. Schuchardt met with Ms. Best and Mr. Hudson in Ms. Schuchardt's office. During the meeting, Mr. Hudson asked Ms. Schuchardt for a copy of the Department of Human Resources workplace drug policy, Directive No. 47 ("Directive 47"). Ms. Schuchardt told Mr. Hudson that she did not know where a copy of the policy was located, and neither Mr. Hudson nor Ms. Best saw Directive 47 at any time on 15 February 1997.

Mr. Brock testified that he left the room to call Dr. Christian, that he told her about the straw Ms. Blanks saw, and that the one seized was not the same one as seen in the chart room, but they agreed they had "reasonable cause" to request a drug test of petitioners. Mr. Brock informed Ms. Best and Mr. Hudson that under the policy, they were expected to take a drug screening test and that "failure to comply with the requested drug screen could lead to a dismissal." The policy also required that petitioners be advised of "the basis for reasonable cause;" Mr. Brock testified that to comply, he told petitioners only about the straw that Ms. Blanks had seen.

Ms. Best and Mr. Hudson left the room after signing forms indicating that they did not consent to a drug test. Ms. Best explained: "I thought it (the drug test) couldn't have been [fair] because what they were doing to me wasn't fair." Mr. Hudson explained during his testi-

mony that he did not consent to the drug test because, "I did not understand what was going on. I did not know why this was happening to me, and I was actually—I was afraid of them at that time. . . .and I just said no." After petitioners refused to consent to the drug tests, "[t]hey told us (Mr. Hudson and Ms. Best) to go home."

Petitioners made appointments with Butner Creedmoor Family Medicine for drug screening tests on Tuesday morning, 18 February 1997, three days after the incident at JUH. Both tested negative and brought their test results with them to their pre-dismissal conferences on that same day. Mr. Hudson and Ms. Best were dismissed, effective 20 February 1997, for refusing to submit to a blood test for drugs in violation of DHR Directive 47.

The Department has established a multi-step appeal procedure for a terminated employee. "Step 1" requires the employee to file a grievance with his/her immediate supervisor. At "Step 2" and "Step 3," the employee files an "Employee Grievance Filing Form" with a specific authorized person in the Unit Personnel Office; at "Step 3," the Department provides a hearing. Petitioners Hudson and Best appealed their dismissal by following these procedures. Their "Step 3" hearing was held 14 May 1997 before Ann Stone, a Department hearing officer. Ms. Stone issued a recommended decision in favor of petitioners. By letters dated 17 June 1997, H. David Bruton, M.D., Secretary of the Department, informed petitioners that he did not adopt the recommended decision. Instead, he concluded there was "reasonable cause to test [petitioners] for drugs on the morning of February 15, 1997, and that Hospital management's instruction to [petitioners] to take a drug test was reasonable under the circumstances."

In July 1997, Ms. Best and Mr. Hudson filed "Petition[s] For A Contested Case Hearing" with the Office of Administrative Hearings, challenging their dismissals from JUH. Petitioners' cases were heard together on 19-20 March 1998 before Administrative Law Judge Sammie Chess, Jr. ("ALJ"), who issued a recommended decision on 13 August 1998. The ALJ proposed extensive findings of fact and concluded as law, *inter alia*, that "[t]he request that Petitioners immediately submit to drug screens was not reasonable under the circumstances;" that "Petitioners' refusals of the drug screens were reasonable refusals under the circumstances;" and that "Petitioners made reasonable efforts to comply with Respondent's request [for a drug screen]." He finally concluded that "Respondent had no just cause to discharge Petitioners for failing to submit to drug screens

that were ordered in violation of the Fourth Amendment prohibition against unreasonable searches," and recommended that "both Petitioners be reinstated with back pay and benefits from the date of termination, and attorneys fees."

The Department disagreed with the ALJ's recommended decision, and submitted a "Proposed Decision and Order" to the SPC. The SPC considered the case on 10 December 1998 and declined to adopt the ALJ's recommended decision, but instead adopted some of the recommended findings and conclusions, and changed many. In part, the SPC concluded that the Department did have reasonable cause to request a drug test and that, "Petitioners blatantly refused to comply with the reasonable request of the Respondent and therefore engaged in insubordination and personal misconduct. Petitioners were not entitled to unilaterally determine which of the Respondent's directives they would comply with, when, and on what terms." The SPC also concluded that "Respondent had just cause to discharge Petitioners for failing to submit to drug screens." The SPC finally ordered that "Respondent's disciplinary action with regard to the Petitioners' employment be affirmed and the Commission hereby finds that the Petitioners failed to meet their burden of proof showing that the Respondent lacked just cause for their dismissals for personal misconduct."

Petitioners filed a joint "Petition for Judicial Review" of the SPC's order in Superior Court alleging that a number of the SPC's findings of fact and the decision to reverse the recommendations of the ALJ were "not supported by the record, and [were] arbitrary and capricious." Petitioners also alleged that the SPC's conclusions of law and decision were "affected by errors of law." Both sides filed extensive briefs with the Superior Court, addressing the facts, the law, and the applicable standards of review.

On 9 December 1999, Superior Court Judge Abraham Penn Jones heard argument on the Petition for Judicial Review and, on 24 October 2000, issued an Order reversing the decision of the SPC. The court "reviewed the conclusions of law and statements of law contained in the Decision and Order *de novo*, and determined that the Commission's decision was affected by errors of law." The superior court also reviewed *de novo* the pertinent constitutional issues, specifically Fourth Amendment search and seizure implications, and concluded that the SPC's decision was affected by errors of law. Next, the superior court "employed the 'whole record' test in reviewing Petitioners' contention that the [SPC's] decision was not supported

by substantial evidence in the record, and determined that the [SPC's] decision was not supported by substantial evidence in the record." "The Court employed the 'whole record' test in reviewing the Petitioners' contention that the [SPC's] decision was arbitrary and capricious, and determined that the [SPC's] decision was arbitrary and capricious." The superior court ordered "that the Decision and Order of the [SPC] is reversed and this matter is remanded to the [SPC] for further proceedings consistent with this Order."

On 16 November 2000, the Department appealed to this Court, alleging that (1) the SPC's decision was not affected by errors of law, and (2) the SPC's decision and order was supported by substantial evidence in the record. We affirm the superior court.

Before reaching the Department's assignments of error, we address the standard of review this Court applies in cases governed by the Administrative Procedure Act ("APA"). *See* N.C. Gen. Stat. §§ 150B-1 to -52 (1999). On review, we are required to "examine[] the trial court's order for error[s] of law" by "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994); *see also Act-up Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). "[T]he proper manner of review depends upon the particular issues presented on appeal." *Id.* at 674, 443 S.E.2d at 118 (citing *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)). If the petitioner alleges that the agency's decision was based on an error of law, then the superior court applies *de novo* review. *See id. De novo* review requires the court "to consider a question anew, as if not considered or decided by the agency." *Id.* If the petitioner alleges either that the agency's decision was not supported by the evidence, or that the agency's decision was arbitrary and capricious, then the superior court applies the "whole record" test. *See id.; see also* N.C. Gen. Stat. § 150B-51(b) (1999). "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*, 114 N.C. App. at 674, 443 S.E.2d at 118 (quoting *Rector v. N.C. Sheriffs' Educ. and Training Standards Comm.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991)).

> [W]hile [t]he nature of the contended error dictates the applicable scope of review, this rule should not be interpreted to mean the manner of . . . review is governed merely by the label an

> appellant places upon an assignment of error; rather, [the court] first determine[s] the actual nature of the contended error, then proceed[s] with an application of the proper scope of review.

In re Appeal of Willis, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725-26 (1998) (citing *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981); *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118) (internal quotations omitted)).

[1] Accordingly, the first question we reach is "whether the trial court exercised the appropriate scope of review." *See Act-up*, 345 N.C. at 706, 483 S.E.2d at 392. We noted in *Willis*, 129 N.C. App. at 503, 500 S.E.2d at 726-27, and *Hedgepeth v. N. C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 348, 543 S.E.2d 169, 175 (2001), that in reviewing a decision from an agency, a superior court's order must: (1) set out the appropriate standards of review, and (2) "delineate which standard the court utilized in resolving each separate issue raised by the parties." Without these two necessary steps, "this Court is unable to make the requisite threshold determination that the trial court 'exercised the appropriate scope of review.' " *See Hedgepeth*, 142 N.C. App. at 348, 543 S.E.2d at 175 (quoting *Willis*, 129 N.C. App. at 503, 500 S.E.2d at 726-27). Here, there are multiple issues on appeal, some requiring *de novo* review and others requiring the "whole record" test. *See McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363 ("A reviewing court may even utilize more than one standard of review if the nature of the issues raised so requires." (emphasis omitted)). The superior court properly set out the appropriate standards of review and delineated which standard of review it was applying to each error alleged. *See Gray v. North Carolina Dept. of Environment, Health, and Natural Services*, 149 N.C. App. ——, 560 S.E.2d 394 (2002); *Act-up*, 345 N.C. at 706, 483 S.E.2d at 392.

At the heart of the Department's arguments on appeal lies the issue of whether JUH had reasonable cause to request that petitioners submit to drug tests. In its Decision and Order, the SPC concluded that it did; the superior court concluded that it did not. If JUH did not have reasonable cause, the petitioners were entitled to refuse to submit to the drug tests. As a direct result of their refusal to submit to the drug test, the Department fired petitioners. The SPC determined that "Respondent had just cause to discharge Petitioners for failing to submit to drug screens." The superior court reversed the termination. Consequently, the ultimate determination of whether the Department was justified in dismissing petitioners from their jobs stems from the determination of reasonable cause. We review the burden of proof of

reasonable cause, and then address the law defining reasonable cause.

The SPC concluded that "[t]he burden of proof lies on the Petitioners to prove the Respondent lacked just cause for their dismissals. Petitioners did not meet their burden of proof." The Petitioners must prove that there was not "substantial evidence in the findings of fact which would support these conclusions." *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 503-04, 397 S.E.2d 350, 354 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991); *see also Employment Security Comm. v. Peace*, 128 N.C. App. 1, 12, 493 S.E.2d 466, 473 (1997) (noting that in "just cause" dismissal cases, an employee might have the burden of proving a negative), *aff'd in part*, 349 N.C. 315, 507 S.E.2d 272 (1998). While we recognize that proving a negative may be difficult, the Supreme Court has approved placing this burden of proof on the employee in State personnel "just cause" dismissal cases. *See, e.g., Soles v. City of Raleigh Civil Service Comm.*, 345 N.C. 443, 448-50, 480 S.E.2d 685, 688-89 (1997); *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 507 S.E.2d 272 (1998). In *Peace*, a divided Court stated that placing the burden of proof on the employee does not violate due process because, "[t]he statutory protections afford a terminated State employee a comprehensive and effective deterrent against erroneous decisions. A terminated employee may avail himself not only of administrative review incorporating full discovery of information and an evidentiary hearing, but may also obtain judicial review of the final agency decision." 349 N.C. at 327, 507 S.E.2d at 280. Here, the SPC properly required the petitioners to prove the absence of substantial evidence of just cause for their termination.

[2] The central issue in this case, therefore, is whether the Petitioners carried their burden of proving that there was not substantial evidence of reasonable cause to justify JUH's request that Petitioners submit to drug tests. The Department contends that the evidence established reasonable cause for it to request a drug test. The SPC agreed with the Department, but the superior court did not. The issue of "reasonable cause" is a legal issue and is subject to *de novo* review by this Court. For the reasons explained below, we conclude that JUH did not have reasonable cause to request a drug test of petitioners.

In 1989, the United State Supreme Court, in *Skinner v. Railway Labor Exec. Assn.*, declared that urine tests on employees, for the purpose of indicating the use of controlled substances, are searches

regulated by the Fourth Amendment of the United States Constitution. *See Skinner*, 489 U.S. 602, 617, 103 L. Ed. 2d 639, 660 (1989). The Court in *Skinner* noted that the "Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Id.* at 619, 103 L. Ed. 2d at 661. Further, "[t]he essential purpose of the Fourth Amendment is to 'impose a standard of reasonableness upon the exercise of discretion by government officials . . . in order to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Boesche v. Raleigh-Durham Airport Authority*, 111 N.C. App. 149, 153, 432 S.E.2d 137, 140 (1993) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653-54, 59 L. Ed. 2d 660, 667 (1979); *Camara v. Municipal Court*, 387 U.S. 523, 528, 18 L. Ed. 2d 930, 935 (1967)). What is "reasonable" depends on the privacy and governmental interests involved in the individual case. *See Treasury Employees v. Von Raab*, 489 U.S. 656, 671, 103 L. Ed. 2d 685, 706 (1989) (noting that certain types of public employees, like Customs agents, have "diminish[ed] privacy expectations even with respect to such personal searches.").

The petitioners here are subject to a "drug-free workplace" policy as state employees. To implement this policy, JUH must comply with the minimum protections against unreasonable search and seizure provided by the Fourth Amendment to the United States Constitution. "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Mills v. Rogers*, 457 U.S. 291, 300, 73 L. Ed. 2d 16, 23 (1982) (citing *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 60 L. Ed. 2d 668, 675 (1979); *Oregon v. Hass*, 420 U.S. 714, 719, 43 L. Ed. 2d 570, 575 (1975)). "Moreover, a State may confer procedural protections of liberty interests that extend those minimally required by the Constitution of the United States." *Id.* at 300, 73 L. Ed. 2d at 24 (emphasis omitted).

The Department contends that JUH based its request that petitioners take a drug test on the "Alcohol and Drug Free Workplace Policy" (Directive 47) promulgated by the Department, which does comply with Fourth Amendment standards. Directive 47 states: "[w]hen management has *reasonable cause* to believe an employee is using or is under the influence of alcohol or a controlled substance in violation of this policy, the employee may be required to submit to a drug and/or alcohol test." (emphasis added). The policy further defines testing based on reasonable cause as follows:

testing based on a belief that an employee is using or has used alcohol or drugs in violation of the department's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based on, but not limited to, one of the following:

[A.] Direct observation of abnormal conduct or erratic behavior by the employee which may render the employee unable to perform his/her duties or which may pose a threat to safety or health.

[B.] A report of observed alcohol or drug use provided by a reliable and credible source.

[C.] An on-the-job accident or occurrence where there is evidence to indicate the accident or occurrence, in whole or in part, may have been the result of the employee's use of a controlled substance or alcohol.

[D.] Evidence that an employee is involved in the use, possession, sale, solicitation, or transfer of drugs or alcohol while working or while on the employer's premises or operating the employer's vehicle, machinery, or equipment.

Directive 47 requires "specific objective and articulable facts and reasonable inferences" before requesting a drug test of an employee. The Federal Courts have approved a requirement of "reasonable suspicion." *American Federation of Government Employees, AFL-CIO v. Roberts*, 9 F.3d 1464, 1468 (9th Cir. 1993). The Court in *Roberts* noted that " '[a]lthough reasonable suspicion does not require certainty, mere 'hunches' are not sufficient to meet this standard.' " *Roberts*, 9 F.3d at 1468 (quoting *American Fed. of Gov't Employees, Local 2391 v. Martin*, 969 F.2d 788, 790, n.1 (9th Cir. 1992)). While reasonable cause is a less demanding standard than probable cause, it does require articulable suspicion based on reliable information. *See Garrison v. Department of Justice*, 72 F.3d 1566, 1569 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 948, 136 L. Ed. 2d 250 (1996). We conclude that JUH's application of "reasonable cause" here did not comply with even the minimum protections afforded by the Fourth Amendment of the United States Constitution.

We have carefully reviewed information known to JUH's officials when they requested the drug tests, to determine whether they had reasonable cause at the time under these standards. *See id.* at 1568.

Information they learned after the fact may not form the basis for reasonable cause. *See id.* At the relevant time, Ms. Blanks suspected that petitioners had some involvement with illegal drug use, because she observed a "yellow straw about three to four inches long . . . and it had a white residue in one end of it" in the chart room. She believed that the straw was used by petitioners, but she observed no erratic behavior by petitioners and she did not believe that either petitioner appeared to be under the influence of any substances. Searches revealed no substances on either petitioner, but did reveal a straw on Mr. Hudson, which Ms. Blanks indicated was not the straw she saw earlier in the chart room. Other information purportedly relied on by SPC, such as the suggestion that Ms. Best instigated the telephone call to draw Ms. Blanks out of the chart room, was not discovered until later.

The superior court noted the following in its Order:

> Commission Findings 91, 92, 93 and 94, that Respondent had objective and articulable grounds for requesting that Petitioners submit to drug testing, are not supported by substantial evidence. The record shows that Mr. Brock did not consult with Dr. Christian prior to requesting that the Petitioners submit to drug testing. (T.Vol.IIB,pp. 227, 237, 240.) The reasons for Dr. Christian requesting the drug tests put forth by the Respondent and adopted by the Commission were not matters known to Dr. Christian prior to Mr. Brock's request that the Petitioners submit to testing, but were reasons developed by the Respondent after the fact in order to justify the drug testing request. (T.Vol.IIA, pp. 159-66.) The record shows that the Respondent's request for drug testing relied on speculation that the straw contained contraband and that the Petitioners were responsible for the straw. Based on this Court's review of the whole record, the Commission's Findings 91, 92, 93 and 94 were not supported by substantial evidence.

We agree.

In sum, the whole record reveals that at the critical time, officials at JUH knew that Ms. Blanks was suspicious of a straw with a powder residue that she saw in the chart room, which she connected to petitioners, and which she believed could indicate some illegal drug activity. Ms. Blanks could not identify the powder residue, and was not able to articulate any other basis for her suspicion. No other JUH employee had similar suspicions and the strip searches of petitioners

revealed nothing improper or illegal. Thus, we agree with the superior court that management at JUH had no "reasonable cause" to believe that either petitioner "[was] using or [was] under the influence of alcohol or a controlled substance." Directive 47.

[3] As the officials at JUH had no reasonable cause to request drug tests of petitioners, the Department had no basis to terminate their employment for refusing to comply. *See Gardner v. Broderick*, 392 U.S. 273, 277, 20 L. Ed. 2d 1082, 1086 (1968); *Fleckenstein v. Dep't of the Army*, 63 M.S.P.R. 470, 473-74 n.3 (1994). A person may not be discharged "for refusing to waive a right which the Constitution guarantees to him." *Gardner*, 392 U.S. at 277, 20 L. Ed. 2d at 1086. In *Gardner*, petitioner, a New York City police officer, was fired for refusing to waive his privilege against self-incrimination. *See id.* at 278, 20 L. Ed. 2d at 1087. The United States Supreme Court held that discharging him "solely for his refusal to waive the immunity to which he is entitled" under the Constitution was improper. *Id.* Here, petitioners elected not to waive their Fourth Amendment rights and refused to take the drug test. Because there was no reasonable cause to request the test, petitioners were improperly fired for refusing to submit to the test.

[4] Next, we address the Department's assertion that the SPC's Decision and Order was supported by substantial evidence in the record, and that the superior court's factual findings were not. Because this case turns on the issue of reasonable cause, we address only those findings of fact concerning whether JUH had reasonable cause prior to its request that petitioners submit to drug tests. We apply the "whole record" test to examine whether the SPC's findings of fact were supported by the evidence. *See Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118.

A number of the SPC's findings address the evidence that it believed supported reasonable cause, including Findings of Fact numbers 9, 12, 13, 19, 20, 21, 32, 43, 69, 73, 74, 84, 85, 86, 91, 92, 93, and 94. After reviewing the whole record, we note that Ms. Blanks was the only witness presented who made pertinent observations that formed the stated basis of reasonable cause prior to JUH's request that petitioners submit to a drug test. Ms. Blanks testified that she saw petitioners in the chart room, but they left soon after she arrived. She saw a straw with powdery residue which disappeared when Mr. Hudson retrieved his keys and cigarettes. She clearly stated that the straw seized from Mr. Hudson was not the same straw.

These observations constituted the entire basis for Ms. Blanks' suspicion that petitioners were engaged in illegal drug activity. Ms. Blanks testified that Mr. Hudson appeared "laid back" during the meeting in Ms. Schuchardt's office, however, no other employees corroborated this observation or articulated any basis for suspicion of drug use by petitioners during the morning of 15 February 1997. In fact, Ms. Schuchardt, Mr. Hudson's supervisor, testified:

Q. Okay. At any point during the time that he was working for you, did you ever believe him to be impaired by drugs or alcohol while on duty?

A. No.

. . .

Q. Okay. And did [Ms. Blanks] tell you about seeing a straw in the room?

A. Yes.

Q. And at that point you didn't have any reason to believe that Mr. Hudson was impaired that day.

A. No.

Ms. Blanks testified during cross-examination as follows:

Q. So they [petitioners] were behaving normally in the [chart]room?

A. Yes, sir.

. . .

Q. Okay. Would there have been anything that you saw them doing that you thought that they should have been pulled off the ward? Were they dangerous?

A. No, sir.

Q. Were they doing anything that would have imperiled a patient?

A. Not that I observed.

Q. Okay. Did you actually see either of them using drugs?

A. No, sir.

Q. Were they involved in any sort of accident or occurrence during this time?

A. No, sir. Not of my awareness.

Q. Okay. Now, you didn't see anything that showed that they were involved in drugs. Did you see the straw in their hand?

A. No, sir.

Q. Did you see the straw in their possession?

A. No, sir.

Q. Did Mr. Hudson or Ms. Best come to you and say we've got some drugs, would you like to buy some?

A. No, sir.

Q. Okay. Did they say we've got some drugs, would you like to use them with us?

A. No, sir.

Q. Did you see them give anyone else any drugs or drug paraphernalia?

A. No, sir.

Q. Did you see them do it while they were operating a vehicle or equipment?

A. I didn't even observe that. Operating a vehicle or equipment.

Counsel for petitioners also questioned Ms. Blanks concerning her knowledge of drug paraphernalia and her ability to accurately identify it. When asked whether knowledge of drug paraphernalia was part of her job, Ms. Blanks responded:

A. I have training related to the drugs in the workplace policy, and as a supervisor of a staff who have CDL's that we've had some special training on. Substance abuse issues, plus patient programming. I watch t.v. and things that give me some general knowledge [] about dru[g] paraphernalia.

Q. And it was based on your feeling, though, that you determined that this was contraband?

A. Yes, ma'am.

She also testified:

Q. What sort of training have you had in the medical field?

A. Medical field?

Q. Yes.

A. None.

Q. You have no training in pharmacy or pharmacal—you have no training in drugs?

A. No, sir. I mean, in terms of the training and in terms of the policies and those—are you talking—

Q. If you have any familiarity at all with drugs?

A. I guess no is the answer. I don't know.

Q. If I were to put down on the table a thing of cocaine, a thing of saccharin[], a thing of sugar, a thing of condensed milk—powder dry milk. Would you be able to tell us without absolute doubt which is which?

. . .

A. No, I guess not.

This testimony reveals the absence of any "specific objective and articulable facts and reasonable inferences drawn" to show reasonable cause under Directive 47 or the Fourth Amendment of the United States Constitution. We hold that petitioners carried their burden of proving that JUH did not have reasonable cause to request that they submit to drug testing. Without such "reasonable cause," the Department lacked just cause for terminating petitioners. We affirm the superior court's Order.

AFFIRMED.

Judge TIMMONS-GOODSON concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

Yolandra Best and Roy Hudson (collectively "petitioners") failed to show that the Department of Health and Human Services, John Umstead Hospital ("JUH") did not have "reasonable cause" to suspect that petitioners were using or possessing drugs. Dr. Patricia Christian ("Dr. Christian"), director of JUH, had "reasonable cause" to request

that petitioners submit to a drug test. Petitioners' refusal to undergo drug testing was insubordination that justified their termination. I would reverse the superior court and affirm the State Personnel Commission's ("SPC") decision. I respectfully dissent.

I agree with the majority's statement of the appropriate standard of review, and that petitioners have the burden of proof to show that respondent lacked just cause to terminate petitioners' employment. I also agree with the majority's conclusion that "reasonable cause is a less demanding standard than probable cause . . . ."

I do not agree with the majority's conclusion that "application of 'reasonable cause' . . . did not comply with . . . the minimum protections afforded by the Fourth Amendment of the United States Constitution." The majority opinion does not conclude that the "reasonable cause" standard in the Alcohol and Drug Free Workplace Policy ("Directive 47") violates the United States and/or the North Carolina Constitutions. The majority opinion holds that "JUH did not have reasonable cause to request that [petitioners] submit to drug testing."

Directive 47 provides that "reasonable cause" must exist before any State employee is required to submit to a drug test.

> When management has reasonable cause to believe an employee is using or is under the influence of alcohol or a controlled substance in violation of this policy, the employee may be required to submit to a drug . . . test.

Directive 47 defines "reasonable cause:"

> Reasonable Cause Drug Testing means testing based on a belief that an employee is using or has used alcohol or drugs in violation of the department's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based on, but not limited to, one of the following:
>
> . . . .
>
> D. Evidence that an employee is involved in the use, possession, sale solicitation, or transfer of drugs or alcohol while working or while on the employer's premisses or operating the employer's vehicle, machinery, or equipment.

(Emphasis supplied).

I. The Dispositive Issue

The dispositive issue is whether Dr. Christian, who had the ultimate decision pursuant to Directive 47 to require drug testing, had "reasonable cause to believe" that petitioners were using or possessing illegal drugs at the time she ordered the tests. This issue is under analyzed by the majority.

The majority opinion states that "[n]either Ms. Blanks, Ms. Schuchardt, Mr. Brock, nor Officer Pendleton saw evidence of abnormal or erratic behavior, nor did any of them see any indication that either petitioner was impaired." This statement is the right observation about the wrong inquiry. Whether the evidence proves that petitioners were under the influence of illegal drugs is not the issue. Evidence of being under the influence is a factor that can lead to reasonable cause. It is not the only factor. Directive 47-D states that evidence of the *use or possession* of illegal drugs is sufficient.

The majority opinion does not address: (1) what facts Dr. Christian knew, (2) when she knew them, (3) what inferences she drew from those facts, (4) whether those inferences were reasonable, and (5) whether those facts and inferences objectively provide reasonable cause. The answers to those questions are dispositive of whether reasonable cause existed to order drug testing of petitioners.

II. Application of "Reasonable Cause"

Substantial evidence shows that Dr. Christian had reasonable cause to believe that petitioners were involved in the use or possession of drugs while working. Her belief was "drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience," and those facts and inferences support an objective determination of reasonable cause. This case is based on direct and circumstantial evidence and the inferences drawn from that evidence.

The majority opinion presumes that Mr. Brock arrived at the hospital having already decided, whether on his own or pursuant to Dr. Christian's directive, to test petitioners. The record does not support this presumption.

The majority's conclusion that "[a]fter reviewing the whole record, we note that Ms. Blanks was the only witness presented who made pertinent observations that formed the stated basis of reasonable cause prior to JUH's request that the petitioners submit to a drug

test" is also not supported by the evidence and grossly misstates the facts in the record. I address the evidence in the record.

A. Dr. Christian's Affidavit and Testimony

Dr. Christian filed an affidavit and later testified before the administrative law judge. Her testimony shows: (1) what she knew, (2) when she knew it, and (3) the inferences she drew prior to making the decision to drug test petitioners. Dr. Christian testified that she first became aware of the incident when Josephine Schuchardt ("Ms. Schuchardt"), petitioners' immediate supervisor, called her at home and reported that "she had come across a problem that she had never had before and she didn't know how to handle it and she didn't want to blow it." Dr. Christian testified that Ms. Schuchardt recounted to her Amanda Blanks' ("Ms. Blanks") entire recollection of the events. Dr. Christian also testified that Ms. Schuchardt stated in that first telephone call that Ms. Blanks had received a "bogus—that was her [Ms. Schuchardt's] word—bogus phone call that took her [Ms. Blanks] out of the [chart] room and during that time, the male health care tech [Mr. Hudson] went back into the record room."

Dr. Christian testified that she directed Ms. Schuchardt to call the Butner Public Safety Department pursuant to Directive 47. Ms. Schuchardt complied. Dr. Christian then called Edgar Sanford Brock III ("Mr. Brock"), the personnel director, and informed him of Ms. Schuchardt's report. Dr. Christian testified that she called Mr. Brock because, according to Directive 47, "the Personal director has to be involved." Dr. Christian then called Ms. Schuchardt, told her that she had spoken with Mr. Brock at home, and that he would remain there to assist her with the investigation, if Ms. Schuchardt needed him. Ms. Schuchardt corroborated Dr. Christian's call. Ms. Schuchardt testified that she called Mr. Brock at home. Mr. Brock was en route to JUH. Mr. Brock's wife gave Ms. Schuchardt his mobile number, and she called him in his car.

Dr. Christian testified that Mr. Brock called her when he arrived at the hospital and "[h]e told me that he was there on the ward with Ms. Schuchardt and that the officer was searching Mr. Hudson outside and that he would call back and inform me when he had more information."

Dr. Christian did not know petitioners personally, but knew of their positions in the Hospital. Dr. Christian testified that she considered Ms. Blanks an "honest" person "based on serving on committees

with her and on projects that she's worked on." She also testified that she knew that "Mr. Brock felt that she ["Ms. Blanks] had a reputation for honesty" and that "he thought she was a very credible witness." Dr. Christian testified that she also considered information about the demeanor of petitioners as related to her by Mr. Brock and Ms. Schuchardt.

Dr. Christian testified that Mr. Brock had "told me that [Officer Pendelton] had found a straw in Mr. Hudson's pocket," and that she used that information in determining "whether or not there was reasonable cause." Dr. Christian:

> inferred from this evidence that Hudson was tied very closely to the tainted straw that had disappeared. That is, in my life experience, I don't know anyone who carries or saves plastic straw remnants. In fact, I don't know of any use at JUH for short straw segments.

Dr. Christian concluded that "[t]he coincidence of [Mr. Hudson] being the last person with access to a powder-tainted straw segment (before it disappeared) and then being found in possession of what appeared to be the remnant segment, was too great to accept as mere coincidence."

Dr. Christian stated in her affidavit that she and Ms. Schuchardt had reviewed the facts and "concluded that there were many suspicious circumstances that when taken as a whole lead to the inescapable conclusion that there was reasonable cause to believe that Hudson and Best had used drugs on the job." Dr. Christian also testified that Mr. Brock "and I together agreed that [drug tests were] warranted, and I told him to go ahead and proceed with requesting . . . tests."

Ms. Schuchardt testified that she was present when "Mr. Brock requested Ms. Best and Mr. Hudson" to submit to a drug test. Dr. Christian stated that Mr. Brock told her that "Hudson would not talk about the straw, either to deny or verify that he'd seen one in the record room" and that Ms. Best was "avoiding eye contact" when she was asked about the events of that morning. Dr. Christian stated that "[i]n my life experience, a health care worker will deny, vigorously, when falsely accused of something as serious as drug use on the job."

Dr. Christian testified that the facts she received were related to her by Mr. Brock and Ms. Schuchardt, and that she had not made a decision to test petitioners until Mr. Brock finished his investigation.

Dr. Christian stated that she conferred with Mr. Brock "to make sure that [she] was not making unreasonable inferences and judgments." This testimony is consistent with and corroborated by all other individuals involved in the investigation into petitioners' conduct.

B. Ms. Blanks' Affidavit and Testimony

Ms. Blanks testified by affidavit and before the administrative law judge. Ms. Blanks stated that she went to work on Saturday, 15 February 1997, at approximately 9:30 a.m. to review and audit charts inside the chart room. This date was a non-scheduled work day for her, and no one expected her to be at work. Ms. Blanks approached the nurses' station, where the chart room entry door is located. She observed Mr. Hudson exit the chart room. She continued to walk through the nurses' station toward the chart room entry door where she saw Ms. Best exit the chart room.

Ms. Blanks entered the chart room, sat down to audit files, and observed a yellowish straw that had been cut to approximately three inches in length, car keys, and a pack of cigarettes located on a counter-top. Ms. Blanks observed a white powdery substance in one end of the straw. Ms. Blanks was the only person present in the chart room at that time. Ms. Blanks testified that she sat in the chart room for a moment and pondered what to do.

Ms. Blanks testified that she was unexpectedly summoned from the chart room to answer a telephone call in the nurses' station. She exited the chart room and answered the telephone a few feet away from the chart room door. She testified that she "maintained a constant view of the chart room" entry door at all times. Ms. Blanks also testified that she was not "quite sure" who the person on the other line was, but speculated the voice sounded like Yvonne Sneed's. Ms. Blanks did not know the answer to the question she was asked. Ms. Blanks stated that she was "suspicious [of the phone call] because I was not scheduled to work that day and was not working my usual ward. Sneed had not seen me at work and could not have expected me to be near the nurses station on Ward 353." As Ms. Blanks was hanging up the telephone, she observed Mr. Hudson re-enter the chart room announcing "where are my keys." He quickly exited the chart room with his keys and a pack of cigarettes and stated that he was "going for a smoke."

Ms. Blanks immediately re-entered the chart room and noticed that the cut straw, car keys, and cigarettes were missing from the

counter-top. No other person had entered or left the chart room between the time that Mr. Hudson re-entered the chart room, exited the chart room, and Ms. Blanks re-entered the chart room.

Ms. Blanks testified that after "five to ten minutes" of contemplation, she left the chart room to look for Ms. Schuchardt. Ms. Blanks located Ms. Schuchardt at approximately 10:00 a.m., and reported the events that she had witnessed, including the "suspicious" phone call that caused her to leave the chart room. They talked for approximately twenty to thirty minutes. Ms. Blanks testified that Ms. Schuchardt stated to her that the incident "[s]ounds like something I need to look into."

C. Ms. Schuchardt's Testimony

Ms. Schuchardt testified as a witness for petitioners. She stated that Ms. Blanks reported to her what she had witnessed and that they discussed the matter at length. Ms. Schuchardt testified that "I reported [to Dr. Christian] what [Ms. Blanks] had said and what she had observed and the series of behaviors that took place in the whole picture, not just the powder—[in] the nurses' station, but all of the events." (Emphasis supplied). "At the time of the phone call, it was my understanding that . . . [Mr. Hudson] was the only one that had been in [the chart room]."

Ms. Schuchardt testified that she told Dr. Christian that "I probably did give the opinion that [the telephone call] was suspicious based on the information that I had received" from Ms. Blanks. Ms. Schuchardt testified that she believed the telephone call which caused Ms. Blanks to leave the chart room "was questionable."

Ms. Schuchardt also stated that Mr. Hudson had walked into her office unannounced, prior to his knowledge that an investigation was underway, and asked:

> if I had seen [Ms. Blanks] and I said yes. And he said, 'Well?' And I said, 'Well, what?' And he said, 'Well, did [Ms. Blanks] report to you that I was smoking in the office or on the ward?' And I said, 'No, she didn't report to me that you were smoking in the office.'

Dr. Christian swore in her affidavit that she used this incident, along with others, to determine whether there was reasonable cause to require the drug tests. Petitioners attempt to attack Dr. Christian's credibility, but they never explain this testimony. This incident is

uncontradicted and is not considered or even mentioned in the majority opinion.

D. Mr. Brock's Affidavit and Testimony

Mr. Brock testified by affidavit and later at the hearing that he received a phone call from Dr. Christian about a "potential situation of possible drug use at the hospital." Mr. Brock decided that "the best thing for me to do was to go to the hospital to provide . . . assistance . . . . I left on my own. [Dr. Christian] did not instruct me to leave at that point." "This would allow me to consult with Ms. Schuchardt and report my findings to Dr. Christian." Mr. Brock testified that he drove to JUH at approximately 12:00 p.m. Upon arrival, he walked to his office and retrieved two drug test kits "in case we might use them." He testified that he "did not know whether we were going to [use them] or not, but there was a potential we could." Mr. Brock testified that he called Dr. Christian to inform her that he was at the hospital. He met Lieutenant Pendelton, who had been dispatched to the hospital after Ms. Schuchardt had called the Butner Public Safety Department at Dr. Christian's direction.

Mr. Brock stated in his affidavit that Lieutenant Pendelton conducted a search of Mr. Hudson, and requested that Ms. Schuchardt and Ms. Blanks search Ms. Best for illegal drugs. Ms. Schuchardt testified that she "never touched Ms. Best. Ms. Best removed her own clothes." Mr. Brock testified that Lieutenant Pendelton told him that "he found a yellow straw," after he completed his search. Mr. Brock testified that Lieutenant Pendelton told him the results of his search before Mr. Brock again called Dr. Christian to review the information he knew at that point.

Mr. Brock testified that "[a]fter [petitioners] denied any knowledge of the straw, before I moved on, I went and made a telephone call to Dr. Christian." During a final conversation with Dr. Christian before the drug tests were ordered, Mr. Brock testified that:

> [s]he asked my opinion, whether we felt reasonable cause was met. I said that is my opinion. I feel with the effects we have, it has been met. We both concurred that we would go ahead with testing, and she gave me instructions to move forward with the procedures for a drug test on these two individuals.

Dr. Christian testified that about "an hour" after Mr. Brock had first called her from the hospital, he called her again. Dr. Christian testi-

fied that "[Mr. Brock] and I talked at—I say at length. . . . . I asked him if he thought we had enough to go with probable testing. He said yes, and I certainly agreed with that."

E. Lieutenant Pendelton's Testimony

Lieutenant Pendelton testified that he is employed by the State of North Carolina's Department of Crimes Control, Public Safety. He is not an employee of JUH. He testified that when he arrived at JUH, he "made contact with Ms. Blanks and Jo Schuchardt in Ward 393." Lieutenant Pendelton prepared an Incident/Investigation Report on 15 February 1997, the day of the incident, wherein he stated that "[t]he activities of the [petitioners] aroused Mrs. Blanks suspicion." After discussing the events that transpired, Officer Pendelton testified that "Ms. Schuchardt informed me that she thought [petitioners] had gone to lunch . . . . When I exited the building . . . [petitioners] were coming up the street." Lieutenant Pendelton searched Mr. Hudson by consent, and "[w]hen he emptied his pockets, he emptied his right pocket and laid the contents on the hood of the truck. The yellow straw was in his right pocket—his right front pocket." Officer Pendelton testified that he "picked [the yellow straw] up. [He] looked at it, observed a white powdery substance inside the straw, and [he] seized it." Lieutenant Pendelton testified that he showed the straw to Ms. Blanks and that she said the yellow straw "looked like [the one she saw]." Lieutenant Pendelton testified that Mr. Hudson made no efforts to explain the straw.

III. The "Suspicious" Telephone Call

I agree with the majority that "[i]nformation they [respondent] learned after the fact [of the demand for drug tests] may not form the basis for reasonable cause." I do not agree that "information purportedly relied on by the SPC, such as the suggestion that Ms. Best instigated the telephone call to draw Ms. Blanks out of the chart room, was not discovered until later" negates the fact that Dr. Christian and her staff knew the phone call was "bogus" or "suspicious." After the drug tests were ordered and refused, respondent discovered that Ms. Best had, in fact, instigated the call that caused Ms. Blanks to leave the chart room and allowed Mr. Hudson, at that time, to retrieve the cut straw. This later known fact is immaterial.

There is substantial overwhelming evidence that Dr. Christian was aware that the telephone call was "suspicious" or "bogus" from the first time she learned of the incident. Petitioners' own witness,

Ms. Schuchardt, testified that the call "was questionable," and that she told Dr. Christian that the call was "suspicious." The later discovery that the call was, in fact, instigated by Ms. Best only confirms and justifies, but does not negate, the staffs' suspicions prior to the demand for drug tests. This later discovered fact was unknown, was not considered in the initial inquiry, and was not a factor in ordering the tests.

IV. Findings 91, 92, 93, and 94

The majority opinion quotes the superior court's conclusions at length and summarily "agrees" that the SPC's findings of fact 91 through 94 "are not supported by competent evidence." The majority's agreement is not supported by the record.

First, the quoted portion of the superior court's conclusion states that the "record shows that Mr. Brock did not consult with Dr. Christian prior to requesting that the Petitioners submit to drug testing." In support of this assertion, the superior court cites transcript testimony where Mr. Hudson is answering "no" to his attorney's question "at any point during that meeting did Mr. Brock get up and leave." The superior court also used Mr. Hudson's "no" response to the question of whether Mr. Brook ever told him that he talked to Dr. Christian. This testimony is the superior court's entire justification for its conclusion. This conclusion is not supported by the evidence in the record. Substantial and consistent evidence compels a contrary result.

Second, the superior court states that "[t]he reasons for Dr. Christian requesting the drug tests put forth by the Respondent and adopted by the Commission were not matters known to Dr. Christian prior to Mr. Brock's request that the Petitioners submit to testing, but were reasons developed by the Respondent after the fact in order to justify the drug testing request." This conclusion is unfounded.

The superior court cites testimony by Dr. Christian on cross-examination to support its conclusion. Petitioners questioned how Dr. Christian could state in her affidavit her sensorial perceptions about petitioners' behavior at a meeting at which she was not present. Dr. Christian testified that those perceptions were conveyed to her by Mr. Brock, who had witnessed petitioners' demeanor. As the director of JUH, Dr. Christian was certainly entitled to rely on reliable information obtained and furnished to her by her personnel director and

the petitioners' supervisor, both of whom Dr. Christian had known and trusted for many years.

Petitioners attempt to impeach Dr. Christian about matters that occurred solely at the final meeting between Mr. Hudson, Ms. Best, Mr. Brock, Ms. Schuchardt, and Ms. Blanks. The superior court and the majority opinion fail to address all of the other facts and inferences that Dr. Christian knew when she made her decision to request that petitioners submit to drug tests. Dr. Christian knew objective and articulable facts when she ordered drug tests and those facts justify her determination of reasonable cause, even if Mr. Brock's statements about petitioners' demeanor at that meeting are omitted. Dr. Christian had reasonable cause to order the tests immediately after Officer Pendelton searched Mr. Hudson.

Third, the superior court states that "Respondent's request for drug testing relied on speculation that the straw contained contraband and that the Petitioners were responsible for the straw." Dr. Christian knew that Ms. Blanks had observed a yellowish cut straw with a white powdery substance next to Mr. Hudson's keys and cigarettes. Ms. Blanks was called out, Mr. Hudson walked in, removed his keys and cigarettes, and the cut straw disappeared. Mr. Hudson testified that the keys and cigarettes he retrieved from the chartroom belonged to him. Lieutenant Pendelton discovered a yellow cut straw in Mr. Hudson's pocket that could have been either: (1) the straw section Ms. Blanks saw, (2) the remaining portion of the cut straw, or (3) a cut portion of a straw unrelated to the one that Ms. Blanks saw. Based on these objective and articulable facts, it was not an unreasonable inference, drawn by Dr. Christian, that the cut straw was "drug paraphernalia." The discovery of a cut straw on Mr. Hudson's person corroborated Ms. Blanks earlier visual observation. These facts, and the inferences drawn from them, along with all of the other circumstantial evidence known by Dr. Christian, would compel a reasonable person to conclude that Mr. Hudson and Ms. Best used or possessed illegal drugs at work.

The majority opinion discusses at length Ms. Blanks "knowledge of drug paraphernalia." Ms. Blanks subjective understanding of drug paraphernalia or drugs is entirely irrelevant. Ms. Blanks' suspicions or hunches are also immaterial. The controlling questions are what facts did Dr. Christian know, when did she learn them, and whether a reasonable person with knowledge of those facts could reasonably believe that petitioners were using or possessing drugs.

V. Reasonable Cause

Reasonable cause, like probable cause, is an objective, not a subjective, standard. " '[T]he scope of the Fourth Amendment is not determined by the subjective conclusion of the law enforcement officer.' " *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982) (quoting *United States v. Clark*, 559 F.2d 420 (5th Cir. 1977), *cert. denied*, 434 U.S. 969, 54 L. Ed. 2d 457 (1977), quoting *United States v. Resnick*, 455 F.2d 1127 (5th Cir. 1972)).

> The officer's subjective opinion is not material. Nor are the courts bound by an officer's mistaken legal conclusion as to the existence or non-existence of probable cause or *reasonable* grounds for his actions. The search or seizure is valid when the objective facts known to the officer meet the standard required.

Peck, 305 N.C. at 741-42, 291 S.E.2d at 641-42 (citing *Scott v. United States*, 436 U.S. 128, 56 L. Ed. 2d 168, *reh'g denied*, 438 U.S. 908, 57 L. Ed. 2d 1150 (1978) (other citations omitted) (emphasis in original)).

Reasonable suspicion depends upon the content of information and the degree of its reliability. *Alabama v. White*, 496 U.S. 325, 110 L. Ed. 2d 301 (1990). "Direct observation or physical evidence of on-duty impairment, while important, is not the only information which will support such testing. Rather, information which would lead a reasonable person to suspect . . . employees . . . of on-the-job drug use, possession or impairment is sufficient under the Fourth Amendment." *Benavidez v. City of Albuquerque*, 101 F.3d 620, 624 (10th Cir. 1996) (citing *National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 974 (D.C. Cir. 1990) ("Constitution requires reasonable suspicion of on-duty *drug use* or drug-impaired work performance") (emphasis in original); *Jackson v. Gates*, 975 F.2d 648, 653 (9th Cir.1992), *cert. denied*, 509 U.S. 905, 125 L. Ed. 2d 690 (1993); *Ford v. Dowd*, 931 F.2d 1286, 1292-93 (1991)). Directive 47 does not require evidence of impairment to sustain reasonable cause to order drug tests.

> The determination of reasonable suspicion, like that of probable cause, necessarily *turns upon the information the person making the determination had when that person acted. The facts then before that person either were or were not sufficient to create a reasonable suspicion that a particular individual used drugs.*

Garrison v. Department of Justice, 72 F.3d 1566, 1569 (Fed. Cir. 1996) (emphasis supplied). "What is reasonable, however, depends upon all the facts and circumstances of the particular situation." *Id.*

> 'Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.'

Id. (quoting *White*, 496 U.S. at 330, 110 L. Ed. 2d at 309 (1990)). "That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence." *White*, 496 U.S. at 330, 110 L. Ed. 2d at 308.

VI. Summary

Dr. Christian did not know petitioners personally, but knew their positions in the hospital. The facts that Dr. Christian knew prior to ordering the drug tests were that: (1) Ms. Blanks had a reputation for honesty; (2) Ms. Blanks had come to work unannounced; (3) Ms. Blanks witnessed petitioners exit the chart room moments before she entered the room; (4) no other person entered or exited the room during the relevant and interim period; (5) Ms. Blanks saw a cut straw that contained white powder; (6) Ms. Blanks was suspiciously called out of the chart room immediately before Mr. Hudson quickly reentered; (7) Ms. Schuchardt thought the phone call was suspicious; (8) no person other than Mr. Hudson and Ms. Best and the person who called Ms. Blanks to the telephone was aware that Ms. Blanks was in that chart room; (8) Mr. Hudson mysteriously appeared in Ms. Schuchardt's office and asked if Ms. Blanks had reported him for smoking; (9) Lieutenant Pendelton, an independent police officer, not a JUH employee, searched Mr. Hudson and found a yellow cut straw in his pocket, which *he believed contained white powder*. This discovery corroborated Ms. Blanks' prior observations of the cut yellowish straw containing white powder; (10) Ms. Blanks testified that the straw Officer Pendelton found on Mr. Hudson looked like the one she saw in the chart room; (11) a cut straw three or four inches long is used to ingest white powdery drugs; (12) Mr. Hudson was linked very closely to the cut yellow straw that disappeared; and (13) no legitimate use for a short, cut straw segment existed at JUH.

Ms. Schuchardt and Mr. Brock observed petitioners' demeanor and described that demeanor to Dr. Christian. Dr. Christian knew that Ms. Best and Mr. Hudson would not talk about the straw, either to deny or verify that they had seen one in the chart room. She knew that Ms. Best avoided eye contact after she was confronted with the facts. Dr. Christian knew from life experience that health care workers will vigorously deny false accusations regarding drug use on the job. Mr. Hudson offered no information or explanation to Lieutenant Pendelton about the cut straw discovered in his pocket. Dr. Christian knew that Ms. Schuchardt would speak openly about her opinions, and knew that Ms. Schuchardt did not protest petitioner's innocence nor question whether "reasonable cause" existed. Dr. Christian reviewed all of the facts and circumstances with Mr. Brock and Ms. Schuchardt. All of this evidence led her to reasonably believe and objectively conclude that petitioners used or possessed drugs in the chart room prior to her decision to order drug tests.

VII. Conclusion

This is not a criminal case. We are not determining whether there is sufficient evidence to uphold a jury verdict convicting petitioners of drug use, only whether reasonable cause existed to require petitioners to submit to a drug test. Reasonable cause is a less demanding standard than probable cause.

Dr. Christian properly initiated an investigation which provided to her specific, objective, and articulable facts conducted over a four hour period. She drew inferences from those facts in light of her experience to conclude that reasonable cause existed to believe that petitioners used or possessed illegal drugs in the chart room.

Dr. Christian serves as director of a large hospital. She knew that Mr. Hudson's and Ms. Best's positions provide hands-on care for numerous sick and fragile patients. Illegal drug use jeopardizes the entire hospital, including the many employees who comprise an intricate web of patient support for the entire hospital community. Dr. Christian is ultimately responsible for the direction and operation of JUH. North Carolina has a compelling interest in a hospital environment free from illegal drugs. Dr. Christian has a duty to protect her patients and employees from the effects of illegal drugs.

In light of her duty, the State's interest, and all of the facts and inferences drawn from those facts known to Dr. Christian at the time

she ordered the drug tests, it would have been unreasonable for Dr. Christian not to have directed petitioners to submit to drug tests. Petitioners' refusal to submit to properly required drug tests was insubordination that justified the termination of their State employment. I would reverse the superior court and affirm the order of the State Personnel Commission. I respectfully dissent.

KATHY FOSTER, EMPLOYEE-PLAINTIFF-APPELLEE v. U.S. AIRWAYS, INC., EMPLOYER-DEFENDANT-APPELLANT, SEDGWICK CMS, ADMINISTRATOR-APPELLANT

No. COA00-1448

(Filed 7 May 2002)

1. Workers' Compensation— total disability—partial earning capacity—maximum medical improvement

The Industrial Commission did not err in a workers' compensation case by awarding total disability benefits to plaintiff employee under N.C.G.S. § 97-29, because: (1) even though defendant employer contends the Commission's findings demonstrate that plaintiff has partial earning capacity, the record does not reflect any employment and the Commission made no findings that plaintiff had resumed any employment during her period of disability; and (2) even though defendant employer contends it was error to award temporary total disability benefits after plaintiff reached maximum medical improvement, defendant employer has not met its burden of proving that plaintiff has regained wage earning capacity.

2. Workers' Compensation— propriety of administrative decision and order—termination or suspension of compensation—res judicata

The doctrine of res judicata did not bar the Industrial Commission from reviewing the propriety of a 14 November 1995 administrative decision and order in a workers' compensation case suspending compensation and the Commission did not err when it determined that the administrative decision and order was improvidently entered, because: (1) Workers' Compensation Rule 703 provides that decisions on applications to approve the termination or suspension of compensation may be raised and determined at a subsequent hearing; and (2) the parties stipulated

that the propriety of the 14 November 1995 order was one issue for the full Commission to address.

3. Workers' Compensation— suitable jobs—educational pursuits a proper form of vocational rehabilitation

The Industrial Commission did not err in a workers' compensation case by concluding that no suitable jobs were available for plaintiff employee and that her educational pursuits were a proper form of vocational rehabilitation under N.C.G.S. § 97-25, because: (1) it was proper for the Commission to consider pre-injury and post-injury wages to determine whether post-injury employment leads were suitable employment; (2) a claimant does not unjustifiably refuse suitable employment where that claimant was offered the same salary as her pre-injury position salary but without the same or similar opportunity for income advancement; and (3) it is within the Industrial Commission's discretion to determine whether a rehabilitative service will effect a cure, give relief, or will lessen a claimant's period of disability.

4. Workers' Compensation— findings of fact—competent evidence

The Industrial Commission's findings of fact numbers 2, 10, 11, 12, 13, and 15 in a workers' compensation case are supported by competent evidence, because: (1) the evidence shows that plaintiff employee would have started at the lower end of the pay scale for a reservationist position, which was not comparable to the salary she received as a flight attendant; (2) all rehabilitation professionals assigned to plaintiff by defendant employer expressed the belief that plaintiff would never earn the same wages without retraining; and (3) the evidence reveals that when the rehabilitation specialists were unable to secure job leads for positions with wages comparable to those plaintiff received as a flight attendant, the specialists pursued job leads for positions with lower paying salaries.

Appeal by defendant from opinion and award entered 21 July 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 October 2001.

Janet H. Downing, PA, by Janet H. Downing, for plaintiff.

Patterson, Harkavy & Lawrence, LLP, by Martha A. Geer, for plaintiff.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Matthew P. Blake, for defendant-appellants.

BRYANT, Judge.

Procedural history

On 14 June 1993, plaintiff Kathy Foster was employed as a flight attendant with defendant U.S. Airways, Inc., when she suffered a shoulder and cervical spine strain. Plaintiff's claim was accepted in a Form 21 agreement, which the North Carolina Industrial Commission (Commission) approved on 27 October 1993. The Form 21 stated the defendant would pay benefits of $435.90 per week for the "necessary" number of weeks. On 9 June 1994, the Commission completed and approved a Form 26 supplemental agreement which stipulated that plaintiff returned to work on 30 August 1993, but became totally disabled on 5 January 1994. In addition, the Form 26 stipulated that plaintiff was to receive temporary total disability benefits at the rate of $435.90 per week for "necessary" weeks.

On 2 October 1995, defendant filed a Form 24 application to suspend plaintiff's disability benefits. By administrative decision and order filed 14 November 1995, defendant's Form 24 application was denied. On 4 December 1995, defendant appealed the 14 November 1995 administrative decision and order by filing a Form 33 request for hearing.

On 26 August 1996, defendant filed a second Form 24 application to suspend plaintiff's disability benefits. By administrative decision and order filed 23 October 1996, defendant's second Form 24 application was approved. On 25 October 1996, plaintiff appealed the 23 October 1996 administrative decision and order by filing a Form 33 request for hearing.

Plaintiff's appeal was heard on 11 February 1997 before Deputy Commissioner Lorrie L. Dollar. By opinion and award filed 8 January 1998, Deputy Commissioner Dollar affirmed the suspension of plaintiff's disability benefits. On 20 January 1998, plaintiff filed notice of appeal to the North Carolina Court of Appeals, however, the Commission treated this filing as notice of appeal to the Full Commission.

On 13 July 1998, the Full Commission heard plaintiff's appeal, and by opinion and award filed 21 July 2000, set aside the 23 October 1996 administrative decision and order as being improvidently entered,

and granted plaintiff's request for reinstatement of her disability benefits. Defendant gave notice of appeal to this Court on 18 August 2000.

Facts

Plaintiff was employed as a flight attendant for defendant for eleven years with an average salary of $35,000 per year. On 14 June 1993, plaintiff sustained a shoulder and cervical strain when the aircraft on which she was working was jolted by a "tug" pushing the aircraft away from a flight gate. Plaintiff subsequently underwent vertebral fusion surgery on two levels of her spine. Dr. Curling, the surgeon who performed the vertebral fusion surgery, released plaintiff from his care on 13 January 1995, when plaintiff reached maximum medical improvement (MMI). Dr. Curling imposed restrictions including that plaintiff was prohibited from lifting anything over forty pounds. Consequently, plaintiff was unable to meet the lifting requirements for the flight attendant position, and could not return to work as a flight attendant.

On 2 February 1995, defendant hired Comprehensive Rehabilitation Association (CRA) to assist plaintiff in obtaining employment. In addition, plaintiff independently contracted with the North Carolina Department of Vocational Rehabilitation (DVR) for vocational training. DVR specialist Lloyd Rollins concluded that plaintiff did not have the educational background or skills to obtain employment in another field with wages similar to wages she previously received as a flight attendant.

In February 1995, Melanie K. Hassell became plaintiff's vocational rehabilitation counselor with CRA. At an April 1995 meeting, Hassell instructed plaintiff to conduct an independent job search. Plaintiff told Hassell that she was interested in completing a bachelor's degree in social work, and inquired whether defendant and the administrator at that time (Alexsis) would authorize her return to college. On 6 June 1995, Hassell informed plaintiff that defendant and Alexsis would not pay for her to return to college. However, prior to receiving a response from Hassell, plaintiff enrolled as a full-time student at Mitchell Community College located in Statesville, North Carolina.

Defendant filed a second Form 24 application seeking to suspend plaintiff's disability benefits alleging that plaintiff's unauthorized class work interfered with her obligation to search for employment. By administrative decision and order filed 14 November 1995,

defendant's Form 24 application was denied; however, plaintiff was ordered to

> use all good faith efforts to comply with vocational rehabilitation in this case. *North Carolina General Statute Section 97-25.* Plaintiff is to keep all appointments with the vocational counselors and follow the directions given by the vocational counselor. Plaintiff has been released to return to work and IT IS FURTHER ORDERED that Plaintiff is to use all good faith efforts to assist in locating a job which is within her restrictions. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762 (1993).

In February 1996, plaintiff failed to apply for a position that Hassell recommended, however, Hassell continued to seek employment for plaintiff. In July 1996, Dan Hefner of CRA informed plaintiff about a reservationist position that was within plaintiff's job restrictions and paid a wage comparable to her wages as a flight attendant. The Full Commission found that the plaintiff was never officially offered the reservationist position. During this time, plaintiff pursued very few, if any, independent job searches.

Standard of review

Opinions and awards of the Commission are reviewed to determine whether competent evidence exists to support the Commission's findings of fact, and whether the findings of fact support the Commission's conclusions of law. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 114, 530 S.E.2d 549, 552 (2000). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001); *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Commission's conclusions of law are reviewed *de novo*. *Allen*, 143 N.C. App. at 63, 546 S.E.2d at 139.

I.

[1] First, defendant argues that the Commission erred by awarding total disability benefits to plaintiff pursuant to N.C.G.S. § 97-29 and that this Court should conclude that plaintiff is entitled to partial disability benefits pursuant to either N.C.G.S. §§ 97-30 or 97-31. We disagree.

When parties execute a Form 21 agreement which stipulates that the disability lasts for the necessary amount of weeks, and the agree-

ment is approved by the Commission, the employee receives the benefit of the presumption of an ongoing disability. *See Russos v. Wheaton Indus.*, 145 N.C. App. 164, 167, 551 S.E.2d 456, 458 (2001), *review denied by* 355 N.C. 214, 560 S.E.2d 135 (2002). Moreover, when a Form 26 supplemental agreement is executed, the nature of the disability is determined according to what is specified in the Form 26 supplemental agreement. *See Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 64 (2000). However, the employer may rebut this presumption by showing that suitable jobs are available, taking into consideration the employee's physical and vocational limitations, and taking into consideration whether the employee is capable of obtaining a suitable job. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763-64, 487 S.E.2d 746, 750 (1997). Evidence that an employee unjustifiably refused suitable employment is evidence sufficient to rebut the presumption of ongoing disability. *Allen*, 143 N.C. App. at 63, 546 S.E.2d at 139.

a.

Defendant argues that the Commission's findings demonstrate that plaintiff has partial earning capacity. Specifically, defendant points our attention to a portion of the Full Commission's opinion and award that states, "Defendant is entitled to a credit for any wages earned during the period compensation of $435.90 per week [as] paid by Defendant." Defendant argues that the above mentioned award is evidence that plaintiff was not totally disabled and was in fact capable of earning some income. We disagree.

The record on direct appeal from a decision of an administrative agency must contain so much of the evidence as necessary for an understanding of the assigned errors. *See* N.C. R. App. P. 18(c)(6). The record in the instant case does not reflect any employment and the Commission made no findings that plaintiff had resumed any employment during her period of disability. Therefore, this Court is unable to address whether this employment, if any, was suitable employment.

b.

Defendant argues that the Commission's findings do not support its conclusion that plaintiff was totally disabled. Specifically, defendant argues that the Commission erred in reinstating plaintiff's award of temporary disability after plaintiff reached MMI. Defendant argues that upon reaching MMI, plaintiff's healing period ceased, and the

temporary nature of plaintiff's disability ceased, triggering her right to permanent disability benefits. We disagree.

In *Russos v. Wheaton Indus.*, 145 N.C. App. 164, 551 S.E.2d 456 (2001), this Court concluded that it was not error for the Commission to award temporary total disability benefits after it was found that the employee had reached MMI. The *Russos* Court stated that once a Form 21 agreement had been entered into by the parties and approved by the Commission, a presumption of ongoing disability attached in favor of the employee. *Russos*, 145 N.C. App. at 167, 551 S.E.2d at 458. Quoting from *Brown v. S & N Communications, Inc.*, the *Russos* Court stated:

> A finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury and does not satisfy the defendant's burden. "The maximum medical improvement finding is solely the prerequisite to determination of the amount of any permanent disability for the purposes of G.S. 97-31."

Russos, 145 N.C. App. at 167, 551 S.E.2d at 459 (quoting *Brown v. S & N Communications, Inc.*, 124 N.C. App. 320, 330, 477 S.E.2d 197, 203 (1996)). "After a finding of maximum medical improvement, the burden remains with the employer to produce sufficient evidence to rebut the continuing presumption of disability; the burden does not shift to the employee." *Brown*, 124 N.C. App. at 331, 477 S.E.2d at 203.

Defendant relies on *Demery v. Converse, Inc.*, 138 N.C. App. 243, 530 S.E.2d 871, *review withdrawn by* 353 N.C. 261, 546 S.E.2d 88 (2000) and *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382 (1996), for the proposition that reaching MMI signifies the end of the temporary nature of a disability. However, we note that the Supreme Court of North Carolina has concluded otherwise several times, as relates to this issue. Specifically, in *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 487 S.E.2d 746 (1997), our Supreme Court reversed the decision of this Court and affirmed the Commission's award of temporary total disability benefits entered after the employee had reached MMI. In addition, in *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 530 S.E.2d 62 (2000), our Supreme Court concluded that a presumption of ongoing disability (created via Form 26) continued, despite the fact that the claimant had reached MMI.

In the instant case, a Form 21 was entered into by the parties and approved by the Commission. In addition a Form 26 was completed and approved by the Commission, which stipulated that plaintiff was to receive temporary total disability benefits. Although there has been a finding of MMI in the instant case, defendant has not met its burden of proving that plaintiff has regained wage earning capacity. Therefore, we overrule the correlating assignment of error.

II.

[2] Second, defendant argues that the Commission erred when it determined that the 14 November 1995 administrative decision and order was improvidently entered. Defendant argues that the doctrine of *res judicata* barred relitigation of the issues resolved by the 14 November 1995 administrative decision and order. Even if the doctrine of *res judicata* did not bar reconsideration of the 14 November 1995 administrative decision and order, defendant argues that plaintiff abandoned issues addressed in the order as a ground for appeal. Defendant argues that the Commission therefore erred when it exercised its inherent judicial power and determined that the 14 November 1995 administrative decision and order was improvidently entered. We disagree.

Workers' Comp. R. of N.C. Indus. Comm'n 703, 2000 Ann. R. (N.C.) 437-38, in pertinent part provides:

> 1. Orders, Decisions, and Awards made in a summary manner, without detailed findings of fact, including Decisions on applications to approve agreements to pay compensation and medical bills, applications to approve the termination or suspension of compensation, applications for change in treatment or providers of medical compensation, applications to change the interval of payments, and applications for lump sum payments of compensation may be reviewed by filing a Motion for Reconsideration with the Industrial Commission and addressed to the Administrative Officer who made the Decision or may be appealed by requesting a hearing within 15 days of receipt of the Decision or receipt of the ruling on a Motion to Reconsider. *These issues may also be raised and determined at a subsequent hearing.*

(emphasis added).

This rule on its face clearly states that decisions on applications to approve the termination or suspension of compensation may be raised and determined at a subsequent hearing. Moreover, in the

instant case, the parties stipulated that the propriety of the 14 November 1995 order was one issue for the Full Commission to address.

We conclude that the doctrine of *res judicata* did not prohibit the Full Commission from reviewing the propriety of the 14 November 1995 administrative decision and order. Therefore, the correlating assignment of error is overruled.

III.

[3] Third, defendant argues that the Commission erred in concluding that no suitable jobs were available for plaintiff, and concluding that plaintiff's educational pursuits were a proper method of vocational rehabilitation. We disagree.

a.

Defendant argues that the Commission erred because its sole consideration in determining the suitability of the vocational rehabilitation job leads and the reservationist job was the disparity in plaintiff's pre-injury wages and her post-injury wages. We disagree.

The disparity between pre-injury and post-injury wages is one factor which may be considered in determining the suitability of post-injury employment. *See Dixon v. City of Durham*, 128 N.C. App. 501, 504, 495 S.E.2d 380, 383 (1998).

The Commission found that the reservationist position was never officially offered to plaintiff. Notwithstanding, the Commission found that (even if plaintiff had been officially offered the reservationist position) plaintiff would start at the bottom of this wage scale and would not have a starting wage similar to the wages she received as a flight attendant. In addition, the Commission found that other job leads were unsuitable; and defendant has offered this Court no evidence that additional opportunities were offered to plaintiff, or that these leads were suitable.

We conclude that it was proper for the Commission to consider pre-injury and post-injury wages to determine whether post-injury employment leads were suitable employment. Therefore, we overrule the correlating assignment of error.

b.

Defendant argues that the Commission erred in its application of the ruling in *Dixon* to the facts in this case. We disagree.

In *Dixon*, the claimant (plaintiff) was serving as a police officer for the City of Durham when she suffered a serious cut to her wrist in the course of performing her duties. Due to the injury, claimant was unable to return to her job as a Police Officer II. Defendant City of Durham was unable to place claimant in a position within her physical limitations, but subsequently offered claimant a position as a meter reader trainee at the same salary as her former position. The meter reader trainee position, however, did not offer the same opportunity for income advancement as her former position. Claimant declined the meter reader trainee position. Subsequently this Court concluded that the meter reader trainee position was not suitable employment and that claimant was justified in rejecting the position.

In this case, the Commission concluded:

> 1. Refusal of the employee to accept any medical, hospital, surgical, or other treatment or rehabilitative procedure when ordered by the Industrial Commission ordinarily shall bar said employee from further compensation until such refusal ceases. N.C. Gen. Stat § 97-25; *Sanhueza v. Liberty Steel Erectors*, 122 N.C.App. 603, 471 S.E.2d 92(1996). However, in this instance the rehabilitation being offered by defendant was not appropriate and the Special Deputy Commissioner should not have ordered the plaintiff to comply with it. Therefore, any failure of the plaintiff to abide by this order did not violate N.C. Gen. Stat. § 97-25 and no sanctions can be based thereon.

The Commission then cited to *Dixon* for the proposition that a claimant did not unjustifiably refuse suitable employment where that claimant was offered the same salary as her pre-injury position salary but without the same or similar opportunity for income advancement.

In both this case and in *Dixon*, an issue was raised concerning the suitability of post-injury employment based on the disparity in pre-injury and post-injury wages. The evidence in the instant case, like the evidence in *Dixon*, reveals that a disparity existed between plaintiff's pre-injury and post-injury salary and opportunity for advancement. We conclude that the Commission did not err in its application of *Dixon* to the facts in this case. Therefore, the correlating assignment of error is overruled.

c.

Defendant argues that the Commission erred in approving plaintiff's educational pursuits as a form of vocational rehabilitation pursuant to N.C.G.S. § 97-25. We disagree.

N.C.G.S. § 97-25 (1999), in pertinent part provides:

> Medical compensation shall be provided by the employer. . . . In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.
>
> The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

Defendant argues that plaintiff's educational pursuits are not reasonably required to effect a cure, give relief, or lessen the period of plaintiff's disability. Therefore, defendant argues that plaintiff's educational pursuits are not a proper form of vocational rehabilitation as referenced pursuant to N.C.G.S. § 97-2(19).

N.C.G.S. § 97-2(19) (1999), provides:

> (19) Medical Compensation.—The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

In construing N.C.G.S. §§ 97-25 and 97-2(19), it appears that the Commission has discretion in determining whether a rehabilitative service will effect a cure, give relief, or will lessen a claimant's period of disability.

The evidence in this case shows that plaintiff was not qualified to earn the same wages in another field that she received as a flight attendant. The evidence shows that "CRA representatives had stated that it would be impossible for them to place plaintiff in a job that paid the same as her old job and thereafter conducted a job search for inappropriate lower paying jobs." The evidence also shows that the DVR representative stated "that plaintiff did not have the educational background or job skills to transfer into a job that was going to pay her anywhere near the $35,000 per year she had earned at USAir." In addition, the evidence shows that receiving a Social Work degree would serve as the foundation for plaintiff to qualify for a higher wage in another field.

We note on at least one prior occasion this Court has documented the Commission's approval of educational pursuits as being a proper form of vocational rehabilitation. *See Russos*, 145 N.C. App. at 166, 551 S.E.2d at 458 (noting that the Industrial Commission approved a claimant's paralegal training as a reasonable attempt at rehabilitation given the totality of the circumstances surrounding the case).

Considering the circumstances in our case, we conclude the Commission did not err nor abuse its discretion in approving plaintiff's educational pursuits. We overrule the correlating assignment of error.

IV.

[4] Last, defendant argues that the Commission's findings of fact 2, 10, 11, 12, 13, 15 and 19 are not supported by competent evidence. As defendant has not presented an argument regarding finding of fact 19, we deem this issue to be abandoned pursuant to N.C. R. App. P. 28(b)(5). As to the remainder of defendant's arguments, we disagree.

As previously stated, the Commission's findings of fact are binding on appeal if supported by competent evidence in the record. *Allen*, 143 N.C. App. at 60, 546 S.E.2d at 137; *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

The Full Commission's findings of fact 2, 10, 11, 12, 13 and 15 read:

> 2. The plaintiff graduated from high school in 1977, attended Elon College for two years, and after numerous changes in her studies, obtained a certificate in Secretarial Sciences in 1979. The

plaintiff also attended classes at High Point College in the 1980's, although no degree was obtained. She also completed in 1994 a course in computer use at Davidson Community College in order to learn to use a home computer. None of this training nor any of her job experience was immediately transferable into a job paying $35,000.00 per year unless it was a return to her job as a flight attendant.

. . .

10. On April 19, 1995, Ms. Hassell, a vocational case manager with CRA, met with plaintiff to discuss the job search, during which she encouraged plaintiff to research and seek job openings independently. At that meeting, plaintiff expressed an interest in completing her degree in social work, which could lead to a career paying approximately what she had made as a flight attendant. Plaintiff advised Ms. Hassell that she had met with Loyd [sic] Rollins, a counselor with the North Carolina Division of Vocational Rehabilitation (NCDVR) concerning this.

11. Plaintiff met with Mr. Rollins who arranged for a series of vocational tests. After reviewing plaintiff's test results and background Mr. Rollins concluded that plaintiff did not have the educational background or job skills to transfer into a job that was going to pay her anywhere near the $35,000 per year she had earned at USAir. He concluded that the only way for her to obtain such a salary was to return to school and complete her degree; otherwise, she was only qualified for jobs with a salary in the low to mid-teens, around half what she had previously earned. In June of 1995, the plaintiff was approved for a scholarship by the NCDVR to enroll at Mitchell Community College in Statesville in furtherance of her goal of retraining and obtaining a job paying approximately $35,000 per year.

12. The plaintiff inquired of both Ms. Hassell and Andrea Quinn, an adjuster with the servicing agent, as to the possibility and advisability of returning to school to obtain a degree which would qualify her for a job at a salary commensurate with what she was earning at the time of her injury. On June 6, 1995, Ms. Quinn advised that the defendant would not pay for plaintiff to go to school. After plaintiff expressed concerns about continuing a job search while attending classes, the vocational services of CRA were temporarily suspended, and a labor market survey for plaintiff's educational and vocational abilities was performed

(This was four months after CRA had begun its vocational efforts). Plaintiff chose to enroll at Mitchell Community College in Statesville in August 1995 as a full-time student in the Human Service Education field under the auspices of the North Carolina Division of Vocational Rehabilitation (NCDVR). The Full Commission finds this to be a proper and reasonable rehabilitative procedure pursuant to N.C. Gen. Stat § 97-25 and hereby authorizes its use *nunc pro tunc*. Although plaintiff had inquired of Ms. Hassell whether USAir would consider such schooling under the auspices of NCDVR to be proper rehabilitation efforts she got no response concerning this question until she had enrolled in the program and was attending classes.

13. On October 2, 1995, the defendant filed a Form 24 Application to Suspend or Terminate Benefits. Although the Form 24 was not approved, then Special Deputy Commissioner W. Bain Jones, Jr., (now Deputy Commissioner) ordered the plaintiff to comply with the defendant's vocational rehabilitation efforts through CRA and to attempt to locate a (low paying) job within her restrictions. This order was improvidently entered in view of the ongoing rehabilitative re-education started at Mitchell Community College in August 1995 under the auspices of the North Carolina Division of Vocational Rehabilitation. It was improper for the Industrial Commission's Special Deputy to order plaintiff to undertake duplicative vocational rehabilitation that interfered with what the Full Commission has found to be proper rehabilitative procedure. This is especially true when the CRA representatives had stated that it would be impossible for them to place plaintiff in a job that paid the same as her old job and thereafter conducted a job search for inappropriate lower paying jobs.

. . .

15. In July of 1996, the plaintiff was informed that the defendant had a reservationist position available in Winston-Salem which was within her restrictions and paid a wage comparable to her pre-injury wage. The Full Commission finds that this job was not suitable and plaintiff's declining of this job was proper. Although a reservationist job had a wage scale similar to plaintiff's previous job, she would have had to start at the beginning end of that wage scale as contrasted to the high end of the flight attendant wage scale she had attained through her years of serv-

ice and she would never obtain wages and benefits in the reservationist job equal to her old job.

As to finding of fact 2, defendant argues that the evidence shows that if plaintiff chose to do so, she could have applied for a reservationist position with a pay scale comparable to her flight attendant position. The evidence, however, does not show that plaintiff was ever offered the reservationist position. Moreover, even if plaintiff had applied for and was offered this position, the evidence shows that plaintiff would have started at the lower end of that pay scale, which was not comparable to the salary she received as a flight attendant. Therefore, the correlating assignment of error is overruled.

As to findings of fact 10, 11, and 12, defendant argues that plaintiff's degree in social work failed to enhance her earning potential. We disagree. The evidence reveals that, with the associate degree in applied science that plaintiff was scheduled to receive in the spring of 1997, she would be unable to assume a position with wages comparable to those she received as a flight attendant. However, plaintiff would be in a position to complete an undergraduate social work degree, and thus, lay a foundation in which her advanced education would qualify her for positions with wages comparable to those she received as a flight attendant. Specifically, the Full Commission found that "[a]ll rehabilitation professionals assigned to plaintiff by defendant expressed the belief that plaintiff would never earn the same wages without retraining. . . ." Therefore, we overrule the correlating assignments of error.

As to finding of fact 13, defendant argues that the Commission's characterization of the 14 November 1995 order, as compelling plaintiff to find low paying jobs, is not supported by evidence in the record. We disagree.

Although the 14 November 1995 order did not state that plaintiff was required to secure a low paying job, the evidence reveals that plaintiff could no longer meet the requirements for a position as a flight attendant. She was unqualified to assume a position in another field with wages comparable to those that she received as a flight attendant. In addition, the evidence reveals that when the rehabilitation specialists were unable to secure job leads for positions with wages comparable to those plaintiff received as a flight attendant, the specialists pursued job leads for positions with lower paying salaries. We conclude that the Commission's characterization of the 14 November 1995 order is supported by competent

evidence in the record. Therefore, the correlating assignment of error is overruled.

As to finding of fact 15, defendant argues that the Commission erred in determining the reservationist position was unsuitable based on the assumption that plaintiff would not obtain wages comparable to her former position. We disagree. As previously stated, there is no evidence in the record that plaintiff was officially offered the position. Moreover, it was proper for the Commission to consider plaintiff's pre-injury and post-injury wages in determining whether the reservationist position was suitable employment. Therefore, we overrule the correlating assignment of error.

Conclusion

We conclude that the Commission did not err in: 1) awarding total disability benefits to plaintiff pursuant to N.C.G.S. § 97-29, 2) determining that the 14 November 1995 administrative decision and order was improvidently entered, and 3) concluding that no suitable jobs were available for plaintiff and that her educational pursuits were a proper form of vocational rehabilitation. In addition, we conclude that the Commission's findings of fact 2, 10, 11, 12, 13, and 15 are supported by competent evidence in the record. The opinion and award of the Commission is affirmed.

AFFIRMED.

Judges WYNN and McCULLOUGH concur.

JOHN JASON JOHNSON AND CHARLES DARNELL BLACKWELL, PLAINTIFFS v. STANLEY EARL HARRIS; JEREMY CAINE FULLER (INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS POLICE OFFICERS); AND CITY OF DURHAM, DEFENDANTS

No. COA01-628

(Filed 7 May 2002)

1. Civil Procedure— motion to strike affidavit—voluntary dismissal

Although plaintiffs contend the trial court erred by denying their N.C.G.S. § 1A-1, Rule 56(e) motion to strike defendant officer's 2 October 2000 affidavit in support of defendant city's

motion for summary judgment, the Court of Appeals is without jurisdiction to address this issue because plaintiffs voluntarily dismissed their claims against defendant city under N.C.G.S. § 1A-1, Rule 41, which terminated the controversy between plaintiffs and defendant city.

2. Jurisdiction— voluntary dismissal—consideration of collateral issues—sanctions

The termination of an action by means of an N.C.G.S. § 1A-1, Rule 41 dismissal does not deprive either the trial court or the appellate court of jurisdiction to consider collateral issues such as sanctions.

3. Pleadings— sanctions—Rule 11—Rule 56(g)

The trial court's 2 January 2001 order awarding N.C.G.S. § 1A-1, Rule 11 sanctions against plaintiffs' attorneys for seeking to recover attorney fees and costs associated with plaintiffs' N.C.G.S. § 1A-1, Rule 56(e) motion to strike defendant officer's affidavit in support of defendant city's motion for summary judgment is reversed, because: (1) the record indicates plaintiffs reasonably believed based on existing case law that the appropriate means for seeking attorney fees and costs associated with their Rule 56(e) motion to strike the affidavit was to move for sanctions under Rule 56(g); and (2) given the unusually sparse case law regarding Rule 56(g) and the meaning of bad faith in the context of Rule 56(g), it would be unduly harsh to conclude that plaintiffs' motion for sanctions under Rule 56(g) was so unwarranted by existing law as to merit Rule 11 sanctions.

Judge WALKER concurring in a separate opinion.

Appeal by plaintiffs from orders entered 2 January 2001 by Judge Henry V. Barnette in Durham County Superior Court. Heard in the Court of Appeals 20 February 2002.

Glenn, Mills and Fisher, P.A., by Stewart W. Fisher, for plaintiff-appellants.

The Banks Law Firm, P.A., by Bryan E. Wardell, for defendant-appellee Jeremy C. Fuller.

Office of the City Attorney, by Assistant City Attorney Patrick Baker; Faison & Gillespie, by Reginald B. Gillespie, Jr. and Keith D. Burns, for defendant-appellee City of Durham.

HUNTER, Judge.

John Jason Johnson and Charles Darnell Blackwell and their attorneys Alexander Charns and N. Cole Williams (together "plaintiffs") appeal the trial court's 2 January 2001 orders (1) denying a motion to strike an affidavit and (2) awarding Rule 11 sanctions against plaintiffs. We hold that we are without jurisdiction to address the trial court's order denying the motion to strike the affidavit. We also reverse the trial court's order granting Rule 11 sanctions against plaintiffs.

The pertinent procedural history is as follows. Plaintiffs filed a complaint against the City of Durham ("the City") and City of Durham Police Officers Stanley Harris and Jeremy Fuller (together "defendants") alleging that Officers Harris and Fuller violated plaintiffs' Fourth Amendment and common law rights during a vehicle stop. After defendants filed answers, plaintiffs deposed Officer Fuller, during which deposition Fuller's attorney instructed Fuller not to answer certain questions. Plaintiffs moved to compel Fuller to answer the questions he had failed to answer, and the trial court granted the motion and ordered that Fuller's deposition be reconvened.

Fuller then filed a motion for summary judgment, and the record does not indicate that the motion was accompanied by any affidavits. The City also filed a motion for summary judgment, which was accompanied by an affidavit from Fuller ("the 2 October 2000 affidavit" or "the affidavit"). Fuller subsequently filed an "Amended and Restated Motion for Summary Judgment," accompanied by a second affidavit from Fuller ("the 20 October 2000 affidavit").

While these motions for summary judgment were pending, Fuller's deposition was reconvened. After the deposition was concluded, plaintiffs filed a motion to strike Fuller's 2 October 2000 affidavit pursuant to Rule 56(e) of the North Carolina Rules of Civil Procedure ("Rule 56(e)"), arguing that Fuller's deposition testimony revealed that his 2 October 2000 affidavit was not based upon personal knowledge as required by Rule 56(e). Plaintiffs also filed a motion for sanctions against Fuller, Fuller's attorney, and the City's attorneys pursuant to Rule 56(g) of the North Carolina Rules of Civil Procedure ("Rule 56(g)"), arguing that Fuller's 2 October 2000 affidavit had been submitted in bad faith.

At a hearing on 13 November 2000, the trial court denied plaintiffs' Rule 56(e) motion to strike Fuller's 2 October 2000 affidavit, and

also denied plaintiffs' Rule 56(g) motion for sanctions. Defendants then orally moved for sanctions against plaintiffs pursuant to Rule 11 of the North Carolina Rules of Civil Procedure ("Rule 11"), arguing that plaintiffs' Rule 56(g) motion for sanctions was not well grounded in fact or in law. The trial court indicated that it would take under advisement defendants' motion for Rule 11 sanctions, as well as Fuller's pending motion for summary judgment. Two days after the hearing, the attorney for the City served the trial court and plaintiffs with an affidavit in support of the motion for Rule 11 sanctions. That same day, Fuller's attorney delivered by hand a letter and affidavit to the trial court regarding the motion for Rule 11 sanctions, but failed to serve these documents on plaintiffs until five days later. On 17 November 2000, before plaintiffs received the letter and affidavit from Fuller's attorney, the trial court filed a "Memorandum of Decision" granting Fuller's motion for summary judgment, and also granting the motion for Rule 11 sanctions against plaintiffs.[1] Plaintiffs filed a Notice of Appeal from the "Memorandum of Decision" on 11 December 2000.

Plaintiffs' claims against Officer Harris were tried before a jury on 27 November 2000, and the jury found in favor of Harris on all claims. On 2 January 2001, the trial court entered a formal order denying plaintiffs' Rule 56(e) motion to strike Fuller's affidavit (embodying the ruling made at the hearing) and a formal order granting defendants' motion for Rule 11 sanctions against plaintiffs (embodying the ruling in the court's "Memorandum of Decision"). On 8 January 2001, plaintiffs filed a Notice of Appeal from the two orders entered 2 January 2001. On 10 January 2001, attorneys Charns and Williams filed a separate Notice of Appeal from the 2 January 2001 order granting Rule 11 sanctions. On 2 April 2001, plaintiffs voluntarily dismissed the remaining claims against the City without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure ("Rule 41").

On appeal, plaintiffs assign error to: (1) the trial court's denial of plaintiffs' Rule 56(e) motion to strike Fuller's 2 October 2000 affidavit; and (2) the trial court's grant of defendants' motion for Rule 11 sanctions against plaintiffs for filing the Rule 56(g) motion for sanctions. Plaintiffs do not assign error to the trial court's denial of

1. The trial court specifically granted Rule 11 sanctions against attorneys Charns and Williams, and not against either of the named plaintiffs, Johnson or Blackwell. However, this opinion will refer simply to "Rule 11 sanctions against plaintiffs" for purposes of convenience.

plaintiffs' Rule 56(g) motion for sanctions. Plaintiffs also do not assign error to the trial court's grant of summary judgment in favor of Fuller.

[1] We first address the trial court's denial of plaintiffs' Rule 56(e) motion to strike Fuller's 2 October 2000 affidavit. The record indicates that the affidavit in question was filed in support of the City's motion for summary judgment. As noted above, plaintiffs have voluntarily dismissed without prejudice their claims against the City pursuant to Rule 41. We hold that we are without jurisdiction to address this issue as a result of plaintiffs' voluntary dismissal of their claims against the City, since such dismissal served to terminate the controversy between plaintiffs and the City. *See Teague v. Randolph Surgical Assoc.*, 129 N.C. App. 766, 773, 501 S.E.2d 382, 387 (1998).[2]

[2] Plaintiffs' remaining arguments all involve the trial court's grant of Rule 11 sanctions. We first note that the termination of an action by means of a Rule 41 dismissal does not deprive either the trial court, or the appellate court, of jurisdiction to consider collateral issues such as sanctions. *See Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992). Therefore, the fact that plaintiffs have voluntarily dismissed their claims against the City does not preclude this Court from reviewing the grant of defendants' motion for Rule 11 sanctions.

[3] On appeal, plaintiffs argue that the trial court erred in awarding Rule 11 sanctions. Because we agree, we need not reach plaintiffs' other arguments.

> Rule 11 provides in pertinent part:
>
> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reason-

2. The record indicates that the affidavit in question was not filed by Fuller in support of either of his motions for summary judgment. However, the denial of plaintiffs' motion to strike this affidavit would still be moot even if the affidavit had also been submitted in support of Fuller's motions for summary judgment because plaintiffs have not appealed the order granting summary judgment in favor of Fuller and, therefore, that judgment has become final, terminating the controversy between plaintiffs and Fuller.

> able inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

N.C. Gen. Stat. § 1A-1, Rule 11(a) (1999). Pursuant to Rule 11, an attorney certifies three distinct things as being true by signing a pleading, motion, or other paper: (1) that it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) that it is well grounded in fact; and (3) that it is not interposed for any improper purpose. *See Bumgardner v. Bumgardner*, 113 N.C. App. 314, 322, 438 S.E.2d 471, 476 (1994). "A breach of the certification as to any one of these three prongs is a violation of [Rule 11]." *Id.* In determining whether an attorney's conduct merits sanctions pursuant to Rule 11, the court must consider the totality of the circumstances. *See Carter v. Stanly County*, 125 N.C. App. 628, 636, 482 S.E.2d 9, 13-14, *disc. review denied*, 346 N.C. 276, 487 S.E.2d 540 (1997).

In reviewing a trial court's determination to award Rule 11 sanctions, the appellate court conducts a *de novo* review. *Twaddell v. Anderson*, 136 N.C. App. 56, 70, 523 S.E.2d 710, 720 (1999), *disc. review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000). Pursuant to this review, the appellate court must determine: "(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Id.*

In the present case, plaintiffs moved to strike Fuller's 2 October 2000 affidavit on the grounds that it violated Rule 56(e), which requires that an affidavit accompanying a motion for summary judgment "shall be made on personal knowledge." N.C. Gen. Stat. § 1A-1, Rule 56(e) (1999). Plaintiffs alleged, and the record establishes, that Fuller testified during his reconvened deposition that he was not familiar with the phrase "car frisk," which phrase appears in at least twelve places in his affidavit. For example, in his affidavit Fuller averred that he is aware that "reasonable suspicion is required to stop or frisk an individual or to conduct a 'car frisk,' " and that he did not

"conduct a 'car frisk' of Plaintiff John Jason Johnson's vehicle." The motion further alleged, and Fuller's deposition testimony establishes, that although Fuller used the phrase "car frisk" on numerous occasions in his affidavit, at the time he signed the affidavit, Fuller had never heard the phrase "car frisk" or used it himself, and was not certain as to the meaning of the phrase. His testimony further indicates that, upon reading the affidavit, he assumed that "car frisk" meant the same thing as a "safety search" or a "weapons check" of a car (which was, apparently, a correct assumption).

Along with their Rule 56(e) motion to strike the affidavit as not being based upon personal knowledge, plaintiffs also requested that Fuller, Fuller's attorney, and the City's attorneys be ordered to pay attorney's fees and costs incurred by plaintiffs in making their Rule 56(e) motion to strike the affidavit. These sanctions were sought pursuant to Rule 56(g), which provides:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees.

N.C. Gen. Stat. § 1A-1, Rule 56(g) (1999). Plaintiffs alleged that sanctions were warranted pursuant to Rule 56(g) because: "At a minimum, the affidavit was signed, filed and used in bad faith. Defendant City of Durham, who has the power to fire Defendant Fuller, had its attorney or attorneys prepare an affidavit using phrases Defendant Fuller did not use, and terms which he did not know the meaning."

It should also be noted that in their Rule 56(g) motion, plaintiffs specifically cited *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986), for the proposition that "the filing of inappropriate affidavits in support of, or in opposition to, motions for summary judgment should be considered under Rule 56(g), rather than Rule 11." *Id.* at 830. Plaintiffs also cited *Brooks v. Giesey*, 334 N.C. 303, 432 S.E.2d 339 (1993), in which case our Supreme Court approvingly quoted *Zaldivar* for the proposition that " 'Rule 11 is not . . . properly used to sanction the inappropriate filing of papers where other rules more directly apply.' " *Id. at* 319, 432 S.E.2d at 348 (citation omitted).

In its 2 January 2001 order granting defendants' motion for Rule 11 sanctions against plaintiffs, the trial court first reviewed Officer Fuller's 2 October 2000 affidavit and Fuller's deposition testimony. The trial court then correctly found that plaintiffs' Rule 56(e) motion to strike was based upon the contention that the affidavit was not based upon personal knowledge, and that plaintiffs' Rule 56(g) motion for sanctions was based upon the theory that defendants had submitted the affidavit in bad faith. The trial court also correctly found that Rule 56(g) does not define "bad faith," and that "[t]here are apparently no cases from North Carolina's appellate courts which interpret or apply Rule 56(g)." The trial court also cited *Jaisan, Inc. v. Sullivan*, 178 F.R.D. 412 (S.D.N.Y. 1998), for the proposition that " '[i]n the rare instances in which Rule 56(g) sanctions have been granted, the conduct has been egregious.' " *Id.* at 415 (citation omitted).

The trial court then entered the following pertinent findings:

> 17. Plaintiffs' Motion for Sanctions is based on the theory that:
>
> (a) the City's attorneys prepared the affidavit and submitted it to Officer Fuller or his attorney;
>
> (b) that the City's attorneys knew that Officer Fuller was not familiar with the term "car frisk" or learned that Officer Fuller was not familiar with the term "car frisk";
>
> (c) that the City's attorneys, using threats of termination, coerced Officer Fuller to sign the affidavit; and
>
> (d) the City's attorneys filed the affidavit with the Court with the knowledge that it was false and with the intent to mislead or deceive the Court.

The trial court further found that plaintiffs had not offered any evidence to support this theory, and that the Rule 56(g) motion was, therefore, not well grounded in fact. In a footnote immediately following Finding of Fact Seventeen, the trial court noted:

> If Plaintiffs are alleging some lesser misconduct which does not include a deliberate attempt to mislead the Court, their motion fails to show that this is one of the "rare instances" of "particularly egregious" misconduct which will support a

> Rule 56(g) motion and the motion is not warranted by existing law.

Thus, the trial court awarded Rule 11 sanctions against plaintiffs.

The trial court appears to have been unsure about the theory underlying plaintiffs' Rule 56(g) motion for sanctions. The trial court appears to have determined that plaintiffs contended that the attorneys for the City engaged in an intentional and unethical act of fraud upon the Court by coercing Officer Fuller to sign an affidavit which the City and Officer Fuller knew was substantively false. The trial court further determined that, this being plaintiffs' theory, the Rule 56(g) motion was not well grounded in fact. However, the trial court also acknowledged that plaintiffs might be alleging "some lesser misconduct which does not include a deliberate attempt to mislead the Court," in which case, the trial court found, plaintiffs' Rule 56(g) motion would not be warranted by existing law.

After carefully reviewing plaintiffs' Rule 56(g) motion, as well as the transcript of the hearing, we hold: (1) that the trial court's finding that plaintiffs' Rule 56(g) motion was based upon the theory that the City had intentionally coerced Fuller to sign an affidavit that the City and Fuller knew was substantively false is not supported by the evidence; (2) that plaintiffs' Rule 56(g) motion was, instead, based upon the contention that an affidavit in support of a motion for summary judgment is submitted in bad faith where it is signed by an affiant who is uncertain about the meaning of certain phrases in the affidavit which are vital to the affidavit's bearing upon the motion for summary judgment; and (3) that the legal basis for plaintiffs' Rule 56(g) motion was not so unwarranted by existing law as to merit Rule 11 sanctions.

As noted above, plaintiffs alleged in their motion that, at a minimum, the affidavit was submitted in bad faith because Officer Fuller signed the affidavit despite the fact that Fuller was uncertain as to the meaning of certain vital phrases in the affidavit at the time he signed it. At the hearing on the motion, plaintiffs again argued to the trial court that Fuller's affidavit was not based upon his personal knowledge and that a party should not be permitted to submit, in support of a motion for summary judgment, an affidavit that contains a term which the affiant does not use, and with which the affiant is not familiar. Plaintiffs further clarified that, although they believed the City should not have prepared an affidavit containing terms with which Officer Fuller was not familiar, their motion for sanctions was also

addressed to Officer Fuller because "ultimately, it's defendant Fuller who swore to the truth and the personal knowledge of this affidavit, [and it] can't be all blamed on lawyers."

Plaintiffs' motion and the transcript of the hearing compel the conclusion that the motion was based upon the allegation that, at the very least, Fuller's deposition testimony established that he had signed an affidavit when he was less than certain as to the meaning of a phrase which appeared twelve times in the deposition and which was, undeniably, crucial to the import of the affidavit and to its bearing upon the City's motion for summary judgment. Thus, plaintiffs sought to have the affidavit stricken pursuant to Rule 56(e), and they also sought, understandably, to recover the attorney's fees and costs associated with their motion to strike. The citations in plaintiffs' motion to *Zaldivar* and *Brooks* imply that plaintiffs' research indicated that sanctions based upon the filing of inappropriate affidavits in support of, or in opposition to, motions for summary judgment should be sought pursuant to Rule 56(g), rather than Rule 11. Thus, plaintiffs presented the argument that, because the meaning of the phrase "car frisk" was vital to the affidavit's bearing upon the motion for summary judgment, and because Fuller's deposition testimony indicated that he was uncertain as to the meaning of this term when he signed the affidavit, the affidavit had been submitted in bad faith.

Plaintiffs were ultimately unable to persuade the trial court that Fuller's affidavit was not based upon personal knowledge, or that it was submitted in bad faith, and, as noted above, the trial court's rulings on these issues are not now before us. However, we do not believe that plaintiffs should be sanctioned for seeking to recover attorney's fees and costs associated with their Rule 56(e) motion to strike the affidavit by moving for sanctions pursuant to Rule 56(g).

This Court has stated that:

> Rule 11 was instituted to prevent abuse of the legal system, our General Assembly never intending to constrain or discourage counsel from the appropriate, well-reasoned pursuit of a just result for their client. Case law clearly supports the fact that just because a plaintiff is eventually unsuccessful in her claim, does not mean the claim was inappropriate or unreasonable. An otherwise reading of the law would compromise every attorney's ability to pursue a claim where the status of the law is subject to

dispute and force litigants to refrain from arguing all but the most clear-cut of issues.

Grover v. Norris, 137 N.C. App. 487, 495, 529 S.E.2d 231, 235-36 (2000). The record indicates that plaintiffs reasonably believed, based on existing case law, that the appropriate means for seeking attorney's fees and costs associated with their Rule 56(e) motion to strike Fuller's affidavit was to move for sanctions pursuant to Rule 56(g). Thus, plaintiffs attempted to persuade the court that Fuller's affidavit, which they contended was not based upon personal knowledge, was also submitted in "bad faith" pursuant to Rule 56(g). Given the unusually sparse case law regarding Rule 56(g) and the meaning of "bad faith" in the context of Rule 56(g), we believe it would be unduly harsh to conclude that plaintiffs' motion for sanctions pursuant to Rule 56(g) was so unwarranted by existing law as to merit Rule 11 sanctions. This is especially so given the fact that both *Zaldivar* and *Brooks* can be read as implying that Rule 56(g) may be an appropriate basis for seeking sanctions even where a party files a merely "inappropriate" affidavit in support of, or in opposition to, a motion for summary judgment. *See Zaldivar*, 780 F.2d at 830; *Brooks*, 334 N.C. at 319, 432 S.E.2d at 348. "Rule 11 should 'not have the effect of chilling creative advocacy,' and therefore, in determining compliance with Rule 11, 'courts should avoid hindsight and resolve all doubts in favor of the signer.' " *Bryson v. Sullivan*, 102 N.C. App. 1, 8, 401 S.E.2d 645, 651 (1991) (citations omitted), *affirmed in part and reversed in part on other grounds*, 330 N.C. 644, 412 S.E.2d 327 (1992). Examining the totality of the circumstances, and resolving all doubts in favor of plaintiffs, we hold that the trial court erred in awarding Rule 11 sanctions against plaintiffs. Therefore, the trial court's 2 January 2001 order awarding Rule 11 sanctions against plaintiffs is reversed.

Reversed.

Judge BRYANT concurs.

Judge WALKER concurs in a separate opinion.

WALKER, Judge, concurring.

I concur with the majority opinion which holds that this Court is without jurisdiction to address the appeal of the denial of plaintiffs' Rule 56(e) motion and that the trial court erred in awarding Rule 11 sanctions against plaintiffs and should be reversed.

"Whether an attorney's conduct merits Rule 11 sanctions is determined by looking at the totality of the circumstances . . ., and is a matter reviewable *de novo*." *Carter v. Stanly County*, 125 N.C. App. 628, 636, 482 S.E.2d 9, 13-14, *disc. rev. denied*, 346 N.C. 276, 487 S.E.2d 540 (1997) (citations omitted). Because our review is *de novo*, we only need to look at whether Rule 11 sanctions should be imposed on plaintiffs for filing their Rule 56(g) motion. Rule 11 provides that a motion must be: (1) warranted by existing law or the good faith modification or extension of existing law, (2) well grounded in fact, and (3) made for a proper purpose. *Golds v. Central Express, Inc.*, 142 N.C. App. 664, 668, 544 S.E.2d 23, 27, *disc. rev. denied*, 353 N.C. 725, 550 S.E.2d 775 (2001). If any one of these does not exist, Rule 11 sanctions are appropriate. *Id.*

Applying this test here, we first determine whether plaintiffs' Rule 56(g) motion for sanctions is warranted by existing law or the good faith modification or extension of existing law. N.C. Gen. Stat. § 1A-1, Rule 56(g) allows for the court, if it finds an affidavit is submitted in bad faith or solely for the purpose of delay, to award expenses, including attorney's fees, to the opposing party. While there is limited case law on what constitutes "bad faith" under Rule 56(g), our Supreme Court has approved the use of Rule 56(g) sanctions for "the filing of inappropriate affidavits" in support of summary judgment motions. *Brooks v. Giesey*, 334 N.C. 303, 319, 432 S.E.2d 339, 348 (1993). Thus, our existing case law or a good faith extension of our case law supports the legal theory that where an affidavit has been submitted in support of summary judgment and was done in bad faith or was inappropriate, Rule 56(g) allows for the recovery of attorney's fees and expenses.

We next look to see whether plaintiffs' Rule 56(g) motion was well grounded in fact. Plaintiffs alleged that, in his affidavit, Officer Fuller used the phrase "car frisk" multiple times. Further, in his sworn deposition, he repeatedly denied having ever used the term or of actually knowing its meaning. Officer Fuller also testified under oath that his employer had been the one who prepared the affidavit. The inference is that the signing and filing of the affidavit, prepared by his employer, with terms he did not know, use, or understand, was in bad faith and inappropriate. Thus, we agree with the majority that the Rule 56(g) motion was well grounded in fact.

We finally ask whether the motion was filed for an improper purpose. "[J]ust because a plaintiff is eventually unsuccessful in her claim does not mean the claim was inappropriate or unreasonable."

Grover v. Norris, 137 N.C. App. 487, 495, 529 S.E.2d 231, 235 (2000). "An improper purpose is 'any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.' " *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) (*quoting Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992)). "An objective standard is used to determine the existence of an improper purpose, with the burden on the movant to prove such improper purpose." *Id.* As the majority notes, "The record indicates that plaintiffs reasonably believed, based on existing case law, that the appropriate means for seeking attorney's fees and cost associated with their Rule 56(e) motion to strike Fuller's affidavit was to move for sanctions pursuant to Rule 56(g)." There has been no showing by defendants that the plaintiffs' motion for Rule 56(g) sanctions was filed for an improper purpose.

Thus, I concur with the majority in holding that the trial court erred in awarding Rule 11 sanctions against plaintiffs for the filing of their Rule 56(g) motion.

EASTERN CAROLINA INTERNAL MEDICINE, P.A., PLAINTIFF v. ANNA FAIDAS, M.D., AN INDIVIDUAL D/B/A COASTAL ONCOLOGY & HEMATOLOGY, DEFENDANT

No. COA01-626

(Filed 7 May 2002)

1. Employer and Employee— employment contract—cost sharing provision—restraint on trade

The trial court did not err in a breach of a physician's employment contract action by granting summary judgment for plaintiff employer and by denying summary judgment for defendant employee on the issue of the cost sharing provision of the contract, designed to protect plaintiff against competition by defendant within the three counties described, even though defendant contends the provision is void as an unreasonable restraint of her trade and against public policy because: (1) a forfeiture, unlike a restraint included in an employment contract, is not a prohibition on the employee's engaging in competitive work; (2) a restriction in the contract with does not preclude the employee from engaging in competitive activity, but simply provides for the loss of

rights or privileges if he does so, is not in restraint of trade; and (3) the contract in this case does not prohibit defendant from engaging in the practice of her profession, but only provides that if she does so within the described three county area, she will pay a certain sum for making this choice.

2. Employer and Employee— employment contract—liquidated damages

The trial court did not err in a breach of a physician's employment contract action by granting summary judgment for plaintiff employer and by denying summary judgment for defendant employee on the issue of the cost sharing provision of the contract, designed to protect plaintiff against competition by defendant within the three counties described, being a legitimate sum of liquidated damages rather than an unenforceable penalty because of: (1) the nature of the contract; (2) the intention of the parties; (3) the sophistication of the parties; (4) the stipulation of the parties; (5) the fact that the parties are better able than anyone to determine a reasonable compensation for a breach; and (6) the fact that the damages were difficult to ascertain.

Judge WYNN dissenting.

Appeal by defendant from orders entered 23 January 2001 and 27 February 2001 by Judge Benjamin Alford in Craven County Superior Court. Heard in the Court of Appeals 13 March 2002.

Ward and Smith, P.A., by A. Charles Ellis, for plaintiff-appellee.

Glover & Petersen, P.A., by James R. Glover, and Voerman Law Firm, P.L.L.C., by David P. Voerman, for defendant-appellant.

TYSON, Judge.

Anna Faidas, M.D. ("defendant") appeals the 23 January 2001 order of the trial court granting summary judgment in favor of Eastern Carolina Internal Medicine, P.A. ("plaintiff") and the 27 February 2001 order of the trial court denying her motion for a new trial and/or amendment of the judgment.

I. Facts

On 21 March 2000, plaintiff filed a complaint alleging a breach of an employment contract ("the Contract") between the parties, dated 22 July 1996, and seeking liquidated damages in the amount of

$109,029.04 from defendant. Defendant denied the claim, asserting that the liquidated damages provision in the Contract was an unenforceable penalty and that the provision was actually a covenant not to compete, void as against public policy.

Both parties filed motions for summary judgment. The trial court found that there was no genuine issue of material fact, denied defendant's motion for summary judgment, granted plaintiff's motion for summary judgment, and entered judgment that plaintiff recover from defendant the sum of $109,029.04, plus interest.

On 25 January 2001, defendant moved for a new trial and/or amendment of the judgment pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. The trial court denied the motion by order filed 27 February 2001. Defendant appeals.

II. Issues

The sole issue presented is whether the trial court erred in granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment.

III. Standard of Review

Rule 56 of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2000). On appeal, this Court must view the record in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Aetna Casualty & Surety Co. v. Welch*, 92 N.C. App. 211, 213, 373 S.E.2d 887, 888 (1988). Both parties conceded that there are no issues as to any material facts preventing summary judgment in this case. Having carefully reviewed the record, we affirm the trial court's judgment and order.

Defendant contends that the provision at issue in the Contract, entitled "Cost Sharing," is: (1) void as an unreasonable restraint on her ability to practice her profession and (2) is not a legitimate sum of liquidated damages but rather an unenforceable penalty. Plaintiff argues that the "Cost Sharing" provision is not a covenant not to compete and a valid liquidated damages clause.

The "Cost Sharing" provision provides:

The parties acknowledge and agree that the practice of medicine at the level afforded Employee by Employer requires a large commitment of capital by Employer together with the undertaking by Employer of significant long term indebtedness and lease obligations for the facilities and equipment provided for Employee; that the recruitment by Employer of a qualified physician to replace Employee upon termination of employment is a lengthy and expensive process; and that Employer will sustain economic loss as a result of the termination of employment of Employee and the absence of revenue generated by Employee to offset continuing overhead obligations of Employer. The parties hereby do stipulate that the termination of employment of Employee will result in economic damage to Employer and that under the circumstances herein provided a reasonable estimate of such damage and an equitable reimbursement thereof to Employer by Employee is the Cost Share as herein computed, which Cost Share amount Employee agrees is reasonable and that Employee will pay pursuant to the terms hereof.

In the event that Employee, within one (1) year following termination of employment with Employer for any reason, shall

(a) engage in the practice of medicine within the geographical boundaries of Jones, Pamlico or Craven Counties, North Carolina, (b) become employed with any practicing physician or group practice within the geographical boundaries of Jones, Pamlico or Craven Counties, North Carolina, or (c) become employed by any hospital, clinic or other entity providing health care services within the geographical boundaries of Jones, Pamlico or Craven Counties, North Carolina,

Employee in any such events thereupon shall pay to Employer an amount equal to the Cost Share.

For purposes of the foregoing, the Cost Share amount shall be computed as follows:

(a) The Total Operating Expense of Employer for the fiscal year of Employer immediately preceding the date of termination of employment as reflected on the fiscal year-end financial statements of Employer shall be divided by the number of full-time equivalent physician-employees of Employer during such fiscal

year, and (b) The quotient then shall be multiplied by twenty-five percent (25%) with the product being the Cost Share amount.

For example, the Cost Share with respect to a termination of employment during 1992 is computed using the Total Operating Expense figure of $4,425,000 from Employer's December 31, 1991 financial statements, divided by 13 full-time equivalent physician-employees for a quotient of $340,000, which then is multiplied by twenty-five percent (25%) to produce a Cost Share amount of $85,000.

A. Covenant Not to Compete

[1] Defendant first argues that the "Cost Sharing" provision is void as an unreasonable restraint of her trade and against public policy. We disagree.

This Court has already addressed this issue in *Newman v. Raleigh Internal Medicine Assocs.*, 88 N.C. App. 95, 362 S.E.2d 623 (1987). In *Newman*, the contract provision at issue provided:

> Limitation of Practice. If Employee voluntarily terminates Employee's employment within three (3) years of Employee's initial employment by the Corporation and in Wake County, North Carolina, directly or indirectly engages in, owns, manages, operates, controls, is employed by, connected with, or participates in any practice or business *similar* to the type of practice or business conducted by the Corporation at the time of termination, the Employee shall forfeit any salary continuation beyond his base salary draw up to the date of termination.

Id. at 97, 362 S.E.2d at 625 (emphasis in original). We held that the provision was not a covenant not to compete. *Id.* at 99, 362 S.E.2d at 626. A " 'forfeiture, unlike a restraint included in an employment contract, is not a prohibition on the employee's engaging in competitive work . . . . A restriction in the contract which does not *preclude* the employee from engaging in competitive activity, but simply provides for the loss of rights or privileges if he does so is not in restraint of trade . . . .' " *Id.* at 100, 362 S.E.2d at 626 (quoting *Hudson v. Insurance Co.*, 23 N.C. App. 501, 503, 209 S.E.2d 416, 418 (1974), *cert. denied*, 286 N.C. 414, 211 S.E.2d 217 (1975) (emphasis in original)).

The dissent attempts to distinguish this case from *Hudson* and *Newman* on the grounds that the employee here would be required to pay a sum of money to her former employer, rather than her former

employer withholding sums due to her. The underlying rational in *Hudson* and *Newman* is that "forfeiture provisions are designed to protect the employer against competition by former employees." The "Cost Sharing" provision at issue here is designed to protect plaintiff against competition by defendant within the three counties described. The defendant only forfeits the "Cost Share" amount upon choosing to engage in competition with plaintiff.

The Contract does not prohibit defendant from engaging in the practice of her profession, but only provides that if she does so within the described three county area, she will pay a certain sum for making this choice. Accordingly, we hold that the "Cost Sharing" provision is not a covenant not to compete and we do not subject it to the strict scrutiny as to reasonableness and public policy required with a covenant not to compete. *See id.* at 100, 362 S.E.2d at 626.

B. Liquidated Damages

[2] Defendant next assigns that even if the "Cost Sharing" provision is not void as an unreasonable restraint of trade, it is an unenforceable penalty. We disagree. "Liquidated damages are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable . . . if the breach occurs." *City of Kinston v. Suddreth*, 266 N.C. 618, 620, 146 S.E.2d 660, 662 (1966) (citing McCormick, *Damages* § 146 (1935) (emphasis in original omitted)). "A penalty is a sum which a party similarly agrees to pay or forfeit . . . but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach, or as security . . . to insure that the person injured shall collect his actual damages." *Id.* (emphasis in original omitted).

Liquidated damages clauses which are reasonable in amount are enforceable as part of a contract and are not seen as penalty clauses. *See* 5 Arthur L. Corbin, *Corbin on Contracts* § 1057 (1964 & Supp. 2000); *see also Knutton v. Cofield*, 273 N.C. 355, 361-62, 160 S.E.2d 29, 34 (1968). Liquidated damages are collectable, but penalties are not enforceable. *Id.* at 361, 160 S.E.2d at 34.

" 'A stipulated sum is for liquidated damages only (1) where the damages which the parties reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where

the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach *or* is reasonably proportionate to the damages which have actually been caused by the breach.' " *Id.* (quoting 22 Am. Jur. 2d *Damages* § 214) (emphasis in original). Whether the liquidated amount is a reasonable prior estimate of damages is determined by the status of the parties at the time of making the contract. *Id.* at 362, 106 S.E.2d at 35.

It is undisputed that defendant breached the Contract. Defendant does not argue that the damages which the parties reasonably anticipated were not difficult to ascertain. We conclude that the first prong of *Knutton* has been satisfied. If either (1) the amount stipulated was a reasonable estimate of damages or (2) it was reasonably proportionate to the actual damages, then the second prong of *Knutton* has also been satisfied.

Defendant argues that the evidence does not establish that the actual damages suffered by plaintiff were reasonably proportionate to the "Cost Share" amount of $109,029.04. The general rule is that the amount stipulated in a contract as liquidated damages for a breach, if not a penalty, may be recovered in the event of a breach even though no actual damages are suffered. *Id.* at 362-63, 160 S.E.2d at 35.

Defendant specifically recognized and stipulated that "the termination of employment of Employee will result in economic damage to Employer" and that "a reasonable estimate of such damage and an equitable reimbursement thereof to Employer by Employee is the Cost Share . . . which Cost Share amount Employee agrees is reasonable."

The dissent focuses on the use of the word "termination" by the parties in the "Cost Sharing" provision and states that if defendant had decided to retire plaintiff would still have suffered the same economic damage. The crucial fact here is that defendant was only required to pay the liquidated damages upon breaching her promise not to compete with plaintiff in the described three county area. While the damages actually suffered by plaintiff in part arise as a result of defendant's termination, the "Cost Sharing" provision is designed to protect the employer against competition by former employees on the basis that the employer recruits the employee, markets the employee, provides the necessary facilities, and establishes a client base for the employee.

The formula provided for determining the "Cost Share" amount is very precise: the total operating expense for 1997 (the year prior to defendant's departure), divided by the number of full-time equivalent physicians employed the preceding year, multiplied by twenty-five percent (25%). Our Supreme Court has approved the use of a mathematical formula to compute liquidated damages. *See id.* at 357, 160 S.E.2d at 31-32. Defendant stipulated that the "Cost Share" amount was a reasonable estimate of the economic damage that plaintiff would suffer upon a breach of the Contract. Additionally, the "Cost Share" amount of $109,029.04 amounted to only three percent (3%) of the 3.5 million dollars produced by defendant for plaintiff in a year.

Considering the nature of the Contract, the intention of the parties, the sophistication of the parties, the stipulation of the parties, the fact that the parties are better able than anyone to determine a reasonable compensation for a breach, and the fact that the damages were difficult to ascertain, we hold that the liquidated damages stipulated were a reasonable estimate of damages and not a penalty. *See Bradshaw v. Millikin*, 173 N.C. 432, 92 S.E. 161 (1917). Accordingly, we hold that the trial court did not err in granting summary judgment for plaintiff and in denying summary judgment for defendant.

Affirmed.

Judge McGEE concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

Because I believe the "Cost Sharing" provision at issue in Dr. Faidas' employment contract was, in effect, an unenforceable covenant not to compete, or, alternatively, that such provision was an unenforceable penalty, I respectfully dissent from the majority opinion.

This Court's decisions in *Newman v. Raleigh Internal Medicine Assoc.*, 88 N.C. App. 95, 362 S.E.2d 623 (1987) and *Hudson v. Insurance Co.*, 23 N.C. App. 501, 209 S.E.2d 416 (1974), *cert. denied*, 286 N.C. 414, 211 S.E.2d 217 (1975), relied upon by the majority in concluding that the challenged "Cost Sharing" provision is not a covenant not to compete, are inapposite. Indeed, both decisions con-

cern the forfeiture of *future* or *prospective* benefits that would otherwise be paid by the former employer.

In *Hudson*, this Court considered the plaintiff's challenge to a provision in his employment contract. The contract provided that the plaintiff, an insurance agency manager, forfeited his right to a monthly retirement allowance from his former employer, if the plaintiff was licensed to sell, or sold, any kind of insurance in North Carolina during the payment period set forth in the contract. Following his retirement, the plaintiff was entitled to receive 120 consecutive monthly retirement benefit payments pursuant to the contract; the plaintiff made no monetary contribution to the retirement plan, which was funded solely by his former employer. The plaintiff challenged the forfeiture provision as an unenforceable covenant not to compete, arguing that such covenants are valid and enforceable only if given for valuable consideration and if the restrictions are reasonable in scope. The plaintiff reasoned that although he had "not made a financial contribution to the retirement plan, the pension rights ha[d] been earned by him and should not [have] be[en] divested by restrictions on future employment which would not [have] be[en] reasonable under the standards usually applicable to covenants not to compete." *Hudson*, 23 N.C. App. at 503, 209 S.E.2d at 418.

This Court in *Hudson* disagreed, noting that the contractual provision at issue was "not one where the employee agrees to refrain from competitive employment." *Id.* at 502, 209 S.E.2d at 417. While the question of the validity of such a provision had not previously been posed to the appellate courts of North Carolina, other jurisdictions had considered the question and concluded that:

> the forfeiture provisions are designed to protect the employer against competition by former employees who might *retire* and obtain benefits while engaging in competitive employment, and that the employer, as part of a noncontributory plan, can provide for this contingency. [Internal citations omitted.] The Courts additionally conclude that *the forfeiture*, unlike the restraint included in an employment contract, is not a prohibition on the employee's engaging in competitive work but *is merely a denial of the right to participate in the retirement plan* if he does so engage. "A restriction in the contract which does not preclude the employee from engaging in competitive activity, but simply provides for the loss of rights or privileges if he does so is not in

> restraint of trade [citations]." *Brown Stove Works, Inc. v. Kimsey*, 119 Ga. App. 453, 455, 167 S.E.2d 693, 695.

Id. at 503, 209 S.E.2d at 418 (emphasis added in part). This Court thus drew a distinction:

> between contracts that preclude the employee from engaging in competitive activity and those that do not proscribe competitive employment but provide that *retirement benefits provided solely by the employer* under the terms of the agreement will be payable only in the event the employee elects to refrain from competitive employment.

Id. at 503-04, 209 S.E.2d at 418 (emphasis added).

Likewise, in *Newman*, the employee sought to recover post-termination benefits under his employment contract. The plaintiff's employment contract provided for post-termination benefits, consisting of a portion of the plaintiff's base salary, for a period of ninety days following the plaintiff's termination for reasons other than cause, death or disability. A separate "Limitation of Practice" provision in the plaintiff's employment contract provided for the forfeiture of any such benefits if, within three years of his initial employment, (1) the employee voluntarily terminated his own employment, and (2) engaged in a post-termination practice in Wake County that was "similar" to his practice with his former employer.

This Court in *Newman* affirmed the trial court's grant of summary judgment to the employer, holding that the "Limitation of Practice" provision was not a covenant not to compete:

> Plaintiff did not promise not to engage in competitive employment. He agreed to forfeit his rights to any *post-termination benefits* should he decide to engage in a similar practice in Wake County within three years after beginning employment with [the employer]. The provision gives [the employer] no right to interfere with plaintiff's post-termination practice. It allows [the employer] to *avoid paying plaintiff additional sums* if he decides to engage in a similar practice.

Newman, 88 N.C. App. 99-100, 362 S.E.2d at 626 (emphasis added). This Court then quoted the above-quoted language from *Hudson* in concluding that the "Limitation of Practice" provision was "not subject to the strict scrutiny with which courts examine" covenants-not-to-compete. *Newman*, 88 N.C. App. at 100, 362 S.E.2d at 626.

As in *Hudson*, the contractual provision at issue in *Newman* concerned the payment of post-termination benefits by the employer to the employee. In contrast, the instant case concerns not the forfeiture of future or prospective post-termination benefits paid by the employer, but the required payment by the employee of a large sum to the employer as compensation for "competing" with the employer. I fail to see a meaningful distinction between the "Cost Sharing" provision at issue herein and a traditional covenant not to compete coupled with a damages provision for breach thereof, as both involve a restraint of trade based upon a disincentive to compete in the form of damages required to be paid by the former employee. *See, e.g., Nalle Clinic Co. v. Parker*, 101 N.C. App. 341, 399 S.E.2d 363 (1991) (concerning a "Practice Limitation" provision and provision for liquidated damages for breach thereof); *see also Iredell Digestive Disease Clinic v. Petroza*, 92 N.C. App. 21, 373 S.E.2d 449 (1988). I therefore believe that the trial court erred in entering summary judgment in favor of plaintiff without any consideration of the reasonableness of the terms of the practice restriction in the "Cost Sharing" provision under a traditional covenant not to compete analysis.

Additionally, I disagree with the majority's categorization of the damages portion of the "Cost Sharing" provision as a liquidated damages provision rather than an unenforceable penalty, based on defendant's specifically recognizing and stipulating in the contract that "the termination of employment of Employee will result in economic damage to Employer" and that "a reasonable estimate of such damage and an equitable reimbursement thereof to Employer by Employee is the Cost Share . . . which Cost Share amount Employee agrees is reasonable." Defendant's stipulation at the time she signed the agreement as to the reasonableness of the damages provision should have no bearing on this Court's independent determination of the reasonableness thereof from a legal standpoint.

Moreover, *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 29 (1968) requires not only that liquidated damages must be difficult to ascertain because of their uncertainty or indefiniteness, but also that the stipulated sum must be (1) a reasonable estimate of the damages which would *probably* be *caused by the breach*, or (2) reasonably proportionate to the damages which have *actually* been *caused by the breach*. *Id.* at 361, 160 S.E.2d at 34. If these conditions are not met, the stipulated sum will be deemed an unenforceable penalty. *Id.* In my view, neither of these conditions has been met in the instant case.

In the "Cost Sharing" provision, the parties acknowledged and agreed that employing Dr. Faidas required "a large commitment of capital by Employer together with the undertaking by Employer of significant long term indebtedness[.]" The parties further acknowledged and agreed that the recruitment of a replacement for Dr. Faidas upon termination of her employment would be "a lengthy and expensive process; and that Employer will sustain economic loss as a result of the termination of employment of Employee and the absence of revenue generated by Employee to offset continuing overhead obligations of Employer." The parties thus stipulated that Dr. Faidas' termination would "result in economic damage to Employer" and that the calculated "Cost Share" was a reasonable estimate of the damage that would likely result from her termination.

Notably absent is any indication that the stipulated "Cost Share" sum was a reasonable estimate of the damages that would be *caused by Dr. Faidas' breach* of the practice limitation, or were reasonably proportionate to the actual damages *caused by the breach.* Rather, the "Cost Sharing" provision specifically acknowledges that these costs would have been incurred by plaintiff upon the termination of Dr. Faidas' employment *under any circumstances.* That is, if Dr. Faidas had decided to retire prematurely, plaintiff would still have suffered the same economic damage as it did under the circumstances present herein. As the "Cost Share" sum was in no way tied to damages *caused* by Dr. Faidas' violation of the practice restriction in the "Cost Sharing" provision, I believe the majority improperly characterizes this sum as an enforceable liquidated damages provision. *See Knutton.*

For the foregoing reasons, I respectfully dissent.

IN THE MATTER OF: THOMAS CLIFFORD WILLIAMS, DATE OF BIRTH: 02/03/1988

No. COA01-964

(Filed 7 May 2002)

1. Jurisdiction— subject matter—Indian Child Welfare Act

The trial court did not err in a termination of parental rights case by denying respondent inmate father's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(1) based on an alleged lack of subject matter jurisdiction even though respondent contends the

trial court failed to satisfy the federal regulations governing jurisdiction over him since he is an American Indian, because respondent has failed to satisfactorily show the Court of Appeals that he is an American Indian entitled to the protection of the Indian Child Welfare Act under 25 U.S.C.A. § 1912(f) when he only made mention of his Indian heritage without providing any supporting evidence such as documentation or the testimony of a representative from his tribal government.

2. Jurisdiction— personal—resident—minimum contacts

The trial court did not err in a termination of parental rights case by denying respondent inmate father's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) based on an alleged lack of personal jurisdiction even though respondent contends he is not a resident of North Carolina and lacks minimum contacts with this state, because: (1) although respondent acknowledged paternity of the minor child, respondent did not take the steps to legitimate the child or provide substantial financial assistance; and (2) the trial court's assertion of personal jurisdiction over respondent did not offend traditional notions of fair play and substantial justice since respondent failed to demonstrate the commitment and ability to carry out his parental responsibilities.

3. Process and Service— sufficiency of service—inmate in correctional institution

The trial court did not err in a termination of parental rights case by denying respondent inmate father's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(5) based on alleged insufficiency of service of process, because: (1) copies of the summons and complaint were sent by certified mail to the correctional institution where respondent is an inmate in another state, and a certified receipt was signed and returned to petitioner presumably by a prison employee of suitable age and discretion authorized to sign the receipt on behalf of respondent; (2) eighteen days after service, respondent filed a petition for appointment of counsel; (3) this return receipt and respondent's filed petition show sufficient compliance with N.C.G.S. § 1A-1, Rule 4 to raise a rebuttable presumption fo valid service; and (4) respondent did not rebut this presumption by showing he never received the summons and complaint.

4. Termination of Parental Rights— motion for minor child to submit to mental examination—good cause not shown

The trial court did not err in a termination of parental rights case by denying respondent inmate father's N.C.G.S. § 1A-1, Rule 35(a) motion to have his minor child submit to a mental examination, because: (1) the trial court determined that the thirteen-year-old minor child was competent and of suitable age to testify about his feelings toward respondent; (2) there was no indication that the minor child's desires and opinions about terminating his father's parental rights were influenced by anyone associated with the Department of Social Services or would have been different had an independent medical evaluation been conducted; and (3) respondent failed to make a good cause showing that a mental examination of the minor child was necessary.

5. Termination of Parental Rights— minor child testifying in closed chambers—best interests of child

The trial court did not err in a termination of parental rights case by allowing the minor child to testify in closed chambers over respondent inmate father's objection, because: (1) respondent's interests were represented by his attorney in chambers; and (2) the court's assessment of what was in the minor child's best interests was reasonable.

6. Termination of Parental Rights— findings and conclusions—sufficiency of evidence

There was clear, cogent, and convincing evidence to support the trial court's findings and conclusions in a termination of parental rights case concerning respondent inmate father's willful abandonment of the minor child, as well as respondent's inability to provide filial affection, support, maintenance, financial assistance, and proper care and supervision to the minor child when taking into consideration the fact that respondent's current incarceration will likely continue for another twenty years.

Appeal by Eric Wildcat Hall ("respondent") from orders entered 12 March 2001 by Judge Douglas B. Sasser in Brunswick County District Court. Heard in the Court of Appeals 14 February 2002.

Bonner Stiller & Associates, by Jason C. Disbrow, for petitioner-appellee Brunswick County Department of Social Services.

Michael T. Cox & Associates, by John Calvin Chandler, attorney advocate and guardian ad litem for the minor child.

Law Offices of Pauline Hankins, Inc., by Pauline Hankins, for respondent-appellant.

CAMPBELL, Judge.

Thomas Clifford Williams ("Thomas") was born to respondent, Eric Wildcat Hall, and Theresa Marie Williams ("Theresa") on 3 February 1988 in the State of Pennsylvania. Respondent and Theresa were not married. Thomas was conceived in 1987 immediately following respondent's release from prison where he had been incarcerated as a result of several burglary convictions. Six weeks after his release, respondent was re-incarcerated as a result of convictions of armed robbery, burglary, attempted murder, and escape from a correctional facility. Respondent is currently incarcerated in the State Correctional Institution at Albion, Pennsylvania for these crimes and is serving a minimum mandatory sentence of approximately thirty-four years and a maximum sentence of approximately seventy-seven years.

Respondent admitted paternity of Thomas in April of 1991; however, he has never seen or spoken with Thomas since his birth. Respondent did send Thomas something less than twenty letters during the three years prior to September of 2000. Also, respondent has sent Thomas approximately $125 worth of gifts and monies during Thomas' lifetime. Respondent receives approximately $35-50 per month in wages through the Pennsylvania Department of Corrections for inmate labor, the entire amount of which is spent primarily on respondent's "necessities and postage and photocopy expenses."

In 1997, Theresa and Thomas moved to North Carolina. On 13 May 1999, Theresa's parental rights were terminated. Thereafter, Thomas was placed in the custody of the Brunswick County Department of Social Services (the "Department"). During Thomas' first eighteen months in the care and custody of the Department, he was in two relative placements, in a group home, in at least two foster placements and in a teen shelter. Prior to Christmas 2000, Thomas was once again placed in foster care.

On 28 September 2000, the Department simultaneously filed a summons and petition to terminate respondent's parental rights. Respondent, in turn, filed a petition for appointment of counsel on 24

October 2000 and was appointed counsel on 14 November 2000. On 29 November 2000, the trial court ordered a writ be issued directing respondent be transported to the Brunswick County Detention Facility. On 7 December 2000, respondent filed an amended answer/motions to dismiss and motion for transportation. The motions to dismiss were denied on 13 December 2000, but the motion for transportation was allowed. Respondent's answer was filed on 2 January 2001. On 5 February 2001, respondent filed a motion to have the minor child examined by a licensed psychologist, but this motion was denied.

The case was heard on 5 February 2001 in Brunswick County District Court, Judge Douglas B. Sasser presiding. During the hearing, respondent admitted that his incarceration prevented him from being able to care for his son without the assistance of his parents. The Department had initially investigated the possibility of placing Thomas with respondent's parents, but deemed such placement unreasonable. The court found that respondent had no knowledge of his parents ever seeing or speaking with Thomas and that his parents had failed to appear in court despite being notified of the hearing. The court also found:

> 20. That the Respondent has failed to pay a reasonable portion of the costs of the juvenile's care in that he has failed to pay any money to the Brunswick County Department of Social Services despite knowing that the juvenile was in their care, custody and control.
>
> . . .
>
> 29. . . . Respondent [was] incapable of providing for the proper care and supervision of the juvenile since the juvenile [was] a dependent juvenile . . . and that there [was] a reasonable probability that such incapability will continue for the perceivable future.
>
> 30. . . . Respondent [had] willfully left the juvenile in foster care or placement outside the home for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances [had] been made in twelve (12) months in correcting [the] condition which led to the removal of the juvenile.
>
> 31. That the Respondent has failed to take such action in regards to the juvenile as to display sufficient filial affection

> and to properly provide reasonable support and maintenance for the juvenile.

Based on these findings of fact, the court concluded that sufficient grounds existed for the termination of respondent's parental rights pursuant to Sections 7B-1111(a)(6) and 7B-1111(a)(2) of our statutes, as set forth in Findings of Fact 29 and 30, respectively.

Respondent brings forth several assignments of error, many of which are identical. For the following reasons, we affirm the trial court's orders.

I.

[1] Respondent begins by assigning error to the trial court's denial of his motion to dismiss based on Rule 12(b)(1) of our rules of civil procedure for lack of subject matter jurisdiction. Specifically, respondent argues that since he is an American Indian, the trial court failed to satisfy the federal regulations governing jurisdiction over him. We disagree.

Pursuant to the Indian Child Welfare Act ("Act"):

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C.A. § 1912(f) (2002). This provision creates a dual burden of proof in which:

> The state grounds for termination must be supported by clear and convincing evidence, while the federal law requires evidence which justifies termination beyond a reasonable doubt. To meet the federal requirement, the trial court must conclude beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damages to the child.

In re Bluebird, 105 N.C. App. 42, 47-48, 411 S.E.2d 820, 823 (1992) (citation omitted).

Respondent contends that since he is an American Indian, the court erred in basing its order solely on state grounds and not on the

dual burden imposed by the Act. However, respondent has not satisfied us that he is an American Indian entitled to the Act's protection. The Nebraska Supreme Court has held that "a party to a proceeding who seeks to invoke a provision of the . . . Act has the burden to show that the [A]ct applies in the proceedings." *See In re Interest of J.L.M.*, 451 N.W.2d 377, 396 (Neb. 1990). Since it appears our Court has never addressed this particular issue, we choose to adopt this Nebraska holding and apply it to the present case. In doing so, we note that respondent only makes mention of his "Indian" heritage in his 7 December 2000 motions to dismiss and during petitioner's cross-examination of him.[1] Respondent fails to provide any supporting evidence to prove the Act's applicability to him, such as documentation or the testimony of a representative from his tribal government. *See id.* (stating that these are two methods of proving tribal membership). Although we acknowledge that there may be other methods by which a party can prove that the Act applies, this equivocal testimony of the party seeking to invoke the Act, standing alone, is insufficient to meet this burden. Thus, we reject this assignment of error.

II.

[2] Secondly, respondent assigns as error the trial court's denial of his Rule 12(b)(2) motion to dismiss based on lack of personal jurisdiction, arguing that he is not a resident of North Carolina and lacks minimum contacts with this state. We disagree.

Generally, a nonresident defendant is subject to personal jurisdiction in North Carolina if: "(1) [O]ur legislature has authorized our courts to exercise personal jurisdiction over the defendant in the action, (2) the plaintiff has properly notified the defendant of the action, and (3) the defendant has 'minimum contacts' with this State." *Harris v. Harris*, 104 N.C. App. 574, 577, 410 S.E.2d 527, 529 (1991). The minimum contacts requirement "protects a person's due process rights by insuring that maintenance of a suit does not 'offend traditional notions of fair play and substantial justice.' " *In re Dixon*, 112 N.C. App. 248, 250, 435 S.E.2d 352, 353 (1993) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)).

Nevertheless, in some circumstances " 'fair play and substantial justice' do not necessitate minimum contacts with the forum state or

1. When asked his "nationality" during cross-examination, respondent testified that it was "Native American and Caucasian."

notice to the party." *Id.* at 251, 435 S.E.2d at 353. One such circumstance has been found in the context of a termination of parental rights proceeding filed against the father of a child born out of wedlock. In the case of *In re Dixon*, 112 N.C. App. 248, 435 S.E.2d 352 (1993), this Court held that a non-resident father's parental rights can be terminated in the absence of minimum contacts with North Carolina if the child is born out of wedlock and the father has failed to establish paternity, legitimate his child, or provide substantial financial assistance or care to the child and mother. *Id.* at 251, 435 S.E.2d at 354. *See also* N.C. Gen. Stat. § 7B-1111(a)(5) (1999) (previously listed as N.C. Gen. Stat. § 7A289.32(6) (Supp. 1992)). We reasoned that "a father's constitutional right to due process of law does not 'spring full-blown from the biological connection between parent and child' but instead arises only where the father demonstrates a *commitment* to the responsibilities of parenthood." *Dixon*, 112 N.C. App. at 251, 435 S.E.2d at 354 (quoting *Lehr v. Robertson*, 463 U.S. 248, 260, 77 L. Ed. 2d 614, 626 (1983)) (emphasis added). Here, respondent acknowledged paternity of Thomas, but did not take the steps to legitimate the child or provide substantial financial assistance.

Section 7B-1111 of our statutes, which establishes grounds for terminating parental rights, is used to determine a putative father's commitment to his child. *See* § 7B-1111. Here, the trial court's order concluded that "sufficient grounds exist[ed] for the termination of the Respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) & (6)." This conclusion was supported by findings that showed that during Thomas' lifetime, respondent has never had a custodial relationship with the child nor has he had any significant personal or financial relationship with the child other than an occasional letter and a total of $125 in monies and gifts. Their father-son relationship is unlikely to change in the foreseeable future due to respondent's lengthy incarceration and Thomas' unwillingness to see him. Additionally, respondent's only alternative for providing for the proper care and supervision of Thomas is through the assistance of his parents, who have had absolutely no relationship with the child and even failed to attend respondent's termination of parental rights hearing. Therefore, despite respondent's lack of minimum contacts with our state, we find that the trial court's assertion of personal jurisdiction over him did not offend "traditional notions of fair play and substantial justice" because he failed to demonstrate the commitment and ability to carry out his parental responsibilities.

III.

[3] By respondent's next assignment of error he argues the district court erred in denying his Rule 12(b)(5) motion to dismiss because of insufficiency of service of process. We disagree.

Rule 4 provides the procedure by which a party can overcome a Rule 12(b)(5) motion to dismiss for insufficiency of process. *See* N.C. Gen. Stat. § 1A-1, Rule 4 (1999). In pertinent part, Rule 4 states that the "manner of service of process within or without the State shall be . . . [b]y mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee." § 1A-1, Rule 4(j)(1)(c). This provision of Rule 4:

> [C]ontemplates merely that the registered or certified mail be delivered to the address of the party to be served and that a person of reasonable age and discretion receive the mail and sign the return receipt on behalf of the addressee.
>
> A showing on the face of the record of compliance with the statute providing for service of process raises a rebuttable presumption of valid service.

Lewis Clarke Associates v. Tobler, 32 N.C. App. 435, 438, 232 S.E.2d 458, 459 (1977) (citation omitted).

In the case *sub judice*, copies of the summons and complaint were sent by certified mail to the correctional institution where respondent is an inmate. A certified receipt was signed and returned to petitioner presumably by a prison employee of suitable age and discretion authorized to sign the receipt on behalf of respondent. Eighteen days after service, respondent filed a petition for appointment of counsel. This return receipt and respondent's filed petition show sufficient compliance with Rule 4 to raise a rebuttable presumption of valid service. Respondent did not rebut this presumption by showing he never received the summons and complaint. *See id.* Thus, we find that defendant was sufficiently served with process.

IV.

Respondent raises two assignments of error relating to the testimony given by his son, Thomas.

[4] First, respondent takes issue with the court's denial of his motion to have Thomas examined pursuant to Rule 35. Rule 35 states that a

judge may order a party to submit to a mental examination upon a showing of good cause when the mental condition of a party is in controversy. *See* N.C. Gen. Stat. § 1A-1, Rule 35(a) (1999). Here, respondent believed Thomas should have been evaluated by an expert who was not employed by or directly connected with the Department so that the child could be fairly evaluated by someone without any preconceived ideas and beliefs against respondent. The court determined that since Thomas was thirteen years old at the time of the hearing, he was competent and of suitable age to testify about his feelings towards respondent. There was no indication in the record or trial transcript that Thomas' desires and opinions about terminating his father's parental rights were influenced by anyone associated with the Department or would have been different had an independent medical evaluation been conducted. Accordingly, respondent failed to make a good cause showing that a mental examination of Thomas was necessary.

[5] Respondent also takes issue with the court allowing Thomas to testify in closed chambers over his objection. Respondent argues his attorney was unable to examine Thomas because the court prevented the child from testifying in open court. This argument is completely without merit. The court deemed it was in Thomas' best interests not to have respondent present in chambers during its questioning of the child because Thomas had never seen his father before and felt that seeing respondent at trial would "probably" upset him. Nevertheless, the court did allow all three attorneys, including respondent's attorney, to be present in chambers and gave each attorney ample opportunity to question Thomas. Since respondent's interests were represented by his attorney in chambers and the court's assessment of what was in Thomas' best interests was reasonable, we find no error.

V.

[6] In his remaining assignments of error, respondent argues that the court's findings of facts (and related conclusions of law) listed previously were based on insufficient evidence. These findings specifically relate to respondent's willful abandonment of Thomas, as well as his inability to provide filial affection, support, maintenance, financial assistance, and proper care and supervision to Thomas. After a thorough review of the record and trial transcripts in this case, including taking into consideration the fact that respondent's current incarceration will likely continue for another twenty years (the time remain-

ing on his minimum mandatory sentence), we find that there was sufficient clear, cogent, and convincing evidence to support the trial court's findings and conclusions.

Thus, for the aforementioned reasons, we hold that the trial court did not err in terminating respondent's parental rights.

Affirmed.

Judges MARTIN and HUDSON concur.

GARY SHOCKLEY, EMPLOYEE, PLAINTIFF v. CAIRN STUDIOS LTD., EMPLOYER, MARYLAND INSURANCE GROUP/ZURICH INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA01-856

(Filed 7 May 2002)

1. **Workers' Compensation— acceptance of claim—newly discovered evidence**

The issue of whether defendants' voluntary payment of medical and temporary total disability benefits constituted an acceptance of a workers' compensation claim is remanded to the Industrial Commission for further findings of fact as to whether plaintiff's subsequent exposure constitutes newly discovered evidence that warrants the Commission to set aside the award which resulted under N.C.G.S. § 97-82.

2. **Workers' Compensation— repayment of overpaid benefits**

Defendants are entitled to repayment of those benefits which it overpaid in a workers' compensation case in order to prevent a double recovery by plaintiff employee if the Industrial Commission concludes on remand that defendants may contest the award based on newly discovered evidence.

3. **Workers' Compensation— occupational disease—last injurious exposure—overpayment of compensation**

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee was last injuriously exposed to an occupational disease while employed with a

company subsequent to plaintiff's employment with defendant employer and that defendants overpaid plaintiff temporary total disability compensation in the amount of $67,193.12.

Appeal by plaintiff from Opinion and Award entered 4 May 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 March 2002.

DeVore, Acton & Stafford, P.A., by William D. Acton, Jr., for plaintiff-appellant.

Moreau, Marks & Gavigan, PLLC, by Daniel C. Marks, for defendants-appellees.

TYSON, Judge.

Gary Shockley ("plaintiff") appeals the denial of his claim to compensation for an occupational disease by the North Carolina Industrial Commission ("Commission"). Defendants, Cairn Studios Ltd. ("defendant-employer") and Maryland Insurance Group/Zurich Insurance Company ("defendant-carrier"), cross-assign as error the denial of a credit for benefits paid to plaintiff. We affirm in part and reverse in part.

I. Facts

Plaintiff began work as a production manager for defendant-employer on 4 October 1993. Plaintiff's job duties included the manufacture of plastic figurines. The production process generated chemicals known as isocynates which were inhaled by plaintiff on a daily basis.

On 1 August 1995, plaintiff began to experience tightness in his chest and breathing problems. Plaintiff reported his health problems to defendant-employer on 8 November 1995. Defendant-employer completed a Form 19, Report of Injury to Employee, on 13 November 1995. Defendants initially denied plaintiff's claim for workers' compensation by filing a Form 61, Denial of Compensation. After receiving additional information, defendants accepted plaintiff's claim by letter dated 29 April 1996 and paid medical benefits. Defendants voluntarily paid temporary total disability benefits to plaintiff beginning 7 August 1997. The parties have stipulated that plaintiff contracted a compensable occupational disease while employed with defendant-employer.

On 1 February 1996, plaintiff accepted other employment with Futuristic, Inc. of Tennessee ("Futuristic") as a sales manager. The employment relationship between plaintiff and defendant-employer terminated on 2 February 1996. During the course of his employment with Futuristic, plaintiff was exposed to dye isocynates, formaldehyde, hardwood dust, fibers and other pollutants. Due to this exposure, plaintiff's condition worsened and he began to experience coughing, wheezing, fatigue, shortness of breath, and headaches. Plaintiff began medical treatment in April 1997 and terminated his employment with Futuristic on 4 August 1997.

On 27 October 1998, defendants filed a Form 33, Request for Hearing, seeking a credit for overpayment of temporary total disability benefits.

Dr. Glenn Baker confirmed plaintiff's exposure to isocynates while employed with Futuristic and concluded that the continued exposure to isocynates significantly exacerbated plaintiff's occupational disease. The Commission unanimously found that plaintiff was "last injuriously exposed" to harmful chemicals which significantly contributed to his disease while employed with Futuristic. The Commission also found that plaintiff was aware that his lung problems were exacerbated by his employment with Futuristic as evidenced by his filing a workers' compensation claim against Futuristic in the State of Tennessee.

The Commission concluded plaintiff's last injurious exposure to the hazards of such occupational disease occurred while employed with Futuristic and subsequent to his employment with defendant-employer. The Commission further concluded that pursuant to N.C.G.S. § 97-57 of the Workers' Compensation Act plaintiff was not entitled to compensation from defendants for an occupational disease. Plaintiff appeals.

The Commission concluded that defendants had overpaid plaintiff compensation in the amount of $67,193.12, in addition to medical expenses. While the Deputy Commissioner ordered a credit to defendants, the Commission did not order a credit to defendants. Defendants cross-assign as error the denial of a credit by the Commission.

II. Issues

The issue presented by plaintiff is whether the defendants' payment of disability constituted a final award and, if so, whether the

Commission erred in setting aside the award. Those other assignments of error relating to the findings of facts and conclusions of law that are not argued are deemed abandoned. N.C.R. App. R. 28(b)(5) (1999).

The issue presented by defendants is whether the Commission erred in not ordering a credit to defendants for compensation and medical expenses paid to plaintiff.

III. Standard of Review

This Court's review is limited to a determination of (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the Commissioner's conclusions of law are supported by the findings of fact. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). The Commission's findings of fact are conclusive on appeal if supported by competent evidence, even where there is evidence to support contrary findings. *Id.* The Commission's conclusions of law, however, are reviewable *de novo* by this Court. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). The Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony. *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951).

IV. Plaintiff's Appeal

[1] Plaintiff argues that defendants' voluntary payment of medical and temporary total disability benefits constituted an acceptance of the claim, and after defendants failed to contest the claim within the period for payments without prejudice provided by N.C.G.S. § 97-18(d), the payments constituted an award of the Commission pursuant to N.C.G.S. § 97-82. We agree. Section 97-18(d) states in pertinent part that:

> [i]n any claim for compensation in which the employer or insurer is uncertain on reasonable grounds *whether the claim is compensable or whether it has liability for the claim* . . . the employer or insurer may initiate compensation payments without prejudice and without admitting liability. . . . Payments made pursuant to this subsection may continue until the employer or insurer contests or accepts liability for the claim or 90 days from the date the employer has written or actual notice of the injury . . . .

N.C. Gen. Stat. § 97-18(d) (1999) (emphasis supplied). After the 90-day period, if the employer does not contest liability or compensability, "it waives the right to do so and the entitlement to compensation becomes an award of the Commission pursuant to G.S. § 97-82(b)." *Higgins v. Michael Powell Bldrs.*, 132 N.C. App. 720, 724, 515 S.E.2d 17, 20 (1999); *see also Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159, 542 S.E.2d 277, 281 (2001); *Shah v. Howard Johnson*, 140 N.C. App. 58, 63-64, 535 S.E.2d 577, 581 (2000); N.C. Gen. Stat. § 97-82(b) (1999) ("Payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury . . . ."). According to the statute and prior case law, the employer must generally contest the issue of compensability or liability within the 90-day period provided pursuant to N.C.G.S. § 97-18(d).

However, section 97-18(d) goes on to state:

> the employer or insurer may contest the compensability of or its liability for the claim after the 90-day period or extension thereof when it can show that material evidence was discovered after that period that could not have been reasonably discovered earlier . . . .

N.C. Gen. Stat. § 97-18(d). Defendants began paying temporary total disability benefits to plaintiff on 7 August 1997. The initial 90-day period expired on or about 7 November 1997. Defendants filed their Form 33 on 27 October 1998. According to N.C.G.S. § 97-18(d) defendants may contest their liability after the 90-day period based on newly discovered evidence. *See Moore v. City of Raleigh*, 135 N.C. App. 332, 336, 520 S.E.2d 133, 137 (1999), *cert. denied*, 351 N.C. 358, 543 S.E.2d 131 (2000) (the Commission has the power to set aside a judgment when there is "[m]istake, inadvertence, surprise, or excusable neglect[,]" or "on the basis of newly discovered evidence," or "on the grounds of mutual mistake, misrepresentation, or fraud.") Plaintiff's subsequent exposure to isocynates while employed at Futuristic would constitute material evidence bearing on defendants' liability.

The Commission did not enter any findings of fact with respect to when defendants learned of plaintiff's subsequent exposure to isocynates while employed at Futuristic. "The Commission is the fact-finding body under the Workmen's Compensation Act." *Watkins v.*

City of Wilmington, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976). This matter is remanded to the Commission for further findings of fact as to whether plaintiff's subsequent exposure constitutes newly discovered evidence that warrants the Commission to set aside the award which resulted pursuant to N.C.G.S. § 97-82.

V. Defendants' Cross-assignment

[2] Defendants contend that they are entitled to a credit for the benefits paid to plaintiff from 7 August 1997 to 21 October 1998. N.C.G.S. § 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 not 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, Inc.*, 105 N.C. App. 480, 484, 414 S.E.2d 102, 104 (1992). The decision of whether to grant a credit is within the sound discretion of the Commission. *Moretz v. Richards & Associates, Inc.*, 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). Such decision to grant or deny a credit will not be disturbed on appeal in the absence of an abuse of discretion. *Id.*

N.C.G.S. § 97-86.1(d) provides that:

> [i]n any claim under the provisions of this Chapter wherein one employer or carrier has made payments to the employee or his dependents pending a final disposition of the claim and it is determined that different or additional employers or carriers are liable, the Commission may order any employers or carriers determined liable to make repayment in full or in part to any employer or carrier which has made payments to the employee or his dependents.

N.C. Gen. Stat. § 97-86.1(d) (1999). The Commission concluded that defendants had overpaid plaintiff compensation in the amount of $67,193.12. This conclusion is supported by the Commission's findings of fact. The Commission did not conclude nor order that defendants are entitled to a credit for the benefits paid to plaintiff

after 7 August 1997. In light of N.C.G.S. §§ 97-42 and 97-86.1(d), we conclude that there is no basis for denying defendants a credit.

Plaintiff does not argue that the Commission erred in finding and concluding that he was "last injuriously exposed" while employed with Futuristic, and that he is not entitled to compensation from defendants for an occupational disease after 7 August 1997 pursuant to N.C.G.S. § 97-57 (1999). There was competent evidence to support the finding that plaintiff was "last injuriously exposed" on 4 August 1997 while employed with Futuristic and this finding of fact justifies the conclusion that defendants are not liable pursuant to N.C.G.S. § 97-57. *See Fetner v. Rocky Mount Marble & Granite Works*, 251 N.C. 296, 111 S.E.2d 324 (1959) (G.S. 97-57 creates an irrebuttable legal presumption that the last thirty days of work is the period of last injurious exposure); *see also Caulder v. Waverly Mills*, 314 N.C. 70, 73, 331 S.E.2d 646, 648 (1985) (an exposure which proximately augmented the disease to any extent, however slight, is deemed the last injurious exposure) (citing *Rutledge v. Tultex Corp.*, 308 N.C. 85, 89, 301 S.E.2d 359, 362 (1983) and *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 22 S.E.2d 275, 277-78 (1942)).

Plaintiff has a pending workers' compensation claim filed against Futuristic in the State of Tennessee. The last injurious injury rule was first adopted and recognized in Tennessee in *Baxter v. Smith*, 364 S.W.2d 936 (Tenn. 1962). The rule announced in *Baxter* is that an employer takes an employee as he finds him and that the employer is liable for disability resulting from injuries sustained by an employee arising out of and in the course of his employment, even though it aggravates a previous condition with resulting disability far greater than otherwise would have been the case. *Id.*

An argument can be made that it is unfair to allow the recoupment of overpayments which the employee used to replace income while he was unable to work and that this may cause an injured employee to be hesitant in spending the benefits received. However, denying the employer the right to recoup the overpayment for which it later discovered it was not liable, could frustrate a primary purpose of the Workers' Compensation Act, to provide prompt payment to the employee.

Here, plaintiff knew that he had been exposed to the same chemicals at Futuristic which augmented his lung condition. To prevent a double recovery by plaintiff, we hold that defendants are entitled to repayment of those benefits which it overpaid if the Commission con-

cludes that defendants may contest the award based on newly discovered evidence.

IV. Conclusion

[3] We affirm that portion of the Commission's opinion and award which concluded that plaintiff was last injuriously exposed while employed at Futuristic and that defendants overpaid plaintiff compensation in the amount of $67,193.12. We reverse the remaining portions of the Commission's opinion and award and remand to the Commission for further findings of fact, conclusions of law, and the entry of an order consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges MARTIN and THOMAS concur.

TERRY DEAN CRAIG, PETITIONER v. JANICE FAULKNER, COMMISSIONER OF THE NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA01-539

(Filed 7 May 2002)

Motor Vehicles— administrative remedy—jurisdiction—restriction on commercial driver's license

The trial court erred by granting defendant Division of Motor Vehicles's (DMV) motion to dismiss based on lack of subject matter jurisdiction in an action contesting the placement of restrictions on petitioner's commercial driver's license, because the fact that the DMV as a matter of policy allows individuals with restrictions on their licenses to request a hearing before the Medical Review Board does not constitute an effective administrative remedy sufficient to preclude jurisdiction in superior court.

Appeal by petitioner from judgment entered 26 February 2001 by Judge Timothy S. Kincaid in Caldwell County Superior Court. Heard in the Court of Appeals 14 February 2002.

Attorney General Roy Cooper, by Associate Attorney General Kimberly P. Hunt, for respondent-appellee.

Wilson, Palmer, Lackey & Rohr, P.A., by Timothy J. Rohr, for petitioner-appellant.

HUDSON, Judge.

Terry Dean Craig ("petitioner") appeals an order granting the motion to dismiss filed on behalf of the Division of Motor Vehicles (the "DMV"). For the reasons given below, we reverse and remand.

Petitioner asserts, and the DMV does not dispute, that he has held a commercial driver's license "since the inception of Commercial Driver's Licenses." By letter dated 26 May 2000, an official with the Medical Review Branch of the Driver License Section of the DMV informed petitioner as follows:

> We have received a favorable recommendation from our Medical Adviser regarding your health as it pertains to your driving status.
>
> You must visit any Driver License Office to make application for a driver's license or learner's permit. The following restriction(s) will be necessary: CLASSIFIED C ONLY. If you currently have a valid driver's license, failure to comply within 15 days from the date of this letter will result in the cancellation of your driving privilege, G.S. 20-29.1.
>
> You must be reexamined and/or submit a current medical report for evaluation on or after 05-26-2001. We will advise you concerning this requirement at a later date.

It appears that this letter was issued pursuant to N.C. Gen. Stat. § 20-7(e) (1999) and N.C. Gen. Stat. § 20-9(e) (1999). Section 20-7(e) provides that "[t]he [DMV] may impose any restriction it finds advisable on a drivers license." Section 20-9(e) provides that

> [t]he [DMV] shall not issue a driver's license to any person when in the opinion of the [DMV] such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warnings or direction signs.

Counsel for the DMV explained to the superior court at the hearing on its motion to dismiss that petitioner had been committed to "Broughton or some—several other hospitals in the mid-1990s," and "[a]s a result of that commitment, he was put in the Medical Review

Program and has since—since had assessments, the last assessment having occurred in the year 2000."

On 13 June 2000, petitioner filed the instant action in the Caldwell County Superior Court alleging, *inter alia*, that the DMV revoked his commercial driver's license without due process of law. On 10 July 2000, the DMV filed a motion to dismiss on the ground that the court does not have subject matter jurisdiction over the matter because petitioner failed to exhaust his administrative remedies. The superior court granted the motion to dismiss. Petitioner appeals.

"As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). "An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999). The exhaustion requirement stems from the Administrative Procedure Act (the "APA"), which provides:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute . . . .

N.C. Gen. Stat. § 150B-43 (1999).

The DMV argued before the superior court that a hearing before a medical review board was petitioner's exclusive remedy. The DMV relied on N.C. Gen. Stat. § 20-9(g)(4) (1999), which provides that "[w]henever a license is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the applicant filed with the [DMV] within 10 days after receipt of such denial." That statute further provides that "[a]ctions of the reviewing board are subject to judicial review as provided under Chapter 150B of the General Statutes." N.C.G.S. § 20-9(g)(4)(f). Thus, the DMV argued, petitioner could not file a petition in the superior court without first pursuing his right to a hearing before the medical review board. Because petitioner failed to request such a hearing, the DMV contended that he failed to exhaust his administrative remedies, and, as a result, the court did not have subject matter jurisdiction over his petition.

On appeal, the DMV argues in the alternative that petitioner was not entitled to a hearing because his license was not actually revoked, but merely restricted. The DMV asserts that N.C.G.S. § 20-9(g)(4) provides for a hearing only in case a license is revoked. The DMV observes, however, that "as a matter of policy," the DMV allows one whose license is restricted to request a hearing. Thus, the DMV now argues that petitioner was afforded more process than is required by law.

We agree with the DMV that N.C.G.S. § 20-9(g)(4), by its express language, applies only to the case where a license has been denied. Thus, the legislature has not "provided by statute an effective administrative remedy," *Presnell*, 298 N.C. at 721, 260 S.E.2d at 615, to one who, like petitioner, retains his license with restrictions.

In fact, N.C. Gen Stat. § 150B-23(f) (1999) provides that in cases covered by the APA, the agency must provide detailed notice of the right to a hearing. The DMV did not provide petitioner with the requisite notice, which must inform a party in writing of his right to file a contested case petition, of the procedure involved, and of the time limit for filing his petition. *See id.* The fact that the DMV here saw no need to provide such notice, which has been required by statute since 1988, *see* Act of July 12, 1988, ch. 1111, secs. 5, 26, 1988 Sess. Laws 897, 899, 904, indicates that it did not believe the right to an administrative hearing applied in these circumstances. The DMV essentially concedes this on appeal, when it argues that it allows such a hearing "as a matter of policy." However, in order to be exclusive and subject to the exhaustion requirement, the administrative remedy must be "effective." An administrative remedy about which one is not notified as required by statute can hardly be said to be effective.

We conclude that the fact that the DMV "as a matter of policy allows individuals with restrictions on their licenses to request a hearing before the Medical Review Board" does not constitute an effective administrative remedy sufficient to preclude jurisdiction in superior court. Therefore, the superior court has subject matter jurisdiction over this action. Accordingly, we reverse the judgment granting the DMV's motion to dismiss and remand for further proceedings.

Reversed and remanded.

Judges MARTIN and CAMPBELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 APRIL 2000

COLEMAN v. COLEMAN No. 01-736	Pender (99CVD277)	Vacated and remanded
COX v. DOE No. 01-439	Johnston (99CVS2739)	Affirmed
DEPARTMENT OF TRANSP. v. HILLIARD No. 01-225	Moore (99CVS410)	Affirmed in part, reversed and remanded in part
FAIRVIEW FOREST HOMEOWNERS ASS'N v. DEAN No. 01-186	Buncombe (99CVD4842)	Affirmed in part, remanded in part
FLORES v. ARCO No. 01-453	Currituck (99CVS384)	Appeal dismissed
GIBBS v. GUILFORD TECHNICAL CMTY. COLL. No. 01-328	Guilford (00CVS5926)	Affirmed
HASSELL v. HASSELL No. 01-553	New Hanover (95CVD3275)	Affirmed in part; vacated in part
IN RE MORRIS No. 01-484	Mecklenburg (00J117) (00J118) (00J119) (00J120)	The appeal of Alvarina Velasco is dismissed. The trial court's order terminating the parental rights of Bonnie Velasco, Alvarino Velasco, Lewis Peeler, Billy Morris and John Milam as to Joshua Morris, Christina Peeler, Jennifer Peeler and Amelia Velasco is affirmed
IN RE MOSLEY No. 01-997	Lenoir (00J110)	Affirmed
IN RE TRULL No. 01-810	Cabarrus (99J30)	Affirmed
KUIPER v. AMERICAN HISTORIC RACING MOTORCYCLE ASS'N, LTD. No. 01-687	Iredell (97CVS2054)	Dismissed

KUIPER v. SHOEI SAFETY HELMET CORP. No. 01-743	Iredell (00CVS551)	Affirmed
McKINNEY v. RICHITELLI No. 01-727	Wake (00CVS7578)	Reversed
ROTH v. US AIR, INC. No. 01-636	Ind. Comm. (I.C. 078192)	Affirmed
STATE v. BELCHER No. 00-1539	Mecklenburg (97CRS35471)	No error
STATE v. BULLARD No. 01-647	Guilford (97CRS30786)	No error
STATE v. BURNETTE No. 01-630	Durham (96CRS22183) (96CRS22184) (96CRS22185) (96CRS22186) (96CRS22187) (96CRS22188) (96CRS2207) (96CRS2208)	Affirmed
STATE v. CLAYTON No. 01-657	Mecklenburg (99CRS30217) (99CRS30218)	No error
STATE v. ELLIS No. 01-480	Rowan (98CRS9725)	No error
STATE v. EVANS No. 01-359	Durham (99CRS71858) (99CRS71859)	No error in part; reversed in part
STATE v. EVANS No. 00-1457	Beaufort (99CRS4613)	No error
STATE v. FISHER No. 01-607	Halifax (98CRS11940) (98CRS11941) (98CRS11942) (98CRS11943)	No error
STATE v. LAMM No. 00-1405	Wake (98CRS3870) (98CRS3871) (98CRS3872)	No error as to 98CRS3870 and 98CRS3872. Remanded for sentencing as to 98CRS3871.

STATE v. LYNCH No. 00-1521	Durham (99CRS23420) (99CRS23421) (99CRS23422)	Affirmed
STATE v. MOORE No. 01-335	Craven (00CRS4000) (00CRS7057)	No error
STATE v. MORRISON No. 01-299	Guilford (98CRS1810) (98CRS1857) (98CRS1858) (98CRS23022)	No prejudicial error
STATE v. PLEMMONS No. 01-323	Buncombe (99CRS62855)	No error
STATE v. RHODES No. 01-639	Wake (99CRS35276) (99CRS35277)	No error
STATE v. TORRENCE No. 01-419	Mecklenburg (99CRS26399)	No error
STATE v. TURNER No. 01-134	Randolph (00CRS111) (00CRS112) (00CRS113) (98CRS18152)	Vacated and remanded
STEVENS v. GUZMAN No. 01-684	Wake (97CVS8076)	Affirmed
TEAGUE v. TEAGUE No. 01-646	Burke (91CVS1611)	Appeal dismissed
YEHDEGO v. JOHNSON C. SMITH UNIV. No. 01-575	Mecklenburg (00CVS14706)	Reversed

FILED 7 MAY 2002

BENTON v. AMERICAN INT'L UNDERWRITERS No. 01-497	New Hanover (00CVS3229)	Affirmed
BREWER v. FINNEY No. 01-474	Rowan (96CVD15)	Affirmed
BUMGARNER v. WOOD No. 01-617	Jackson (99CVD560)	Reversed
BURNS v. BEACHAM No. 01-195	Dare (00CVS24)	Affirmed

CLUNK v. PFIZER, INC. No. 01-522	Ind. Comm. (I.C.943216)	Affirmed
DALE K. CLINE, CPA, PLLC v. DAHLE No. 01-94	Catawba (00CVS2114)	Affirmed
GUY M. TURNER, INC. v. COMMERCIAL PLANT RELOCATORS, INC. No. 01-597	Guilford (99CVS1816)	Affirmed
IN RE CALLEJA No. 01-400	Forsyth (97J434) (97J435)	Affirmed
IN RE COFFEY No. 01-1012	Buncombe (99J21)	Affirmed
IN RE K.M.A. No. 01-583	Davidson (00J41) (00J42)	Affirmed
IN RE K.M.A. No. 01-802	Davidson (00J41) (00J42)	Affirmed
IN RE MATASICH No. 01-1053	Pender (99J61)	Vacated
IN RE MURRAY No. 01-752	Cabarrus (00J85)	Affirmed
JONES v. SUMMIT HOMES GRP., INC. No. 01-723	Wake (99CVS8992)	Reversed and remanded
KEFFER v. KEFFER No. 01-366	New Hanover (98CVD3112)	Affirmed
LIOTTA v. LAKESIDE RESTAURANT & LOUNGE, L.L.C. No. 01-543	Iredell (99CVS1808)	Reversed and remanded in part; affirmed in part
MALDARI v. HOLLAR No. 01-1073	Alexander (01CVD199)	Dismissed
McKINNEY v. STAFFORD No. 01-904	Mitchell (99CVS227)	Affirmed and remanded; motion for sanctions denied
MERRITT v. DURHAM TAXICAB ASS'N No. 01-778	Wake (00CVD7791)	Appeal dismissed

PADGETT v. PRO SPORTS, INC. No. 01-663	Iredell (99CVS2678)	Affirmed in part, dismissed in part
RATCLIFF v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 01-331	Burke (00CVS679)	Affirmed
RAY v. YOUNG No. 01-1087	Wake (98CVS6514)	Affirmed
STATE v. ALLEN No. 01-1296	Union (00CRS11367) (00CRS53356)	No error
STATE v. ALSTON No. 01-928	Pasquotank (00CRS2445)	Affirmed
STATE v. BARNETTE No. 01-875	Lincoln (96CRS3813)	No error
STATE v. BELL No. 01-811	Sampson (00CRS2308) (00CRS2309) (00CRS51768) (00CRS51769)	No error
STATE v. BLAND No. 01-223	Martin (99CRS1792)	No error
STATE v. BOLER No. 01-925	Forsyth (00CRS56359)	No error
STATE v. BRIDGES No. 01-190	Gaston (98CRS25427)	No error
STATE v. BURGESS No. 00-1391	Forsyth (00CRS7228)	No error
STATE v. BURKE No. 01-540	Mecklenburg (00CRS3390) (00CRS3392)	No error
STATE v. CHAVIS No. 01-1104	Guilford (00CRS23781) (00CRS100029)	No error
STATE v. COVINGTON No. 01-941	Cumberland (00CRS4713) (00CRS4714) (00CRS53981) (00CRS53982) (00CRS53983) (00CRS54478) (00CRS54479) (00CRS54480) (00CRS54481)	Dismissed

	(00CRS54482) (00CRS55326)	
STATE v. CRUMP No. 01-751	Richmond (99CRS8727) (01CRS291)	No error
STATE v. CULPEPPER No. 01-303	Carteret (99CRS9314)	No error
STATE v. CUMMINGS No. 01-1125	Moore (97CRS9469) (97CRS9470)	Affirmed
STATE v. FARR No. 01-1115	Wilson (00CRS50587) (00CRS50588)	No error
STATE v. GILLEY No. 01-235	Randolph (97CRS3847)	No error
STATE v. GOAD No. 01-1201	Mecklenburg (99CRS144164)	No error
STATE v. GOODE No. 01-1010	Northampton (00CRS2028) (00CRS2029) (00CRS2030)	No error
STATE v. JAMES No. 01-1049	Wayne (99CRS9378)	No error
STATE v. JONES No. 01-455	Durham (98CRS38495) (99CRS18397)	No error at trial; remanded for correction of clerical error
STATE v. LANGSTON No. 01-1131	Wake (00CRS16123) (00CRS16124)	No error
STATE v. LEGGETT No. 01-511	Robeson (99CRS6847)	No error
STATE v. MALONE No. 01-262	Halifax (98CRS11261) (98CRS11262) (98CRS11263)	No prejudicial error
STATE v. MATTHEWS No. 01-894	Wayne (00CRS5692) (00CRS54404)	No error
STATE v. McCALLUM No. 01-814	Durham (00CRS22512) (00CRS57623) (00CRS57624)	No error

STATE v. McMASTERS No. 01-509	Rockingham (00CRS4501)	No error
STATE v. MILLER No. 01-1150	Forsyth (99CRS45305) (99CRS45298) (99CRS45299) (99CRS45300) (99CRS45301)	Affirmed
STATE v. MONROE No. 01-1253	Lee (01CRS50213) (01CRS50216)	No error
STATE v. MOODY No. 01-1071	Forsyth (99CRS23310) (99CRS23311)	No error
STATE v. MUENTNICH No. 01-412	Robeson (99CRS3441)	No error
STATE v. RAYNOR No. 01-1055	Hertford (99CRS1291) (99CRS1292) (99CRS1293) (99CRS1294) (99CRS1295) (99CRS1533) (99CRS2482)	Remanded for resentencing; motion for appropriate relief dismissed
STATE v. REES No. 01-404	Buncombe (99CRS57428)	Affirmed
STATE v. ROBINSON No. 01-414	Robeson (97CRS11369) (97CRS11371)	No error
STATE v. SHAHEED No. 01-1127	Cumberland (99CRS66126)	No error
STATE v. SIMMS No. 01-590	Guilford (99CRS62919) (00CRS23225)	No error
STATE v. SMALL No. 01-1156	Columbus (98CRS3197) (98CRS3202) (98CRS3597) (98CRS3598) (98CRS3611) (98CRS5649) (98CRS5650) (98CRS5651) (98CRS5652) (98CRS5653)	Affirmed

	(98CRS5654) (98CRS5655) (98CRS5656) (98CRS5657)	
STATE v. SMITH No. 01-645	Alexander (99CRS3022) (99CRS3023) (99CRS3026) (99CRS3027)	No error
STATE v. VALENTINE No. 01-523	Forsyth (00CRS13025) (00CRS25310) (00CRS51403) (00CRS51404) (00CRS51406) (00CRS51407) (00CRS51408) (00CRS51409) (00CRS51410)	No error
STATE v. VINSON No. 01-508	Johnston (99CRS50507)	No error
STATE v. WALLACE No. 01-672	Guilford (99CRS104819) (00CRS23223)	No error
STATE v. WILLIAMS No. 01-1210	Wake (95CRS88991) (95CRS88992)	No error
THOMPSON v. THOMPSON No. 01-513	Stanly (98CVD674)	Affirmed
UNDERWOOD v. NORTHWESTERN MUT. LIFE INS. CO. No. 01-797	Moore (00CVS1306)	Affirmed
WALSER v. WALSER No. 01-285	Davidson (99CVD1222)	Affirmed
WHISNANT v. WHISNANT No. 00-1268	Catawba (95CVD1541)	Affirmed
ZABEN v. GARDINER No. 01-699	Mecklenburg (00CVD1307)	Affirmed

APPENDIXES

ORDER ADOPTING AMENDMENTS TO
RULES 7 AND 26 OF THE
RULES OF APPELLATE PROCEDURE

ORDER ADOPTING AMENDMENT
TO RULE 21 OF THE
RULES OF APPELLATE PROCEDURE

ORDER ADOPTING TECHNICAL CHANGES
TO APPENDIXES REGARDING
REQUIREMENT FOR AN INDEX AND
CONTENT OF TABLE OF AUTHORITIES
OF THE RULES OF
APPELLATE PROCEDURE

ORDER ADOPTING AMENDMENTS TO
RULE 3 OF THE GENERAL RULES OF
PRACTICE FOR THE SUPERIOR
AND DISTRICT COURTS

ORDER ADOPTING AMENDMENT TO
RULES OF CONTINUING JUDICIAL
EDUCATION, ADOPTED
OCTOBER 24, 1988

Order Adopting Amendments to Rules 7 and 26 of the Rules of Appellate Procedure

Rule 7(a)(1) is hereby amended by adding a second paragraph to read as follows:

In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).

Rule 26(a)(1) is hereby amended to read as follows:

(1) Filing by Mail: Filing may be accomplished by mail addressed to the clerk, but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.~~, if first class mail is utilized.~~

Adopted by the Court in Conference this the 15th day of August 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J
For the Court

Order Adopting Amendment to Rule 21 of the Rules of Appellate Procedure

Rule 21(e) is hereby amended to read as follows:

(e) Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed. Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to ~~life imprisonment or~~ death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall

be dismissed by the Court. In the event the petition is without merit, it shall be denied by the Court.

Adopted by the Court in Conference this the 15th day of August 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J
For the Court

Order Adopting Technical Changes to Appendixes Regarding Requirement for An Index and Content of Table of Authorities of the Rules of Appellate Procedure

Appendix B. Format and Style

Indexes is hereby amended to read as follows:

A brief or petition which is 10 pages or more in length ~~long or complex or which treats multiple issues,~~ and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

Appendix E. Content of Briefs

Table of Cases and Authorities is hereby amended to read as follows:

This table should begin at the top margin of the page following the Index. Page references should be made to each citation of authority ~~the first citation of the authority in each question to which it pertains~~.

Adopted by the Court in Conference this the 15th day of August 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J
For the Court

Order Adopting Amendments to Rule 3 of the General Rules of Practice for the Superior and District Courts

Rule 3 is hereby amended to read as follows:

An application for a continuance shall be made to the presiding judge of the court in which the case is calendared.

~~When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court.~~

~~At mixed sessions, criminal cases in which the defendant is in jail shall have absolute priority.~~

The General Rules of Practice for the Superior and District Courts are amended by adding a new Rule 3.1 to read:

RULE 3.1 GUIDELINES FOR RESOLVING SCHEDULING CONFLICTS

(a) In resolving scheduling conflicts when an attorney has conflicting engagements in different courts, the following priorities should ordinarily prevail:

1. Appellate courts should prevail over trial courts.

2. Any of the trial court matters listed in this subdivision, regardless of trial division, should prevail over any trial court matter not listed in this subdivision, regardless of trial division; there is no priority among the matters listed in this subdivision:

—any trial or hearing in a capital case;

—the trial in any case designated pursuant to Rule 2.1 of these Rules;

—the trial in a civil action that has been peremptorily set as the first case for trial at a session of superior court;

—the trial of a criminal case in superior court, when the defendant is in jail or when the defendant is charged with a Class A through E felony and the trial is reasonably expected to last for more than one week;

—the trial in an action or proceeding in district court in which any of the following is contested:

—termination of parental rights,

—child custody,

—adjudication of abuse, neglect or dependency or disposition following adjudication,

—interim or final equitable distribution,

—alimony or post-separation support.

3. When none of the above priorities applies, priority shall be as follows: superior court, district court, magistrate's court.

(b) When an attorney learns of a scheduling conflict between matters in the same priority category, the attorney shall promptly give written notice to opposing counsel, the clerk of all courts and the appropriate judges in all cases, stating therein the circumstances relevant to resolution of the conflict under these guidelines. When the attorney learns of the conflict before the date on which the matters are scheduled to be heard, the appropriate judges are Senior Resident Superior Court Judges for matters pending in the Superior Court Division and Chief District Court Judges for matters pending in the District Court Division; otherwise the appropriate judges are the judges presiding over those matters. The appropriate judges should promptly confer, resolve the conflict, and notify counsel of the resolution.

(c) In resolving scheduling conflicts between matters in the same priority category, the presiding judges should give consideration to the following:

—the comparative age of the cases;

—the order in which the trial dates were set by published calendar, order or notice;

—the complexity of the cases;

—the estimated trial time;

—the number of attorneys and parties involved;

—whether the trial involves a jury;

—the difficulty or ease of rescheduling;

—the availability of witnesses, especially a child witness, an expert witness or a witness who must travel a long distance;

—whether the trial in one of the cases had already started when the other was scheduled to begin.

(d) Nothing in these guidelines is intended to prevent courts from voluntarily yielding a favorable scheduling position, and judges of all

courts are urged to communicate with each other in an effort to lessen the impact of conflicts and continuances on all courts.

Adopted by the Court in Conference this the 15th day of August 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J
For the Court

Order Adopting Amendment to Rules of Continuing Judicial Education, Adopted October 24, 1988

Rule II(C), Requirements is hereby amended to read as follows:

C. At least fifteen (15) ~~twenty (20)~~ of the thirty (30) hours required shall be continuing judicial education courses designed especially for judges and attended exclusively or primarily by judges. All Superior Court Judges are expected to attend the scheduled Superior Court Judges Conferences and the programs there presented. All District Court Judges are expected to attend the scheduled District Court Judges Conferences and the programs there presented.

Adopted by the Court in Conference this the 15th day of August 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Edmunds, J
For the Court

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW—Continued

Scope of review—State personnel just cause dismissal case—The trial court exercised the appropriate scope of review in a State personnel just cause dismissal case and the State Personnel Commission properly required petitioner state employees to prove the absence of substantial evidence of reasonable cause for their termination. **Best v. Department of Health & Human Servs., 882.**

Whole record test—findings of fact—reasonable cause—drug testing of state employees—The whole record test reveals that the evidence did not support the State Personnel Commission's findings of fact that John Umstead Hospital had reasonable cause to request that petitioner state employees submit to drug testing. **Best v. Department of Health & Human Servs., 882.**

ALCOHOLIC BEVERAGES

Dram Shop claim—parent of underage impaired driver—A parent of an underage person who dies from injuries proximately resulting from his operation of a motor vehicle while impaired after consuming alcohol negligently sold by a permittee may be included within the class of people known as "aggrieved parties" under N.C.G.S. § 18B-120(1) and may recover damages for his or her "injury," including damages pursuant to N.C.G.S. § 28A-18-2(b). **Storch v. Winn-Dixie Charlotte, Inc., 478.**

ANIMALS

Dog biting—summary judgment—landlords—knowledge of vicious propensities of dog—degree of control over property—The trial court did not err in an action alleging negligence based on a dog biting incident by granting summary judgment in favor of defendant landlords even though plaintiff asserts there exists a genuine issue of material fact as to defendants' knowledge of the vicious propensities of the dog and the degree of control defendants exercised over the property. **Joslyn v. Blanchard, 625.**

APPEAL AND ERROR

Appealability—denial of arbitration—substantial right—Although defendants' appeal from the denial of their motion to compel arbitration is an appeal from an interlocutory order, an order denying arbitration is immediately appealable because it involves a substantial right. **Sciolino v. TD Waterhouse Investor Servs., Inc., 642.**

Appealability—joinder order—An appeal was dismissed as interlocutory where the trial court order required the joinder of necessary parties within 30 days to avoid dismissal with prejudice. The order requires further action by the trial court and does not affect a substantial right. However, a dismissal for failure to join a necessary party is not on the merits and may not be with prejudice. **Fairfield Mountain Prop. Owners Ass'n v. Doolittle, 486.**

Appealability—order declining to incorporate separation agreement into divorce judgment—custody reserved—An appeal was dismissed as interlocutory where the parties had entered into a separation agreement which included joint custody of the children, plaintiff's divorce complaint requested that the separation agreement be incorporated into the divorce judgment, defendant had already requested primary custody and support in a separate, pending action, and

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

CITIES AND TOWNS—Continued

Annexation—reporting requirements—map—police protection—street maintenance—method of financing—The trial court did not err in an annexation case in its findings and conclusions that the town complied with the reporting requirements of N.C.G.S. § 160A-35 except with respect to the plans for providing sanitation services to properties located within the annexed area. **Sonopress, Inc. v. Town of Weaverville, 492.**

Annexation—sanitation services—The trial court did not err in an annexation case by concluding that the town's failure to comply with N.C.G.S. § 160A-35 on the issue of sanitation services can be remedied upon remand without further public hearing and comment. **Sonopress, Inc. v. Town of Weaverville, 492.**

Annexation—statement of intent to provide services—The trial court did not err in an annexation case by finding that the town complied with N.C.G.S. § 160A-37(e)(2) which requires that an annexation ordinance shall contain a statement of the intent of the municipality to provide services in the area being annexed. **Sonopress, Inc. v. Town of Weaverville, 492.**

Annexation—tax record classifications—use of land—The trial court did not err in an annexation case by finding that the town complied with N.C.G.S. § 160A-36 when it used tax records and land use maps to show the percentage of development of the annexed area. **Sonopress, Inc. v. Town of Weaverville, 492.**

Demolition proceeding—reasonable opportunity to conform with housing code—The trial court did not err in a case seeking the demolition of petitioner's apartment buildings by concluding that respondent housing appeals board gave petitioner a reasonable opportunity to bring its apartment units into conformity with the housing code. **Carolina Holdings, Inc. v. Housing Appeals Bd. of Charlotte, 579.**

Demolition proceeding—space and use and light and ventilation provisions of housing code—previous failure to cite violations—The trial court did not err in a case seeking the demolition of petitioner's apartment buildings by applying the space and use and light and ventilation provisions of the housing code for petitioner's apartment units that were originally used as a motel before being converted into apartments even though petitioner contends the application of the code provisions would be an impermissible retroactive application and past code inspectors had failed to cite these violations previously. **Carolina Holdings, Inc. v. Housing Appeals Bd. of Charlotte, 579.**

Demolition proceeding—whole record test—The trial court did not err in a case seeking the demolition of petitioner's apartment buildings by concluding respondent housing appeals board's findings and conclusions concerning housing code violations in petitioner's apartment units were supported by competent evidence in the whole record and are not arbitrary and capricious. **Carolina Holdings, Inc. v. Housing Appeals Bd. of Charlotte, 579.**

Injury while in police custody—public duty doctrine—no intentional misconduct—no action on sheriff's bond—The trial court correctly denied plaintiff's Rule 60(b) motion to set aside summary judgment for defendants in an action arising from injuries suffered in custody of a county deputy sheriff and a city police officer where plaintiff did not sufficiently allege a claim under the spe-

CONSTITUTIONAL LAW—Continued

his right to have an attorney present and that one would be appointed if defendant could not afford an attorney; defendant clearly and unequivocally asserted that he did not wish to proceed with an attorney and protested when the trial court attempted to have one appointed for him; the court informed defendant of the consequences of this action and defendant stated that he understood; and the court engaged in a lengthy discussion with defendant about the nature of the charges and the possible punishments. **State v. Phillips, 310.**

Right to unanimous verdict—right to have jury polled—The trial court erred in an armed robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by failing to correctly poll the individual jurors as required by N.C.G.S. § 15A-1238 and N.C. Const. Art. I, Sec. 24 where the jurors responded collectively by raising their hands. **State v. Holadia, 248.**

CONTEMPT

Criminal—untruthfulness during hearing—opportunity to be heard—The trial court did not err by summarily punishing defendant for direct criminal contempt during a probation revocation proceeding where defendant recanted her testimony and does not dispute that she had not been truthful. Defendant's conduct took place in the trial court's presence, she had ample opportunity to present the trial court with reasons for not being found in contempt, and her conduct was punished promptly. **State v. Terry, 434.**

Show cause order—standard—The trial court erred by applying the wrong standard when denying a motion for a show cause order where the court concluded that no showing had been made under N.C.G.S. § 5A-21, but should have determined under N.C.G.S. § 5A-23(a) whether, considering all the facts and circumstances presented, the information in the motion and the record was sufficient to warrant a prudent person to believe that the subject of the order had the present ability to comply. **Young v. Mastrom, Inc., 483.**

CONTRACTS

Breach of oral agreement to enter into partnership—directed verdict—judgment notwithstanding the verdict—The trial court did not err by denying defendants' motions for directed verdict and judgment notwithstanding the verdict on the issue of breach of an oral agreement to enter into a partnership to purchase property. **Cap Care Grp., Inc. v. McDonald, 817.**

Lease—disguised sale—meeting of minds—The trial court did not err by not granting summary judgment for defendants in an action arising from breach of a lease/purchase agreement where defendants contended that there was no meeting of the minds in that defendants understood the transaction to be a sale disguised as a lease. The tax consequences of the agreement may not constitute an essential term because they do not relate to the rights and obligations of the parties to each other. **Green Park Inn, Inc. v. Moore, 531.**

Ratification—motor fuel pricing formula—Plaintiff did not ratify defendant's pricing of wholesale motor fuel where plaintiff did not bring suit until 3 years after he learned of an unexpected freight charge and only when plaintiff was in default, but awareness of the freight charge is inconclusive. Plaintiff did not have full knowledge of all material facts concerning the elements of the formula. **Neugent v. Beroth Oil Co., 38.**

CRIMINAL LAW—Continued

Flight—evidence sufficient—The trial court did not err in a first-degree murder prosecution by instructing the jury on flight where defendant claimed that the evidence showed only that he went to his sister's apartment after the shooting, but there was sufficient evidence that defendant was attempting to escape apprehension in that defendant came out of the apartment carrying his nephews as a shield after police tracked him down. **State v. Evans, 767.**

Joinder—purposeful circumvention—no evidence—The prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury did not violate statutory joinder requirements where defendant was originally indicted for attempted murder, defendant requested that the court charge on assault with a deadly weapon inflicting serious injury, the court denied that request and defendant was convicted of attempted second-degree murder, that conviction was vacated pursuant to a ruling that the crime of attempted second-degree murder did not exist, and defendant was then charged with assault with a deadly weapon with intent to kill inflicting serious injury. There is no evidence that the State withheld the charge to circumvent joinder requirements. **State v. Tew, 456.**

Jurisdiction—assertion that jurisdiction lacking—no opposing statement filed—The Court of Appeals rejected a criminal defendant's argument that the State effectively stipulated that the trial court lacked jurisdiction by failing to file a sworn statement challenging his assertion of a lack of jurisdiction. Defendant failed to cite any legal authority for his proposition. **State v. Phillips, 310.**

Jurisdiction in state court—constitutional provision—Jurisdiction was established for a prosecution for speeding and failing to produce a license by a citation which clearly averred that the crimes were committed in North Carolina. Article III, Section 2, Clause 1, of the U.S. Constitution does not confer original jurisdiction on the U.S. Supreme Court in criminal matters brought by a state against its citizen for a crime occurring in that state. **State v. Phillips, 310.**

Jury instruction—doctrine of recent possession—The trial court did not err in a felonious breaking and entering, felonious larceny, and felonious possession of stolen goods case by failing to additionally instruct the jury on the doctrine of recent possession that the goods must be found in defendant's possession to the exclusion of others. **State v. Foster, 206.**

Jury instructions—flight—The trial court did not commit plain error in a first-degree murder and armed robbery case by its instructions to the jury on flight. **State v. Kornegay, 390.**

Limited appearance to contest jurisdiction—not allowed—The trial court had jurisdiction over a defendant convicted of speeding and failure to produce a license where defendant attempted to limit his appearance to challenging jurisdiction, but did not cite any statute or case providing a criminal defendant with this right. Moreover, defendant was properly served with the citation. **State v. Phillips, 310.**

Motion for mistrial—publication of defendant's statement without proper redaction—The trial court did not err in a contributing to the delinquency of a juvenile, taking indecent liberties with a child, second-degree kidnapping, and third-degree sexual exploitation case by denying defendant's motion for a mistrial after defendant objected to the continued reading of defendant's statement by

CRIMINAL LAW—Continued

a detective when that objection was sustained but the jury had already been provided with copies of the statement without the improper content having first been redacted. **State v. Patterson, 354.**

Officer issuing citation—not unauthorized practice of law—A defendant convicted of speeding and refusing to produce a license was properly charged even though he contended that the officer who issued his citation was not authorized to "enter pleadings" on behalf of the State and was engaged in the unauthorized practice of law, and that the trial court erred by failing to hold a probable cause hearing. The officer issued a citation which complied with the statutory requirements and then transported defendant to a magistrate. The citation indicated that the magistrate determined that probable cause existed. **State v. Phillips, 310.**

Prosecutor's argument—outside record—failure to grant mistrial—lack of intervention following objections—The trial court abused its discretion in an action where defendant was found guilty of voluntary manslaughter by failing to grant defendant's motion for a mistrial under N.C.G.S. § 15A-1061 based on the prosecutor's improper and inflammatory jury argument concerning a witness's pretrial statements that were never admitted into evidence and the prosecutor's comparison of defense counsel to Joseph McCarthy. **State v. Jordan, 838.**

Prosecutor's argument—plea agreements of coparticipants—motion for mistrial—The trial court did not abuse its discretion in a second-degree murder case by denying defendant's motion for a mistrial after the prosecutor improperly stated during closing arguments that two coparticipants who pled guilty to second-degree murder "had the same option that this Defendant had." **State v. Lambert, 163.**

DAMAGES AND REMEDIES

Liquidated—provision enforceable—A liquidated damages provision in a lease was enforceable where the damages in the event of a breach would have been difficult to ascertain at the time the parties entered into their agreement and the statements about the negotiations offered by defendants to show that the amount was unreasonable were insufficient to raise a genuine issue of material fact. **Green Park Inn, Inc. v. Moore, 531.**

Punitive damages—award not excessive—The trial court did not err by determining the modified jury award of punitive damages of $250,000 was not excessive. **Rhyne v. K-Mart Corp., 672.**

Punitive damages—per plaintiff rather than per claim basis—The trial court did not err by capping punitive damages on a per plaintiff rather than a per claim basis. **Rhyne v. K-Mart Corp., 672.**

Statute capping award of punitive damages—right to jury trial—separation of powers—open courts guarantee—special legislation—due process—equal protection—vagueness—The trial court did not err by reducing the jury's award of punitive damages to plaintiffs from $11.5 million each to $250,000 each in accordance with the cap, or limit, on the award of punitive damages under N.C.G.S. § 1D-25 and by refusing to declare the statute unconstitutional. **Rhyne v. K-Mart Corp., 672.**

ESTATES—Continued

where the three year statute-of-limitations would have barred the action, but the driver died before the limitations period expired. Plaintiff is permitted to commence the action against the driver's personal representative or collector, but the claim must be presented by the date specified in the general notice to creditors and the record here does not establish whether defendant ever published or posted a general notice to creditors. Her failure to establish that she complied with the statutory requirements for notice to creditors precludes reliance on the statute of limitations. Furthermore, plaintiff filed the complaint prior to the earliest deadline which the executrix could have specified in the notice to creditors and within the outside time limitation established by N.C.G.S. § 28A-19-3(f) of three years after the driver's death. **Mabry v. Huneycutt, 630.**

Summary administration for widow—widow not automatically the representative—The fact that the clerk of superior court entered an order that the widow of a deceased was entitled to summary administration did not result in the widow becoming the personal representative; when a court enters an order that a surviving spouse is entitled to summary administration, the spouse does not necessarily thereby attain the status of representative or collector of the estate. **Mabry v. Huneycutt, 630.**

EVIDENCE

Assault—defendant's prior drug use—Evidence of defendant's prior drug use was relevant in a prosecution which resulted in convictions for first-degree murder and assault inflicting serious bodily injury because the prior drug use explains the victim leaving defendant and his ill will towards her. Moreover, testimony regarding the drug use was minimal and there was substantial evidence that defendant committed the crimes of which he was convicted. **State v. Hannah, 713.**

Cross-examination—statement by defendant—not basis of opinion testimony—Defendant had no right to cross-examine a trooper regarding a statement defendant made about how a crash in which the victim was killed occurred where the trooper testified that defendant's statement did not represent a basis for his opinion testimony at trial. **State v. Ray, 137.**

Defendant's statement—prior crimes or bad acts—The trial court did not err in a contributing to the delinquency of a juvenile, taking indecent liberties with a child, second-degree kidnapping, and third-degree sexual exploitation case by allowing the prosecutor to publish defendant's statement without redacting the mention of his prior charges. **State v. Patterson, 354.**

Exclusion of coparticipant's plea agreement—impeachment—bias—The trial court did not err in a second-degree murder case by excluding evidence of a plea agreement executed by one of defendant's coparticipants even though defendant sought to use the evidence for impeachment purposes to show that the coparticipant had a plea arrangement with the State and to show the coparticipant's potential bias as a witness where the plea agreement did not show that the coparticipant received any consideration for his testimony. **State v. Lambert, 163.**

Expert testimony—damages—The trial court did not abuse its discretion in an action for breach of an oral agreement to enter into a partnership to purchase

EVIDENCE—Continued

accident by overruling defendant's objection to a detective's testimony that lacerations on the victim's hand were not consistent with a traffic accident. The detective was offering a lay opinion based on his personal observations at the scene and his investigative training as a police officer; moreover, the medical examiner testified that the lacerations were consistent with defensive wounds. **State v. Ray, 137.**

Limitation on cross-examination—victims' sexual activity—The trial court did not err in a contributing to the delinquency of a juvenile, taking indecent liberties with a child, second-degree kidnapping, and third-degree sexual exploitation case by refusing to allow defendant to question witnesses concerning the alleged victims' sexual activity involving a codefendant where the codefendant was unavailable. **State v. Patterson, 354.**

Marijuana trafficking—record of customers and amounts due—The trial court did not err in a prosecution for conspiracy to traffic in marijuana by admitting papers found on defendant which contained the names of those who had purchased marijuana and the amounts due. The paper corroborated the testimony of two witnesses and was relevant and admissible as substantive evidence of intent and design. **State v. Martinez, 553.**

Out-of-court-statements—hearsay—prior inconsistent statement exception—The trial court did not err in a prosecution for conspiracy to traffic in marijuana by allowing the State to introduce out-of-court statements for impeachment purposes where there was no evidence that the State's primary purpose was to evade the hearsay rule; there was other evidence of conspiracy; the statement was not admitted for substantive purposes; and it would otherwise have been admissible because of the prior inconsistent statement exception to the hearsay rule. **State v. Martinez, 553.**

Prior crimes or bad acts—assault upon a law enforcement officer—failure to give limiting instruction—Although the trial court erred in a second-degree murder case arising out of defendant's driving while intoxicated by failing to charge the jury with a limiting instruction regarding defendant's 1980 conviction for assault upon a law enforcement officer, the omission does not entitle defendant to a new trial. **State v. Goodman, 57.**

Prior crimes or bad acts—ball bat incident—assault—The trial court did not abuse its discretion in a first-degree murder prosecution by admitting evidence under N.C.G.S. § 8C-1, Rule 404(b) concerning a "ball bat incident" between defendant and the victim, including testimony that defendant pushed and shoved the victim while she begged defendant to leave her alone. **State v. Harris, 398.**

Prior crimes or bad acts—driving record—driving convictions—Although the trial court erred in a second-degree murder case arising out of defendant's driving while intoxicated by admitting defendant's entire driving record which detailed his prior driving convictions under N.C.G.S. § 8C-1, Rule 404(b) when some of his convictions were too remote in time to be probative, the trial court did not commit plain error. **State v. Goodman, 57.**

Prior crimes or bad acts—drug activity—motive—context and circumstances of crime—The trial court did not err in an armed robbery and assault with a deadly weapon inflicting serious injury case by allowing one of the victims

HOMICIDE—Continued

First-degree murder—voluntary intoxication—The trial court did not err in a first-degree murder case by failing to instruct on voluntary intoxication. **State v. Kornegay, 390.**

Heat of passion—instruction refused—The trial court did not err in a first-degree murder prosecution (which resulted in a second-degree murder conviction) by refusing defendant's requested instruction on heat of passion where the prosecution arose from the beating of a man who allegedly attempted to abduct a child. A significant amount of time passed following the attempted abduction and defendant's evidence indicates that he was capable of cool reflection during the confrontation. **State v. Wood, 413.**

Second-degree murder—acting in concert—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder based on the theory of acting in concert where defendant participated in assaulting the victim by throwing glass bottles at her and remained nearby while the coparticipants beat the victim with a tree limb. **State v. Lambert, 163.**

Second-degree murder—driving while intoxicated—failure to submit misdemeanor death by vehicle—The trial court did not err in a second-degree murder case arising out of defendant's driving while intoxicated by failing to submit to the jury the possible verdict of misdemeanor death by vehicle. **State v. Goodman, 57.**

Second-degree murder—driving while intoxicated—malice—sufficiency of evidence—The trial court did not err by failing to dismiss the charge of second-degree murder arising out of defendant's driving while intoxicated based on the sufficiency of the evidence concerning malice. **State v. Goodman, 57.**

Self-defense—instruction on aggressor—evidence sufficient—The trial court did not err in its instruction on self-defense in a prosecution resulting in a second-degree murder conviction where the court instructed the jury that defendant would lose the benefit of self-defense if the jury determined that defendant was the aggressor where there was more than sufficient evidence that defendant could have been the aggressor. **State v. Wood, 413.**

Short-form indictment—first-degree murder—felony murder—A short-form murder indictment under N.C.G.S. § 15-144 is sufficient to allege first-degree murder under theories of premeditation and deliberation and felony murder. **State v. Ray, 137.**

IMMUNITY

City sewer system—proprietary function—Defendant-city was not immune from tort liability in the operation and maintenance of its sewer system where plaintiffs alleged specifically that defendant set rates and charged fees for the maintenance of sewer lines and the reasoning of *Pulliam v. City of Greensboro*, 103 N.C. App. 748, was applicable. **Bostic Packaging, Inc. v. City of Monroe, 825.**

REAL PROPERTY—Continued

Restrictive covenants—encroachment—location of lake property line—summary judgment—The trial court did not err in an action to enforce a subdivision's restrictive covenants by granting partial summary judgment in favor of plaintiff homeowner's association regarding defendant's encroachment on the pertinent lake even though defendant alleges the location of the property line is still at issue. **Bunn Lake Prop. Owner's Ass'n, Inc. v. Setzer, 289.**

SALES

Wholesale motor fuel—breach of contract—unexpected freight charge—In a contract action arising from the transfer of a service station and its motor fuel supply agreement, summary judgment was properly entered for defendants as to plaintiff's breach of contract claims regarding the prices defendant charged in the interim between Amoco leaving North Carolina and a new agreement being formed. Bare allegations of an unexpected freight charge do not state a claim for breach of the implied covenant of good faith under N.C.G.S. § 25-2-305. **Neugent v. Beroth Oil Co., 38.**

Wholesale motor fuel—oral contract—not shown—Plaintiff failed to meet his burden of showing that an oral contract for motor fuel was entered into at a meeting where, presuming that an offer was made, the evidence shows that it was not accepted and that it lapsed well before the date defendant began supplying plaintiff with motor fuel. **Neugent v. Beroth Oil Co., 38.**

Wholesale motor fuel—pricing—issues of fact—There were genuine issues of material fact concerning the breach of a contract to supply motor fuel to a service station where the plain, clear, and unambiguous language of the dealer service agreement established a pricing formula which created an expectation by plaintiff and an obligation by defendant that plaintiff could purchase motor fuel at the same price as every other Amoco dealer supplied by defendant in defendant's "pricing area." **Neugent v. Beroth Oil Co., 38.**

Wholesale motor fuel—sale of goods—governed by UCC—The sale of motor fuel by a jobber, distributor, or oil company to a dealer is a "sale of goods" governed by the UCC. **Neugent v. Beroth Oil Co., 38.**

SCHOOLS

Assistant teacher—wrongful discharge—disability discrimination—abandonment of claim—insufficient allegations of public policy violation—The gravamen of plaintiff assistant teacher's complaint against defendant board of education for wrongful termination based on her inability to drive a school bus due to a seizure disorder was an employment discrimination claim under N.C.G.S. § 168-1 et seq., not a claim for wrongful termination in violation of public policy to ensure the safety of persons and property, and the complaint was properly dismissed because plaintiff specifically abandoned her disability discrimination claim, where there were no allegations to support an inference that defendant board wanted plaintiff to drive a school bus after learning of her seizure disorder, plaintiff's allegations show that the board gave plaintiff only the choice to resign or be terminated, and plaintiff's complaint was thus based on her disability condition and not on her refusal to violate public policy. **Kelly v. Carteret Cty. Bd. of Educ., 188.**

SENTENCING—Continued

Habitual offender statute—All of defendant's arguments for dismissal of his habitual felon indictment were rejected in other opinions. **State v. Williams, 795.**

Insurance fraud and fraudulently burning building—aggravating factor—amount of monetary damages—The trial court did not err in a prosecution for insurance fraud and fraudulently burning a dwelling by finding as an aggravating factor for both charges that the acts involved an attempted and actual taking of property of great monetary value. The amount of monetary damages is not an element of either offense. **State v. Payne, 421.**

Kidnapping and attempted rape—aggravating factor—masturbation—The trial court erred when sentencing defendant for kidnapping and attempted rape by aggravating the sentence for "performing the loathsome act of masturbation." Observing this act may have been unpleasant for the victim, but there was no showing that it increased her risk of harm. **State v. Robertson, 563.**

Mitigating factor—voluntary acknowledgment of wrongdoing—The trial court did not err in an armed robbery prosecution by not finding as a mitigating factor that defendant had voluntarily acknowledged wrongdoing at an early stage where defendant challenged the voluntariness of his statement at trial. The question of whether this impermissibly burdened his constitutional rights was not raised at trial and thus was not considered on appeal. **State v. Thompson, 276.**

Presumptive range—written findings not required—The trial court did not abuse its discretion in a felonious breaking and entering, felonious larceny, and felonious possession of stolen goods case by allegedly sentencing defendant in excess of the amount allowed by law because the court imposed minimum sentences within the presumptive range and the corresponding maximum terms, and the court was not required to make written findings. **State v. Foster, 206.**

Record points—prayer for judgment continued—The trial court did not err when sentencing defendant for cocaine possession by assessing prior record points for a district court prayer for judgment continued. A formal entry of judgment is not required in order to have a conviction. **State v. Graham, 215.**

Second-degree murder—failure to prove prior convictions—Defendant is entitled to a new sentencing hearing in a second-degree murder case arising out of defendant's driving while intoxicated based on the State's failure to prove defendant's prior convictions where the court sentenced defendant based upon information provided by the State's unverified prior record level worksheet. **State v. Goodman, 215.**

SEXUAL OFFENSES

Indecent liberties—felonious failure to notify sheriff of change of address—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charges of two counts of felonious failure to notify the sheriff of a change of address by a sex offender even though defendant contends he called someone in the sheriff's department to give notification of his change of address. **State v. Holmes, 572.**

WORKERS' COMPENSATION—Continued

Attorney fees—reasonable grounds to defend disability claim—Defendants did not have reasonable grounds to defend plaintiff's workers' compensation claim, and the Industrial Commission erred by failing to tax plaintiff's attorney fees as costs under N.C.G.S. § 97-88.1, where plaintiff met his burden of establishing disability with a Form 21 agreement, which created the presumption of a continued disability; plaintiff never signed an agreement electing partial disability compensation, although he unsuccessfully attempted to return to work in another job; and a letter from defendants to plaintiff's counsel cancelling a hearing appeared to settle the issue and restore the presumption of ongoing total disability. Nothing thereafter occurred to put the presumption in question and defendants did not have reasonable grounds to defend the claim. **Johnson v. United Parcel Service, 865.**

Attorney fees—unreasonable denial and defense of claim—The Industrial Commission did not abuse its discretion in a workers' compensation case by failing to award plaintiff grocery cashier her attorney fees under N.C.G.S. § 97-88.1 for defendants' alleged unreasonable denial and defense of this claim regarding plaintiff's retained wage-earning capacity based on plaintiff's return to work in a greeter position. **Effingham v. Kroger Co., 105.**

Benefits—temporary total disability—The Industrial Commission did not err in a workers' compensation case by awarding plaintiff grocery cashier temporary total disability benefits instead of permanent total disability benefits. **Effingham v. Kroger Co., 105.**

Calculation of disability—overtime available in new job—A workers' compensation disability award was remanded where plaintiff had worked after the accident in a position with defendant which did not provide as much overtime and the Commission found that plaintiff had sustained a decrease in her earning capacity. Plaintiff's pre-injury earnings should not be compared with her post-injury earnings in another job because the circumstances of the pre-injury job had changed in that the plant had suffered a downturn which resulted in a plant-wide reduction in overtime. The proper comparison should be between the amount of overtime available to the person currently in plaintiff's former postion and the overtime available to plaintiff in her new position. **Derosier v. WNA, Inc./Imperial Fire Hose Co., 597.**

Compensable injury—Commission is sole judge of credibility of witnesses—The Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff grocery cashier's neck injury was not caused by her compensable back injury where evidence supported the Commission's finding that the history plaintiff provided to a doctor was not credible. **Effingham v. Kroger Co., 105.**

Costs—mediated settlement conference—The Industrial Commission did not err in a workers' compensation action by ordering defendants to pay costs, including those of a mediated settlement conference. **Knight v. Wal-Mart Stores, Inc., 1.**

Death benefits—truck driver—findings of fact—impairment—proximate cause—The Industrial Commission erred in a workers' compensation case by awarding plaintiff guardian ad litem death benefits for the use and benefit of decedent truck driver employee's minor daughter under N.C.G.S. §§ 97-38 and

WORKERS' COMPENSATION—Continued

97-39 based on defendants' presentation of sufficient evidence of the affirmative defense found in N.C.G.S. § 97-12 that the employee's death from a single tractor-trailer accident was proximately caused by his being under the influence of a non-prescribed controlled substance at the time of his fatal accident, including cocaine and marijuana. **Willey v. Williamson Produce, 74.**

Deposition—requested late—not significant new evidence—The Industrial Commission did not err in a workers' compensation case by denying defendants' request to depose one of the doctors who had operated on plaintiff's back where the evidence in this doctor's report was merely an update of plaintiff's continued problems for the same injury and not significant new evidence. Furthermore, despite having the medical records for over two years, defendants made no motion to depose this doctor until after the Commission entered its award. **Cummins v. BCCI Constr. Enters., 180.**

Disability—burden of proof—employee capable of returning to employment—The Industrial Commission did not err in a workers' compensation case by placing the burden of proof on defendants to show that plaintiff employee was capable of returning to employment. **Burchette v. East Coast Millwork Distribs., 802.**

Disability—evidence considered—The record in a workers' compensation case does not indicate that the Industrial Commission failed to consider evidence that plaintiff was not disabled where it is likely that the Commission recognized that the evidence cited by defendants does not necessarily conflict with the conclusion that plaintiff is unable to work due to pain. **Knight v. Wal-Mart Stores, Inc., 1.**

Disability—findings—sufficient—The findings of the Industrial Commission in a workers' compensation case supported the conclusion that plaintiff is disabled; medical testimony that a plaintiff suffers from severe pain from a physical injury, combined with the plaintiff's own credible testimony that his pain is so severe that he is unable to work, may be sufficient to support a conclusion of total disability. **Knight v. Wal-Mart Stores, Inc., 1.**

Disability—release—not unrestricted—The Industrial Commission did not abuse its discretion in a workers' compensation action by awarding plaintiff temporary total disability where one of plaintiff's doctors stated that he released plaintiff with no specific work restrictions other than those his symptoms dictated. This is not an unrestricted work release and does not rebut the presumption of disability. **Cummins v. BCCI Constr. Enters., 180.**

Failure to render opinion within 180 days—no prejudice—Although defendants contend the Industrial Commission erred in a workers' compensation case by failing to render an opinion within 180 days after the close of the record, defendants have failed to show how this delay prejudiced them. **Burchette v. East Coast Millwork Distribs., 802.**

Finding of no evidence—explanation not required—The Industrial Commission did not abuse its discretion in a workers' compensation case by finding that there was no evidence that an increase in plaintiff's symptoms following his raking his yard was the result of an independent intervening cause attributable to his own intentional conduct. There is no reason the Commission should be

WORKERS' COMPENSATION—Continued

required to unnecessarily explain why it found no evidence of an intervening cause. **Cummins v. BCCI Constr. Enters., 180.**

Form 21 agreement—not located—The Industrial Commission did not err in a workers' compensation action by making findings and conclusions regarding a stipulation that the parties had entered into a Form 21 agreement where defendant contended that the stipulation had been conditioned upon the Form 21 being located, which was not done. Defendants did not argue that the stipulation was the result of fraud, misrepresentation, undue influence, or mistake, and all of the evidence in the record supported the existence of the stipulation. **Moore v. Concrete Supply Co., 381.**

Functional Capacity Evaluation—evidence—The trial court did not err in a workers' compensation action by making a finding regarding plaintiff's Functional Capacity Evaluation which defendant challenged as incomplete without offering supporting legal authority. The evidence supported the finding. **Moore v. Concrete Supply Co., 381.**

Illegal alien—disability—The Industrial Commission did not err in a workers' compensation proceeding by requiring defendants to continue to pay benefits until an illegal alien returns to work. The employer has the burden of returning the employee to a state where the employee could obtain employment "but for" his illegal status, with the employee's illegal alien status being the last consideration. **Gayton v. Gage Carolina Metals, Inc., 346.**

Injury—direct and natural consequence of injury by accident—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff's post 15 June 1998 injuries were a direct and natural consequence of her 1 January 1998 injury by accident where medical testimony showed that plaintiff's subsequent falls would have occurred in the absence of her compensable fall. **Frazier v. McDonald's, 745.**

Involuntary dismissal for failure to prosecute—dismissal with prejudice—abuse of discretion—A deputy commissioner abused his discretion by dismissing plaintiff's workers' compensation claim with prejudice for failure to prosecute when other lesser sanctions were appropriate and available, and a subsequent order by the executive secretary allowing defendants' motion to strike plaintiff's request for a hearing must also be vacated. **Harvey v. Cedar Creek BP, 873.**

Late payment penalty—payment of benefits during employee's attempt to return to work—The Industrial Commission did not err in a workers' compensation case by failing to find and conclude that plaintiff grocery cashier was entitled to a ten percent late payment penalty under N.C.G.S. § 97-18(g) based on defendants' failure to pay plaintiff temporary partial disability benefits during her attempt to return to work. **Effingham v. Kroger Co., 105.**

Make work position—justified refusal—The Industrial Commission did not err in a workers' compensation action by finding that plaintiff was justified in turning down a "maintenance worker" position offered by defendant because the position was "make work" and not suitable employment for plaintiff, a former concrete truck driver, where there was testimony that no individual employee assumed the duties of the maintenance worker position, that the position was

WORKERS' COMPENSATION—Continued

ZONING—Continued

WORD AND PHRASE INDEX

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